

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/23/1391

Property: Flat 1, 47 Sassoon Grove, Edinburgh EH10 5FB (“the Property”)

The Parties:-

Ms Linda Davis, Flat 1, 47 Sassoon Grove, Edinburgh EH10 5FB (“the homeowner”)

James Gibb Property Management Limited, registered in Scotland under the Companies’ Acts (SC299465), having their registered office at Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ and having a place of business at 4 Atholl Place, Edinburgh EH3 8HT (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Mrs Sandra Brydon (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') decided that the property factors had not failed to comply with Sections 1.C.6, 2.6, 3.1 or 5.4 of the Property Factors Code of Conduct effective from 16 August 2021.

Background

1. By application, deemed by the Tribunal as received on 26 June 2023, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. She alleged failures to comply with Sections 1.C.6, 2.6, 3.2 and 5.4 of the Property Factors Code of Conduct effective from 16 August 2021.

2. The homeowner stated that, in February 2021, she viewed the Property, then unfinished, and part of the Development of the former Craighouse Hospital and its grounds, in Morningside, Edinburgh. The site agent told her that the factors' fees would be no more than £300 per annum. Later, but prior to moving into the Property in August 2021, she was given a written estimate of the factors' charges as £493.23 in the first year and £533.89 in the second year. These figures were stated in the Reservation Form and the "UK Finance Disclosure Form" used by the valuer to inform her mortgage company. There was no hint that these were merely estimates. Since moving in on 23 August 2021, her mortgage payments have more than doubled. She accepted this as an unavoidable risk of an interest-only mortgage and was aware that it could happen. She was, however, shocked by the massive difference between the quoted cost of factoring and the actual bills she received. She was currently paying approximately two and a half times the amounts stated when she reserved the Property and made her mortgage application.
3. It appeared to the homeowner that the mistake or mis-selling arose because the buildings insurance sum had been mis-calculated. She had made a formal complaint to the property factors, who had responded on 24 February 2023. Mr Roger Bodden, the property factors' Regional Director East, had offered to meet with the homeowner to discuss her complaint, but she had come away from that meeting on 20 March 2023 anything but reassured, as Mr Bodden had told her that the property factors were looking at reconfiguring the insurance so that the residents of the contemporary townhouses at the Development were removed from the shared financial responsibility for the insurance and would be treated separately. At a Residents Meeting on 25 April 2023, he advised that this would lead to a reduction in insurance costs for those in modern blocks and an increase for those in the older Listed properties. He also advised that further charges would be coming their way once the land used communally by the public came under the care of the residents and the Great Hall would also add to the factors' charges once it was opened. None of this had been discussed with the site agent when the homeowner first viewed the Property.
4. Mr Bodden had also said at the meeting that he had valued the reinstatement cost of the estate at £21million, but when a qualified surveyor looked at the site, that figure was doubled.
5. As a pensioner paying an interest-only mortgage, the homeowner was already financially stretched because of interest rate rises over the

past year. The additional factoring charges were far higher than she had been told and, with further increases predicted, it was an additional worry and she might well have to sell the Property if costs become too burdensome.

6. The homeowner understood that mistakes can happen but did not feel that the additional costs above those explicitly given to her should be borne by an unsuspecting resident. She believed they should be borne by the property factors and/or the Developers if both Parties were involved as what she described as “negligent mis-selling”. She also referred to the fact that the property factors received a very substantial commission on the insurance premiums. Mr Bodden had told her that if they did not receive commission, their fees would be much higher. The homeowner regarded this as a strange way of calculating the cost of a service which is intrinsically linked to the cost of insurance – the higher the insurance premium, the more the property factors benefit.
7. On 23 June 2023, the homeowner stated in an email to the Tribunal that her complaint was about the lack of transparency and extraordinarily high fees that she was being charged.
8. The homeowner provided the Tribunal with copies of her Reservation Form (which stated the “Apartment Estimated Service Charge 1st year £493.23 2nd year £533.89 (including VAT)), a UK Finance Disclosure Form, completed by the sellers’ agents, Rettie & Co, on their behalf and showing the initial amount of the Service charges to be £493.22, an Invoice in the sum of £293.62 from the property factors for the period 28 November 2021 to 27 February 2022, and the response, dated 24 February 2023, by the property factors to her formal complaint to them of 27 January 2023.
9. In their response of 24 February 2023, the property factors stated that they had carried out an in-depth analysis of the charges to date and would be happy to discuss their findings with the homeowner. Their estimate, presented to the developers during the tender process, prior to a formal Reinstatement Cost Assessment being carried out, did not accurately reflect the original rebuild valuation of the Property. The subsequent hardening of the residential insurance market had compounded the issue as index-linking of the Rebuild Value and changes in the insurance rate have meant higher premium costs each year. There had been other impacts on the annual factoring charges, including the provision of additional assets, such as electric vehicle charging points, at the request of homeowners, which were not part of the original specification. Charges had also been impacted by the

extraordinary inflation affecting the building and maintenance sector during and post-COVID and by the impact of the war in Ukraine and the energy crisis.

10. In relation to the garden ground to which the homeowner had referred, the property factors responded that they would hope that the homeowner's solicitor had advised her of the burdens within the title deeds prior to her signing missives to purchase the Property, and added that she might wish to discuss this matter with her solicitor if she felt that her decision to purchase would have been different if she had known the extent of her liability. As she would know, the whole Development, when complete, includes extensive woodland, gardens and open space, a share of which she will be liable for. Currently, however, because the Development is in a transitional phase between the developers and the homeowners, the property factors have applied a short-term apportionment relating only to those parts of the development that have been handed over to the homeowners.
11. On 24 August 2023, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make any written representations by 14 September 2023.
12. On 8 September 2023, the property factors made written submissions to the Tribunal. After raising a number of procedural points, they responded to the substance of the homeowners' application. They stated that their management fee and provisions for review were clearly stated in Section 5 of their Written Statement of Services. The homeowner had not specified why she believed any breaches of Sections 2.6 and 3.2 of the Code of Conduct had occurred or why she believed, in relation to Section 5.4 of the Code of Conduct, there had been no substantial change to the cover provided by the insurance policy.
13. On 11 September 2023, the homeowner provided the Tribunal with a Chronology of Case, setting out a timeline of events.

Case Management Discussion

14. A Case Management Discussion was held by means of a telephone conference call on the morning of 30 October 2023. The homeowner was present. The property factors were represented by their Regional Director East, Mr Roger Bodden.
15. The homeowner told the Tribunal that, at her meeting with Mr Bodden on 20 March 2023, he had told her that insurance charges were going

to be recalculated retrospectively, with owners in the Listed Buildings having their shares of the cost increased. She also had concerns about her liability for public areas and The Great Hall. She confirmed that she had not made any complaints to the developers, Craighouse Group Limited Group or their estate agents Rettie & Co, who had provided her with the estimate of factoring charges.

16. Mr Bodden stated that the property factors were appointed in 2017 and that the estimates of factoring charges included in their tender for the business were based on the information available at that time. Over time, more and more finished properties were being added to the common policy, which is a Block Policy for the whole development. Costs are apportioned according to floor area, and it had been decided recently that it was fundamentally unfair that owners of new properties should be paying for the common areas of the Listed Buildings, including The Great Hall, when their reinstatement costs would be considerably lower than those of the older, Listed buildings. The fundamental basis of floor area would remain, but instead of calculating liability using the reinstatement value of the whole Development, costs would be split according to declared values of each individual building. He accepted that, whilst this had been discussed with residents, there had been no formal consultation. They were correcting a previous error in alignment with the title deeds, which did not lend themselves to clarity. They did not, for example, oblige the Developers to pay common charges for properties down to the date they are certified by the local authority for habitation. Responsibility for maintaining and insuring The Great Hall will land with the 45 owners within New Craig and not with the owners of new properties.
17. Mr Bodden told the Tribunal that, within the next week or so, a full document would be issued to owners, showing the new arrangement, with a table giving the reinstatement values. It would then provide the adjustment calculations, stating how much each owner has paid and how much they were due to pay, thus reconciling the account. He added that the owners have no liability for maintaining mature trees within the Development. That responsibility lies with The Woodland Trust, but the owners will be liable for the costs in relation to the formal garden, which has been laid out by the Developers.
18. The homeowner repeated that her main issue was that she was told when she bought the Property that the first year's charges would be £493 and she did not understand the nature of the service charge.

19. Mr Bodden explained that the 2017 tender presentation contained a budget including insurance, general maintenance, and lift maintenance, broken down according to square footage for each block within the proposed Development. The anticipated costs for Years 1 and 2 would be lower as, for example, the lifts would have been under warranty for the first year. Later accounts to owners would include the cost of lift maintenance. In closing remarks, he told the Tribunal that the property factors' operating practices are better than they were in 2017 and that, if they had their time over again, they would not take on one or two flats within a stair, but would wait until a majority of the properties on the stair had been sold. He accepted that the property factors could have communicated better with the owners.

20. The homeowner repeated that her main issue was the huge difference between the estimated figures and what she was actually required to pay.

21. The Parties then disconnected from the telephone conference call and the Tribunal Members considered all the evidence, written and oral, before them.

Findings of Fact

- i. The homeowner is the proprietor of the property, which is situated within the Craighouse Development in the Morningside area of Edinburgh. The Development includes the conversion into flats of the original Craighouse Hospital buildings and the erection of new flats and townhouses and comprises 145 properties in total. The Property is within a Category A Listed Building which, when complete, will have 45 flats and a Great Hall. The Development sits within extensive grounds.
- ii. The property factors, in the course of their business, manage the common parts of the Development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- iii. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- iv. The date of Registration of the property factors was 23 November 2012 and the date of their current registration is 17 May 2019.

- v. The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- vi. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, deemed by the Tribunal to have been dated 26 June 2023, under Section 17(1) of the Act.
- vii. The concerns set out in the application have not been addressed to the homeowner's satisfaction.

Reasons for Decision

22. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it sufficient information and documentation to enable it to decide the application without a Hearing.
23. **Section 1.C.6 of the Code of Conduct** states that the Written Statement of Services must set out "the management fee charged by the property factor, including any fee structure and also the property factor's policy for reviewing and increasing or decreasing this management fee". The Tribunal did not uphold the complaint under this Section. The property factors' Written Statement of Services deals with management fees and the process for reviewing them.
24. **Section 2.6 of the Code of Conduct** states that "A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of condition or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service". The Tribunal did not uphold the complaint under this Section. There was no evidence before the Tribunal to indicate that the property factors intend to provide work or services that will incur charges or fees in addition to those relating to the core service.
25. **Section 3.2 of the Code of Conduct**, insofar as relevant to the application, provides that two of the overriding objectives of Section 3 are to "protect homeowners' funds" and to "provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor." The Tribunal dealt with the homeowner's complaint regarding insurance under the heading of Section 3.2.
26. The view of the Tribunal was that the original estimated factoring charges could only be regarded as indicative, based on information available at the time. They preceded any formal assessment of reinstatement values and the date of registration of the Deed of

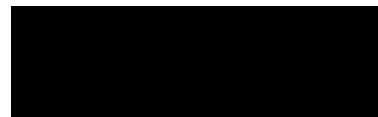
Conditions affecting the Development. The information had, in any event, not been provided to the homeowner by the property factors. It had been supplied by the Developers and their agents, Rettie & Co, and the Reservation Form clearly stated that the figures were estimates. There was no indication that the budget included in the property factors' tender document had been given other than in good faith. The Tribunal makes no comment on the provisions of the title deeds, other than to say that it appears that maintenance of the common parts of a Block or of a Townhouse within a row is to be shared by the owners within that Block or of the Townhouses in that row, according to Net Internal Area. It would have been for the homeowner's solicitors to advise her on the maintenance obligations she was undertaking should she proceed to purchase the Property. The Tribunal understood the concerns that the homeowner had expressed about her liability for charges but was unable to hold that the property factors had failed in their duties to her under Section 3.2 of the Code of Conduct.

27. **Section 5.4 of the Code of Conduct** states, in relation to insurance, that "Homeowners must be notified of any substantial change to the cover provided by the policy." The Tribunal did not uphold the complaint under this Section. No evidence was provided of any substantial change to the cover provided by the policy. The homeowner's complaint related to a proposed reallocation of responsibility for common charges resulting from an earlier incorrect interpretation of the title deeds and to the reinstatement values for the Development having originally been understated. There was no indication that the cover provided under the policy had altered.
28. The decision of the Tribunal was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Signed



Date: 8 November 2023
George Clark (Legal Member/Chairman)

