



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011  
Sections 17(1)(a) and 17(1)(b)**

**Chamber Ref: FTS/HPC/PF/21/1928**

**Re: Property at 22 Claythorn Avenue, Glasgow, G40 2HB ("the Property")**

**Parties:**

**Mr Kyle Kennedy, 22 Claythorn Avenue, Glasgow, G40 2HB ("the Homeowner")**

**Thenue Housing, 423 London Road, Glasgow, G40 1AG ("the Property Factor")**

**Tribunal Member:**

**Neil Kinnear (Legal Member) and Andrew Taylor (Ordinary Member)**

**DECISION**

The Tribunal dismissed the Homeowner's application upon the basis that the Homeowner failed to notify the Property Factor in writing as to why the homeowner considers that the property factor has failed to comply with the *Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors* as required by Section 17(3) of the *Property Factors (Scotland) Act 2011*.

The Decision of the Tribunal is unanimous.

**Introduction**

In this Decision the *Property Factors (Scotland) Act 2011* is referred to as "the 2011 Act"; the *Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors* is referred to as "the Code"; and *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended are referred to as "the Rules".

The Property Factor was a Registered Property Factor and had a duty under section 14(5) of the 2011 Act to comply with the Code.

## **Background**

By application dated 11<sup>th</sup> August 2021 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with Sections 6.1, 6.4, 6.6 and 6.9 of the *Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors* (effective from 1 October 2012) as required by Section 14(5) of the 2011 Act.

On 14<sup>th</sup> October 2021 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a Case Management Discussion. By letters dated 28<sup>th</sup> February 2022 both parties were notified that a Case Management Discussion by conference call would take place at 10:00 on 6<sup>th</sup> April 2022.

A Case Management Discussion was held at 10:00 on 6<sup>th</sup> April 2022 by conference call. The Homeowner did not participate, and was not represented. The Property Factor's Miss McMillan and Miss Reynolds participated, and was represented by Mrs Mullen, solicitor.

The Tribunal clerk telephoned the Homeowner to enquire if he intended to participate, but received an automated voicemail message and was unable to speak with the Homeowner.

The Tribunal noted that the Homeowner had been in regular contact with the Tribunal, most recently on 31<sup>st</sup> March 2022. The Property Factor objected to the Case Management Discussion being adjourned, and although the Tribunal had considerable sympathy with its position, in circumstances where this was the first time that the Homeowner had failed to attend the Tribunal in relation to this application the Tribunal considered that it would not be just nor in the interests of justice to proceed with the Case Management Discussion in circumstances where the Homeowner was not in attendance to present his arguments.

Accordingly, the Tribunal decided to set a continued Case Management Discussion to allow the Homeowner one further opportunity to participate. The Tribunal also issued a direction to the Homeowner to provide further specification of the grounds for his application.

## **The Continued Case Management Discussion**

A continued Case Management Discussion was held at 10:00 on 22<sup>nd</sup> June 2022 by conference call. The Homeowner participated, and was not represented. The Property Factor's Ms McMillan and Ms Sutherland observed proceedings, and the Property Factor was represented by Mrs Mullen, solicitor.

Thereafter, the Tribunal discussed with the parties the preliminary issue raised by the Tribunal in its Direction of 6<sup>th</sup> April 2022 regarding whether or not the Homeowner had

complied with section 17(3) of the 2011 Act with respect to notifying the Property Factor in writing as to why he considered that the Property Factor has failed to comply with the Code prior to lodging his application with the Tribunal.

The Tribunal noted that the Homeowner lodged his application dated 11<sup>th</sup> August 2021 with the Tribunal together with a pro-forma template section 17 notification of the same date. The Tribunal responded to the Homeowner by e-mail dated 30<sup>th</sup> August 2021 seeking further information. Amongst other matters raised in that e-mail, the Tribunal noted that it did not consider that the pro-forma template section 17 notification gave sufficient notification of the Homeowner's complaint to the Property Factor.

The pro-forma template section 17 notification simply lists section numbers of the Code which the Homeowner asserts the Property Factor had breached, but does not set out any reasons for those assertions nor identify in respect of what matters the Homeowner asserts that the Property Factor had breached the Code.

In its e-mail of 30<sup>th</sup> August 2021, the Tribunal requested evidence that the Homeowner had notified the Property Factor of his complaint, and asked the Homeowner to write to the Property Factor setting out in turn each specific section of the Code which he believed the Property Factor had failed to comply with and setting out in detail the reasons why he believed the Property Factor had failed to comply with each of those sections.

The Homeowner replied to the Tribunal's e-mail of 30<sup>th</sup> August by e-mail dated 11<sup>th</sup> October 2021. In that e-mail he provided certain further information as requested, but did not respond to the Tribunal's request in relation to the section 17 notification.

The Tribunal noted this issue at the Case Management Discussion of 6<sup>th</sup> April 2022, and issued a Direction on that date to the Homeowner to provide written representations with regard to whether the terms of the notice which he gave to the Property Factor dated 11<sup>th</sup> August 2021 are sufficient to comply with section 17(3)(a) of the 2011 Act. The Homeowner responded to certain other matters identified in the Direction, but again did not respond to the Direction in relation to providing written representations regarding the section 17 notice.

It became clear to the Tribunal that the Homeowner had not appreciated that the answer to the question of whether he had complied with section 17(3) of the 2011 Act or not might mean that the Tribunal has no jurisdiction to hear this application.

The Homeowner requested that the Tribunal continue the Case Management Discussion to a further date to allow him to investigate his previous correspondence with the Property Factor, and stated that he was unable to do that if the Case Management Discussion was adjourned to a time later on 22<sup>nd</sup> June 2022. The Homeowner explained that he had become unwell on the morning of 6<sup>th</sup> April 2022 with covid symptoms, and apologised for his non-participation in the Case Management Discussion on 6<sup>th</sup> April 2022.

Ms Mullen argued that the Homeowner had not complied with section 17(3)(a) of the 2011 Act, as the pro-forma template section 17 notification was not a notification in writing to the Property Factor as to why the Homeowner considered that the Property

Factor had failed to comply with the Code prior to lodging his application with the Tribunal for the reasons that the Tribunal had already identified to the Homeowner in its e-mail to him of 30<sup>th</sup> August 2021 and in its Direction of 6<sup>th</sup> April 2022.

Ms Mullen opposed any further continuation of the application upon the bases that the Homeowner had had ample time to address this issue which had been raised with him twice by the Tribunal, and in circumstances where the Property Factor's correspondence file with the Homeowner revealed no correspondence which might be sufficient to satisfy the terms of section 17(3) of the 2011 Act.

Ms Mullen invited the Tribunal in the event that it dismissed the application, to make an award of the expenses of the proceedings in favour of the Property Factor in terms of Rule 40 of the Rules.

The Tribunal adjourned for fifteen minutes to consider parties' submissions before resuming and advising them of its decision.

### **Statement of Reasons**

Section 17 of the 2011 Act provides:

#### **"17 Application to the First-tier Tribunal**

- (1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—
  - (a) to carry out the property factor's duties,
  - (b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").
- (2) An application under subsection (1) must set out the homeowner's reasons for considering 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.
- (3) No such application may be made unless—
  - (a) the homeowner has notified the property factor in writing as to why the homeowner considers 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, and
  - (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.
- (4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.
- (5) In this Act, "*property factor's duties*" means, in relation to a homeowner—

- (a) duties in relation to the management of the common parts of land owned by the homeowner, or
- (b) duties in relation to the management or maintenance of land—
  - (i) adjoining or neighbouring residential property owned by the homeowner, and
  - (ii) available for use by the homeowner.”

The Tribunal required to decide upon its interpretation of the requirements imposed by section 17 of the 2011 Act, and whether these had been met in this application.

Section 17(3) provides that no application may be made to the Tribunal unless the Homeowner has notified the property factor in writing as to why the homeowner considers 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, and the Property Factor has refused to resolve, or unreasonably delayed in attempting to resolve, the Homeowner's concern.

It appears to the Tribunal that the purpose of this provision is for the Homeowner who intends to make the application to be required to bring his or her concern to the Property Factor's attention identifying the specific Code breaches and breaches of the Property Factor's duties the Homeowner relies upon, and to allow the Property Factor's complaints procedure to be engaged.

It is once that procedure has been engaged, and in the event that it fails to resolve the complaint by the Property Factor's refusal or delay in doing so, that the Tribunal's jurisdiction is in turn engaged.

The discreet question in this application was whether the pro-forma template section 17 notification sent to the Property Factor was sufficient to meet this requirement.

The Tribunal, after very careful consideration, concluded that it was not for the following reasons.

The pro-forma template section 17 notification sent to the Property Factor simply lists section numbers of the Code which the Homeowner asserts the Property Factor had breached, but does not set out any reasons for those assertions nor identify in respect of what matters the Homeowner asserts that the Property Factor had breached the Code.

The Tribunal requested evidence that the Homeowner had notified the Property Factor of his complaint, and asked the Homeowner to write to the Property Factor setting out in turn each specific section of the Code which he believed the Property Factor had failed to comply with and setting out in detail the reasons why he believed the Property Factor had failed to comply with each of those sections. He failed to do so.

The purpose of sending notification in terms of section 17(3)(a) of the 2011 Act is to notify the Property Factor of the breaches of the Code which the Homeowner asserts and the reasons for those assertions. In the absence of any reasons being provided, the Property Factor cannot attempt to resolve the Homeowner's complaint in terms of section 17(3)(b) of the 2011 Act, as it has no proper notification of the basis for the complaint.

For these reasons, the Tribunal considered that the Homeowner failed to notify the Property Factor in compliance with Section 17(3) of the *Property Factors (Scotland) Act 2011* ("the 2011 Act"), and accordingly this application must be dismissed.

Finally, with regard to the Property Factor's application for expenses, Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides:

"(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.

(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."

The Tribunal accepted that the Homeowner's conduct of the case had put the Property Factor to unnecessary expense. He had been slow to appreciate that the answer to the question of whether he had complied with section 17(3) of the 2011 Act or not might mean that the Tribunal has no jurisdiction to hear this application, despite the Tribunal's promptings to address that issue.

However, the Tribunal did not consider that the Homeowner's conduct of the case was sufficient to be considered as unreasonable behaviour. The Homeowner represented himself and has no legal training. He apologised for his non-participation in the Case Management Discussion on 6<sup>th</sup> April 2022, and explained that had become unwell on the morning of 6<sup>th</sup> April 2022 with covid symptoms. The issue of the section 17 notification is a subtle legal question, and the Tribunal did not consider in those circumstances that the Homeowner acted unreasonably as defined in Rule 40 of the Rules.

That being so, the Tribunal did not award expenses against the Homeowner.

## **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.**

**23 June 2022**

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**Date**