

Housing and Property Chamber

First-tier Tribunal for Scotland



Statement of Decision in an application for Review under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (contained in Schedule Part 1 of the Chamber Procedure Regulations 2017 (SSI No 328), as amended) ("the Procedure Rules")

Chamber Ref: Reference number: FTS/HPC/LM/22/2880

Property: 17 Corn Mill Road, Lenzie, Kirkintilloch, Glasgow, G66 3TL ("The property")

Parties:

Dr Gordon Jahn, residing at 17 Corn Mill Road, Lenzie, Kirkintilloch, Glasgow, G66 3TL ("the Applicant")

and

Residential Management Group Scotland Ltd, a company incorporated under the companies Acts and having their registered office at Unit 6, 95 Morrison Street, Glasgow, G5 8BE ("the Respondent")

Tribunal Members:

Paul Doyle (Legal Member)

Helen Barclay (Ordinary Member)

Unanimous Decision of the Tribunal

The Tribunal grants the application for Review in terms of Rule 39 of the Procedure Rules.

Reasons for decision

1. On 2 February 2023 the First-tier tribunal for Scotland (Housing and Property Chamber) issued a decision dismissing the applicant's application for an order under The Property Factors (Scotland) Act 2011.

The Request for Review

2. By email dated 17 February 2023 the Respondent asks for a review of the decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) dated 2 February 2023.

3. The tribunal's decision was intimated on 3 February 2023, so that the application for review is made in time.

4. The respondent seeks review on the following grounds.

At the time of making the original submission to the Court, the Property Factor submitted that the 2022 Written Statement of Services was available via its RMG Living portal. The homeowner disputed that and after investigation the Property Factor identified that while a communication signposting the owners to the 2022 WSS was uploaded to the portal, the WSS itself was not uploaded. This was a genuine mistake by the Property Factor.

The test for applying for a review is whether it is in the interests of justice to do so. The Property Factor considers it is in the interests of justice for the Tribunal to review its decision because the Property Factor is under a duty to correct the inaccurate statement, albeit it was a genuine mistake, previously submitted to the Tribunal, and the Tribunal's decision ought to be made on the basis of a wholly accurate set of facts and circumstances.

The Property Factor seeks a review of the Tribunal's decision in order that it can correct the inaccurate statement contained within its submission. Specifically, finding in fact (o) and paragraphs 28 to 30 of the decision might be affected. The Property Factor's position is that, notwithstanding this application for a review, and the correction of the inaccurate statement, the Tribunal ought to reach the same conclusion because on the evidence available it is still able to make the finding in fact (o) and substantiate its decision using the reasons which currently exist at paragraphs 28 to 30.

5. The applicant had earlier submitted his own application for review, which was refused by the tribunal on 14 February 2023. The applicant challenged, *inter alia*, the tribunals reasoning at paragraph 29 of the decision.

6. Parties now agree that the Tribunal should not have relied on the evidence which led to the findings in fact found at [9(o)] of the decision, and the reasoning at [28] to [30] of the decision. It is in the interests of justice to review the decision.

7. A hearing was fixed to take place within Glasgow Tribunal Centre on 2 May 2023 at 10am to address the extent and effect of review. The applicant as present and unrepresented. The respondent was represented by Mr A Kane, solicitor.

8. The applicant set his position out in a detailed written submission, upon which he succinctly expanded, before Mr Kane summarised the respondent's position

The Review

9. Both parties agree that the respondent's position was inaccurately stated at the hearing on 2 February 2023, and as a result [9(o)], and [28] to [30] of the decision are tainted.

10. The applicant says that the respondent has been deliberately dishonest, but it was the respondent's solicitor who candidly corrected the respondent's position when he realised an error had been made in the tribunal's decision. The source of that error was inaccurate evidence from the respondent, but it was the respondent who, having considered matters after the hearing, drew the inaccuracy to the tribunal's attention.

11. On the balance of probabilities, the evidence provided by the respondent about updating the written statement of services was provided in error, but not dishonestly. We reach that conclusion because of the respondent's candour in seeking a review of the decision.

12. [9(o)] of the decision said

The respondent issued a written statement of services to all proprietors in the development. An online version of that written statement of services is regularly updated.

13. We review [9(o)] so that it now says

The respondent issued a written statement of services to all proprietors in the development. An online version of that written statement of services was not updated between 2017 and 02/02/2023.

14. [28] to [30] of the decision said

28. The applicant says there is a breach of section 1.2 of the code of conduct. The respondent says that the written statement of services is constantly updated on the RMG living portal. The applicant says that the respondent is lying and that the only written statement of services on the RMG living portal he has access to is dated 2017. The applicant produces screenshots of the RMG living portal. In those screenshots, a link to a statement of services dated 29 December 2017 can be seen.

29. The problem for the applicant is that he has not opened the link to the written statement of services for the tribunal. We do not know what lies beyond the link to the written statement of services. On the one hand the applicant says that the written statement of services has not been updated for five years. On the other, the respondent says that the latest update was last year.

30. Because the only evidence that is placed before us is a series of Internet links rather than the document itself, we cannot make the finding of fact that

the applicant wants us to make. There is insufficient evidence placed before us of a breach of section 1.2 of the code of conduct for property factors.

15. We review the decision by deleting [29] and [30].

16. It is now common ground that the respondent did not upload updates to the written statement of services between 2017 and the start of February 2023.

Effect of Review

17. Overarching Standard of Practice (OSP)2, OSP4 and section 1.2 of the code of conduct must be considered in light of the reviewed decision. The applicant wants us to consider OSP 9, but that was not part of his original application, and cannot competently be raised now.

18. OSP 2 says

You must be honest, open, transparent and fair in your dealings with homeowners.

19. OSP 4 says

You must not provide information that is deliberately or negligently misleading or false.

19. Section 1.2 of the code of conduct says

A property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners:

- within 4 weeks of the property factor:-
 - agreeing in writing to provide services to them; or
 - the date of purchase of a property (the date of settlement) of which they maintain the common parts. If the property factor is not notified of the purchase in advance of the settlement date, the 4 week period is from the date that they receive notification of the purchase;
 - identifying that they have provided misleading or inaccurate information at the time of previous issue of the WSS.
- at the earliest opportunity(in a period not exceeding 3 months) where:
 - substantial change is required to the terms of the WSS.

Any changes must be clearly indicated on the revised WSS issued or separately noted in a 'summary of changes' document attached to the revised version.

20. We find that the respondent has not acted dishonestly. The applicant wants to invoke OSP 2 and OSP 4 because the evidence provided to the tribunal on 02/02/2023 was not reliable. We have already found that the error made by the respondent was not made dishonestly. A mistake was made. Unreliable evidence was given in the belief it was true, and the inaccuracy was found as a result of research and reflection after the decision was issued.

21. A holistic view of the respondent's actions and candour demonstrate honesty and diligence, not dishonesty and negligence. The Respondent's solicitor has properly adhered to his duty to the tribunal and his professional ethical duties.

22. There is no breach of OSP 2 or OSP4

23. It is now an admitted fact that the respondent did not update the online version of the written statement of services between 2017 and 02/02/2023. That is clearly a breach of section 1.2 of the code of conduct.

24. The remedy sought by the applicant is removal of the property factor and prosecution for an alleged criminal offence. Those are not appropriate remedies.

25. The effect of the respondent's breach is minimal, but the applicant has dedicated significant time and effort to establishing a breach of the code of conduct, and his efforts have been resisted by the respondent.

26. We find that the property factor should be ordered to pay a nominal sum to the applicant for distress and inconvenience. On the facts as we find them to be, the correct measure of damages for distress and inconvenience is £250.

27. In addition, the respondent should be ordered to send the applicant the current version of the written statement of services within 30 days.

28. If the respondent pays the applicant £250 within 30 days, and sends the applicant the current version of the written statement of services within 30 days, then a PFEO might not be necessary

Decision

29. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

“1. Within 30 days of the date of service on the property factor of this property factor enforcement order the property factor must pay the

applicant £250.00 as solatium for the distress and inconvenience caused to the applicant.

2. Within 30 days of the date of service on the property factor of this property factor enforcement order the property factor must deliver a copy of the most up to date written statement of services to the applicant”

30. Section 19 of the 2011 Act contains the following:

(2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

(3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

31. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Right of Appeal

32. 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Legal Member of the Tribunal

3 May 2023