

Housing and Property Chamber
First-tier Tribunal for Scotland



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/19/4097

Re: Property at 0/1, 43 St Andrews Square, Glasgow G1 5PP ("the Property")

The Parties:

Mr David Hammond, 0/1, 43 St Andrews Square, Glasgow G1 5PP ("the Home Owner")

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Rutherglen, Glasgow G73 1UZ ("the Property Factor")

Tribunal Members:

Neil Kinnear (Legal Member) and Mike Links (Ordinary Member)

DECISION

The Tribunal dismissed the Homeowner's application upon the basis 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").

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 20th December 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act and had failed to comply with Sections 1.1a A.b., 2.1, 2.4, 3.3, 5.2, 5.3, 5.5, 5.6, 5.7 and 6.4 of the Code as required by Section 14(5) of the 2011 Act.

On 16th March 2020 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 31st July 2020 both parties were notified that a hearing by conference call would take place at 10am on 16th September 2020

A Hearing was held on 16th September 2020 by conference call. The Homeowner did not participate, but was represented by Miss Corrine Sinclair. The Property Factor's Brian McManus participated, and was not represented.

Mr McManus raised as a preliminary issue that he considered that the Homeowner had failed to notify the Property Factor in terms of Section 17(3) of the 2011 Act. As a result, the Homeowner was not entitled to make this application which should be dismissed.

This application is one of twenty-one applications made by different Homeowners at the St Andrews Square development against the Property Factor, which are being considered together as a group. Miss Sinclair is one of the other Homeowners bringing an application, but she also represents the other twenty Homeowners in their respective applications and has provided the Tribunal with mandates from each for her to act on their behalf.

The preliminary issue Mr McManus raised also applies to eighteen of the other applications. It does not apply to the application made by Miss Sinclair, nor to that made by another Homeowner, Mr Hogg.

The Tribunal, after discussing this issue with Miss Sinclair and Mr McManus, considered that it was appropriate for it to hear parties' arguments on the preliminary issue, and to then either issue a decision dismissing this application if it accepted Mr McManus's argument, or continuing it to a full hearing in the event that it did not.

Mr McManus' argument was a short one, but of considerable importance. He argued that the Homeowner had not notified the Property Factor in writing as to why the Homeowner considered that the Property Factor failed to carry out the Property Factor's duties and to comply with the Code in terms of section 14 of the 2011 Act. As a result of that failure to notify, the Property Factor could not be said to have refused to resolve, or unreasonably delay in attempting to resolve, the Homeowner's concerns. In these circumstances, the Homeowner was not entitled to make this application.

Mr McManus accepted that both Miss Sinclair and another Homeowner, Mr Hogg, had provided notification in terms of section 17(3) of the 2011 Act. However, the other nineteen Homeowners had not.

Miss Sinclair explained that after submitting all twenty-one applications, she had been contacted by the Tribunal advising her of the necessity of the Homeowner providing notification to the Property Factor in terms of section 17(3) of the 2011 Act.

In consequence of that, she had sent an e-mail to Mr McManus dated 12th February 2020. The terms of that e-mail are important to determination of the preliminary issue taken by Mr McManus.

The e-mail is in the following terms:

“To Whom it May Concern:

Please find attached the formal notification of a group complaint to Speirs Gumley Property Management. As you aware, I have been acting as a representative of Phase 1A for St Andrews Square, Glasgow for some time by submitting requests for information and filing reports etc. Robert Hogg and Myself have worked hard to resolve issues the proprietors of Phase 1A have had.

During this time I personally submitted a complaint which went back and fore and much of which covered issues raised previously. This complaint reached stalemate whereby nothing could be done by either party to progress matters. Bryan McManus requested further information which I had previously provided and I responded stating I felt we were going around and around in circles to no resolution.

What came from this situation was I have now raised an action with the Property Factors Tribunal and they have requested me to put in writing the complaint and the group complainers to make you aware.

I attach the 2 letters of complaint with why I feel Spiers Gumley Property Management have breached the Property Factors (Scotland) Act 2011 and a list of those who have completed a mandate for me to pursue this claim.

We all have the exact same issues and seek resolution at the Tribunal. I have further copied these proprietors into this e-mail as evidence of consent and to allow them to see the progress I am making on the issues raised.

Please confirm receipt of this e-mail.

Yours sincerely,

Corrine M Sinclair
Flat 3/1
43 St Andrews Square
Glasgow”

The recipient list includes in addition to Mr McManus numerous others, whom Miss Sinclair advised the Tribunal were the other proprietors whom she represents.

The attachments were a list of names and addresses of the other twenty proprietors whom Miss Sinclair represents, a copy of her own section 17 notification to the Property Factor, and a copy of Mr Hogg's section 17 notification to the Property Factor.

Both the notifications under section 17 are simply copies of the notifications that both Mr Hogg and Miss Sinclair gave to the Property Factor as individuals. The notifications are in each of their names alone, and relate to their own property alone.

Mr McManus argued that there is no such thing as a "group complaint". Each Homeowner, if they choose to do so, requires to make a separate and individual application to the Tribunal.

In order for each separate and individual Homeowner to make an application, each must first notify the Property Factor in terms of section 17 of the 2011 Act as to why the Homeowner considers that the Property Factor has failed to carry out its duties and/or comply with the Code.

Mr McManus argued that the purpose of this provision is to engage the Property Factor's complaints procedure in respect of the Homeowner and property to which the notification relates. He observed that although Miss Sinclair stated that she represented other proprietors for the purpose of bringing applications on their behalf to the Tribunal, she had not provided any mandate or authorisation which would allow him to safely conclude that she did.

Due to General Data Protection Regulations, the Property Factor could not properly enter a complaints procedure and correspondence with a Homeowner without proper documentation to confirm that Miss Sinclair did indeed have the authorisation that she claimed from her fellow Homeowners.

Mr McManus argued that the whole purpose of section 17 of the 2011 Act, was to require a Homeowner who intended to apply to the Tribunal to first intimate their complaint to the Property Factor in order to engage its complaints procedure and give it the opportunity to resolve the complaint.

That being so, the purported "group" notification contained in the e-mail of 12th February was insufficient, as it did not relate to individual Homeowners and their properties, and did not indicate the individual complaints that each Homeowner was making for the purpose of allowing the Property Factor to respond to those.

Miss Sinclair contended that the e-mail of 12th February was sufficient to comply with the provisions of section 17 of the 2011 Act in respect of each and all of the Homeowners which she represented.

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 had considerable sympathy with the position each party adopted. From the Homeowner's representative's point of view, she had attempted to comply with the terms of section 17 of the 2011 Act once this had been drawn to her attention. From the Property Factor's perspective, they had not received adequate notification of the complaint in order to allow them to properly respond to it.

The Tribunal is not aware of any previous case authority upon this point, and accordingly requires to decide it upon its interpretation of the requirements imposed by section 17 of the 2011 Act, and whether these have 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 complaint to the Property Factor's attention, 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 Tribunal observes that applications to it are made by individual Homeowners in terms of both the 2011 Act and the Rules. There is no such thing procedurally as a "group complaint". In the event that a number of Homeowners make the same complaint against the same Property Factor in respect of the same development in which they all live, then the Tribunal may administratively hear them together and in parallel.

However, they remain separate applications, in respect of separate Homeowners and in respect of separate Properties. As a result, each Homeowner requires to comply with the terms of Section 17 of the 2011 Act with regard to notification to the Property Factor.

The discreet question in this application is whether the e-mail of 12th February 2020 from Miss Sinclair is sufficient to meet this requirement.

The Tribunal, after very careful consideration, concludes that it is not for the following reasons.

As each application by a Homeowner against their Property Factor is a separate application in respect of their particular property, each must comply with section 17 of the 2011 Act and notify the Property Factor of their complaint made by them in respect of their Property.

That may ordinarily be done by each Homeowner individually sending notification to the Property Factor of their complaint in respect of their property. Doing this engages the Property Factor's complaints procedure, and it is only upon that procedure failing to resolve the complaint either through the Property Factor refusing to resolve or unreasonably delaying in attempting to resolve the Homeowner's concerns that the Tribunal's jurisdiction is engaged.

That said, the Tribunal considers that it may be sufficient for a group of Homeowners in the same development, and with the same complaint against the same Property Factor, to send one notification which is clearly identified as being made on behalf of all the Homeowners and which lists the same complaints in respect of each of them

and which clearly specifies and identifies all the Homeowners and clearly specifies and identifies the properties.

However, that is not what occurred here. In this application, the Homeowner did not send notification to the Property Factor of the Homeowner's complaint in respect of the Homeowner's property. Instead, the Homeowner's representative sent an e-mail to the Property Factor indicating that she was representing the Homeowner, and enclosing her own individual notification for her own property and another individual notification in respect of another property.

The Homeowner's representative appears to have attempted to "adopt" her own and Mr Hoggs' notifications to the Property Factor of their own individual complaints as being the complaints of the Homeowner.

Unfortunately, the Tribunal does not consider that sufficient, standing the terms of Section 17 of the 2011 Act which provides that the Homeowner (or his/her representative) must notify 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.

No such notification has been given individually by the Homeowner, and the e-mail by the Homeowner's representative of 12th February simply copies two notifications given by different Homeowners with the same complaint and seeks to attempt to adopt those in respect of a number of other Homeowners whom the maker of the notification now represents.

It appears to the Tribunal that the purpose of section 17 is to require any Homeowner who has a complaint against his/her Property Factor to exhaust the complaints procedure set out in their contract with the Property Factor before making application to the Tribunal.

That being so, any Homeowner who wishes to apply to the Tribunal must first exhaust that complaints procedure before making application to the Tribunal. The mechanism for doing that is set out in the 2011 Act as being the Homeowner giving notification to the Property Factor as to why the Homeowner considers the Property Factor has failed in its duties.

The Tribunal considers that the e-mail of 12th February 2020 does not give notification to the Property Factor of a complaint by the Homeowner. Instead, as earlier explained, it intimates complaints by other Homeowners and seeks to adopt the contents of those separate complaints in respect of the Homeowner.

The Tribunal considers that such an approach, if accepted, would cause substantial difficulties to the Property Factor. It would not know the details of the complaint made by an individual Homeowner in respect of the Homeowner's property. That would make it very difficult for the Property Factor to properly address and resolve the complaint.

Further, in the absence of any evidence by way of mandate or letter of authorisation of the alleged representative being provided, the Property Factor would be left in an invidious position where it did not know if the author of the complaint truly had the authority of the Homeowner to make that complaint or not.

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.

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.

Legal Member

Date