

Housing and Property Chamber

First-tier Tribunal for Scotland



Statement of Decision with Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Reference numbers:

FTS/HPC/PF/23/0742

FTS/HPC/PF/23/0743

Re: Property at 12/17 and 13/14 Ravelston Terrace, Edinburgh EH4 3TP (“the Property”)

Parties:

Mr Richard Heaton and Mrs. Janet Heaton both residing at 12/17 Ravelston Terrace, Edinburgh EH4 3TP (“the Homeowner”)

Hacking and Paterson Management Services, 103, East London Street, Edinburgh EH7 4BF (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) Andrew McFarlane (Surveyor and Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2012 and has not failed to comply with the Property Factor Code of Conduct 2021.

Background

1. The Homeowner made two applications to the First-tier Tribunal for Scotland (Housing and Property Chamber) for determinations that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2012 (“the 2012 Code”) and the Code of Conduct for Property Factors 2021 (“the 2021 Code”).
2. The applications were set out as follows:
 - i) PF/23/0742

This application was on Form C1 and complained of breaches of the 2012 Code at Written Statement of Services at paragraph C.f relating to paragraph B.c, Communication and Consultation at paragraph 2 leading statement relating to 2.4 and Financial Obligations at paragraph 3, leading statement.

ii) PF/23/0743

This application was on Form C2 and complained of breaches of the 2021 Code at Written Statement of Services at paragraph C7 relating to paragraph B4; Communication and Consultation at paragraphs 2.1 relating to paragraph 2.6 and 2.5, and Financial Obligations at paragraphs 3.1 and 3.2.

3. Copy emails between the Parties, copy invoices issued by the Property Factor and a copy of the Property Factor's Written Statement of Services (WSS) accompanied the applications.
4. A legal member of the Chamber with delegated powers of the Chamber President accepted the applications and a Case Management Discussion (CMD) was fixed for 30 May 2023 at 10.00 by telephone conference call for both applications.
5. Prior to the CMD, the Property Factor submitted written representations. Also prior to the CMD, the Tribunal issued a Direction requiring the Homeowner to provide a print of the title sheet or title sheets for the Property showing the Deed of Conditions or title conditions relating to the common property or a copy of the relevant burden writs. The Homeowner complied with this Direction and also submitted photographs and plans of the Property.

Case Management Discussion

6. The CMD took place on 30 May 2023 at 10.00 by telephone conference call. The Homeowner was represented by Mr. Heaton, the first-named Homeowner. The Property Factor was represented by Mr. Gordon Buchanan.
7. The Tribunal advised the Parties that the purpose of the CMD was to identify if matters were disputed or could be resolved and if a Hearing on evidence is required. The Tribunal noted that the issue between the Parties appeared to arise from the way in which the Property Factor had dealt with water ingress repairs in relation to the apportionment of the common charges and the content of correspondence. For the Property Factor, Mr. Buchanan confirmed that the complaints raised in the Applications were not accepted.
8. At the CMD the Tribunal noted that core issue is the Property Factor's role and responsibility in determining the source of water ingress to the Property and apportioning costs for work instructed in respect of the water ingress.

9. The Tribunal adjourned the CMD to a Hearing on the parts of the Codes referred to in the Applications.

10. The broad matters to be considered at the Hearing are:

- i) With regard to the invoices for water ingress work which form part of the Applications, did the Property Factor instruct the works properly in terms of their authority under the title deeds and in accordance with their WSoS and the Codes?
- ii) With regard to the invoices for water ingress work which form part of the Applications, did the Property Factor apportion the common costs properly in terms of the title deeds and in accordance with their WSoS and the Codes?
- and
- iii) Did the Property Factor respond to complaints and communications in accordance with their WSoS and the Codes?

Hearing

11. The CMD took place on 28 September 2023 at 10.00 at George House, Edinburgh. The Homeowner was represented by Mr. Heaton, the first-named Homeowner. The Property Factor was represented by Mr. Gordon Buchanan accompanied by Ms. Emma Blair.

12. The Tribunal advised the Parties that the parameters of the Tribunal's jurisdiction were limited to the complaints raised in the Applications in respect of the Codes and so the Tribunal would focus on the wording of Codes.

13. In broad introduction, Mr. Heaton explained that the construction of the Development is unusual for residential properties as it is a 1970s reinforced office block which was converted and redeveloped and so the construction does not conform to a standard "tenement building" in respect of the definitions of "roof", "balcony" and "common parts". As explained at the CMD, Mr. Heaton repeated that the owners have relied on the Property Factor to remedy the water ingress issues and agreed that the owners are divided in their opinions in respect of leaks emanating from the common roof or from individual balconies.

14. For the Property Factor, Mr. Buchanan repeated the Property Factor's position from the CMD that, whilst the Property Factor has sympathy for the owners predicament, the Homeowner in these Applications is misconceived in raising the proceedings against the Property Factor as it is not the Property Factor who determines which parts of the building are common and which are not but the owners themselves. He explained that the Property Factor was not appointed in terms of the title deeds acts as an agent for the owners and acts on their instructions as a collective.

Complaints as narrated in the Applications.

15. As the two Applications are broadly similar in respect of the sections of the codes complained about the Tribunal dealt with the Codes together.

Written Statement of Services

The 2012 Code at Written Statement of Services at paragraph Cf which states, with regard to Financial and Charging Arrangements, that the WSS must include *“the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee, what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated”*.

The 2021 Code at Written Statement of Services at paragraph C7 which states, with regard to Financial and Charging Arrangements, that the WSS must state *“what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services that each homeowner is responsible for. This is likely to be set out in the title deeds for the property. If management fees are charged at a flat rate rather than as a proportion, then this should be clearly stated”*

16. The Tribunal referred Mr. Heaton to the Property Factor's WSS which at Paragraph 4 on pages 4 and 5 sets out the annual management fee for Core Services and that the apportionment can be found in the common charges accounts which can be clarified further on request. Mr. Heaton agreed that he had received the common charges account as required and had received further clarification when requested but disputed that these provided clarity on how the apportionments had been arrived at and why.
17. Mr. Buchanan repeated that the Property Factor apportioned the common charges in accordance with owners' instructions as a collective which were agreed at regular owners' meetings. Mr. Heaton agreed that he attended these meetings.
18. Mr. Buchanan stated that the Property Factor complied with these sections of the Codes.

Communications and Consultations

The 2012 Code at Communications and Consultations at paragraph Communication and Consultation at paragraph 2 leading statement which states *“Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes”* and, at 2.4, which states *“You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).”*

The 2021 Code at Communication and Consultation at paragraphs 2.1 which states *“Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations”* 2.5

which states “A property factor must provide a homeowner with their contact details, including full postal address with post code, telephone number, contact e-mail address (if they have an e-mail address) and any other relevant mechanism for reporting issues or making enquiries. . If it is part of the service agreed with homeowners, a property factor must also provide details of arrangements for dealing with out-of-hours emergencies including how a homeowner can contact out-of-hours contractors” and 2.6 which states “ 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. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner.”

19. The Tribunal referred Mr. Heaton to the Property Factor’s WSS which at Paragraph 5 on pages 6 and 7 sets out the communications arrangements. Mr. Heaton accepted that the Property Factor had made a good attempt at trying to resolve the complex issue of the water ingress and accepted that the Property Factor had attempted to make a buildings insurance claim. He said that he understood that the Property Factor had incurred significant costs on behalf of the owners in respect of investigative works and was obliged to recover these costs. However, Mr. Heaton did not accept that the Property Factor had communicated fully with the owners and with the Homeowners, in particular, in respect of the individual costs allocated to the Property. He stated that the Homeowner should have been given clear prior warning of the likelihood of an excessive sole liability for the roof works and should have had detailed advance notice of how the charges were to be apportioned ahead of the invoices being issued. Mr. Heaton explained that the Property Factor had written to the Homeowner with an explanation on 23 November 2022 and issued the invoice two days later on 25 November 2022.
20. Mr. Buchanan repeated that the Property Factor apportioned the common charges in accordance with owners’ instructions as a collective which were agreed at regular owners’ meetings. He stated that an email of 14 November 2022 had given prior warning to the Homeowner and that a further email of 3 February 2023 went into greater detail. Mr. Heaton advised that he did not appear to have received the email of 14 November 2022 and maintained that the Property Factor had not complied with these sections of the Code.
21. Ms. Blair advised the Tribunal that the contractor instructed to carry out the investigatory work was also instructed to carry out works which were necessary and to invoice these accordingly. Therefore, some works to solely owned property such as balcony balustrades were carried out and invoiced to the relevant owners. Mr. Heaton agreed that some works fell to the Homeowner alone. He explained that the Homeowner could not carry out their own investigative works as the water ingress could have come from other solely owned property or from common property and so had to rely on the Property Factor to instruct the works.

22. Mr. Buchanan stated strongly that the Property Factor had complied with these sections of the Codes.

Financial Obligations.

The 2012 Code at Financial Obligations which states *“While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved. The overriding objectives of this section are: Protection of homeowners’ funds, Clarity and transparency in all accounting procedures and Ability to make a clear distinction between homeowners’ funds and a property factor’s funds.”*

The 2021 Code at Financial Obligations which at 3.1 states *“While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply”* and which at 3.2 states *“The overriding objectives of this section are to ensure property factors: protect homeowners’ funds; provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; make a clear distinction between homeowners’ funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor’s own funds and fee income.”*

23. Mr. Heaton explained that this part of his complaints related to the apportionment of the costs by the Property Factor, that it was not clear to him that the apportionment had been carried out correctly and that it was not clear to him that the Property Factor was looking after his funds in properly. Following discussion with the Tribunal, Mr. Heaton accepted that the purpose of this part of both Codes was to ensure that property factors do not misuse client funds by mixing them with their own funds. Mr. Heaton accepted that the correct proportion of three times one-sixty third of the overall cost, of items for which responsibility with other owners was shared, had been applied to the Homeowner’s ownership.

24. Mr. Buchanan stated that the Property Factor had complied with these sections of the Codes.

Findings in Fact.

25. The Tribunal had regard to the Applications in full, and to the submissions made at the CMD and the Hearing and to the productions lodged, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.
26. The Tribunal found both Mr. Heaton and Mr. Buchannan to be truthful, straightforward and candid in their submissions.
27. The Tribunal found the following facts established:

- i) The Parties are as set out in the Applications;
- ii) The Property is part of a larger Development in respect of which there are sixty three ownership shares;
- iii) Three of the sixty three ownership shares are attributed to the Property;
- iv) The Property Factor takes instructions from the owners as a collective as a usual practice and apportions shares by sixty thirds;
- v) With regard to the water ingress investigations at the core of the Applications, the Property Factor instructed this work on behalf of the owners as a collective following a meeting of those owners and in accordance with their usual practice;
- vi) The water ingress investigation work was not straightforward due to the unusual construction of the Development;
- vii) The contractors invoiced the Property Factor for water ingress investigation work to the common parts;
- viii) The contractors carried out works to the Homeowner's solely owned property;
- ix) The Property Factor allocated costs for works carried out to the Homeowner's solely owned property to the Homeowner;
- x) The contractors invoiced the Property Factor for water ingress remedial work to the common parts;
- xi) The Property Factor's instructions in respect of the allocation and apportionment of common charges is given to them by the Development owners;
- xii) The Property Factor allocated costs for common parts in accordance with the Development owners' instructions;
- xiii) The Homeowner's dispute relates to the allocation and apportionment of common charges;
- xiv) The Homeowner's dispute lies with the other Development owners and their collective instructions to the Property Factor;
- xv) The Property Factor's WSS complies with the Codes;
- xvi) The Property Factor complied with their WSS;

Decision of the Tribunal with reasons

28. From the Tribunal's Findings in Fact as set out above, the Tribunal found that the Property Factor had not failed to comply with the 2012 Code and with the 2021 Code.

29. The decision is unanimous.

Appeal

In terms of section 46 of the Tribunals (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

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Karen Moore, Chairperson

12 October 2023