



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

In an Application under section 17 of the Property Factors (Scotland) Act 2011
by

Sandra Dickson, Chilton, Gracefield Court, Musselburgh EH21 6LL ("the Applicant")

Charles White Ltd, Citypoint, Haymarket Terrace, Edinburgh EH12 5HD ("the Respondent")

Re: Property at Chilton, Gracefield Court, Musselburgh EH21 6LL ("the Property")

Chamber Ref: FTS/HPC/LM/23/0252

Tribunal Members:

John McHugh (Chairman) and Elaine Munroe (Ordinary (Housing) Member).

DECISION

The Respondent has failed to carry out its property factor's duties.

The Respondent has not failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is the owner of Flat GF2, Chilton, Musselburgh EH21 6LL (hereinafter "the Property").
- 2 The Property is located within a development of flatted blocks and associated common areas known as Gracefield Court (hereinafter "the Development").
- 3 The Respondent is the property factor responsible for the management of common areas within the Development.
- 4 The property factor's duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
- 5 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 7 December 2012. From 16 August 2021 it was under a duty to comply with the updated 2021 Code.
- 6 The Applicant reported to the Respondent that two missing drain covers required replacement.
- 7 The Respondent instructed a contractor, East of Scotland Drainage Services to attend to the issue.
- 8 East of Scotland Drainage Services replaced the drain covers.
- 9 East of Scotland Drainage Services issued its invoice to the Respondent dated 15 October 2021.
- 10 The invoice included a works description of "pipe repair". It included a charge of £240 plus VAT for labour and £15 plus VAT for "pipe & fittings".
- 11 The Respondent's Written Statement of Services provided it with delegated authority to instruct repairs up to a sum of £250 excluding VAT with an exception in emergency situations.
- 12 The contractor's invoice exceeded the £250 limit.
- 13 The works were not of an emergency nature.
- 14 The Respondent did not notice that the amounts and work description in the contractor's invoice seemed not to match the works instructed.
- 15 The contractor's charges were then charged to the Applicant and the other owners in the affected block in the Respondent's invoice dated 1 March 2022.
- 16 The Applicant has, by her correspondence, including by her letter of 24 February 2023 informed the Respondent of the reasons why she considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 17 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A Case Management Conference took place by telephone conference on 14 June 2023.

It was agreed at that hearing that the matter would proceed to determination by the Tribunal without the need for a further hearing. That was subject to the Applicant lodging photographs and the Respondent having the opportunity to comment upon the photographs lodged.

The Applicant lodged photographs on 19 June 2023. The first image was of a downpipe where it meets the ground and includes a small drain cover. The second image was a webpage from Tool Station which shows a page relating to a square gulley grid cover

160mm x 160mm which is on sale for a price of £1.58. On 26 June 2023 the Respondent confirmed by email that the photographs appeared to show the correct location.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included the Respondent’s Written Statement of Services marked as Effective from January 2014 (updated 2023) which we refer to as “the Written Statement of Services”. The version lodged shows the history of amendments over the time period that the Written Statement has been in force.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services Clauses 2.1 and 2.5 are relied upon in the Application as a source of the property factor's duties.

(There was originally some confusion as to whether the Applicant complained regarding property factor's duties. That was caused by the way in which the Applicant had completed the Application form and her correspondence with the Tribunal. The situation was clarified with the Applicant in her email of 26 May 2023).

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 6.1 and 6.4 of the Code.

The elements of the Code relied upon in the application provide:

“...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE...

6.1 This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard...

...6.4 Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.”

The Matters in Dispute

The Applicant complains in relation to the following issue:

The Respondent issued an invoice to her dated 1 March 2023 which included a charge for drain maintenance – her share being £51.

Background

The Respondent issued its invoice No. 01070381 dated 1 March 2022 to the Applicant.

The invoice included an entry under the heading “Development Maintenance” as follows:

“15/10/21 East of Scotland Drainage Services Replace Missing Drain Covers £255”

The invoice apportioned a 1/6 share of this item to the Applicant, being £51 including VAT.

The Applicant was unhappy with this charge. She undertook her own investigations and observed that the work appeared to her to have been very minimal in nature and not to have been carried out well. She complained to the Respondent that they had failed to inspect the work and that the cost was excessive.

She requested a copy of the invoice of the contractor which had carried out the works, East of Scotland Drainage Services. When she inspected this she found that it contained a description of the works which appeared not to match the works carried out in that it referred to a pipe repair for which a total labour charge of £240 plus VAT had been made and “pipe and fittings” charged at £15 plus VAT.

The Applicant was concerned that the repairs totalled £255 plus VAT which exceeded the Respondent’s delegated authority in terms of Clause 2.5 of its Written Statement of Services which provide a limit of £250 plus VAT (or £20 per property).

The Applicant raised her concerns with the Respondent. The Respondent investigated the complaint. The Respondent discussed the issue with the contractor. The contractor explained that it used standard terminology referring to a pipe repair for a job of this kind even though it was in fact replacing a drain cover. It explained that the time charged reflected an initial visit to site to locate the drain covers affected; to measure them and then to travel to buy new covers and then return and replace them at an hourly rate of £80. The contractor accepted that the labour element had been overcharged in error and provided a refund of £80.

This explanation was communicated by the Respondent to the Applicant on 10 May 2023. The Respondent accepted that there had been a failure to identify the inaccuracies in the contractor’s invoice. The Respondent then provided the affected owners with a refund of £80 plus VAT by crediting the sum of £16 to each owner in their invoice of 1 June 2022.

Section 2 of the Written Statement of Services provides:

“2 Services Provided

2.1 CWL will carry out the services and perform the duties of the Owners’ Association with reasonable skill and diligence in accordance with the principles of good estate management.

2.2 The Owners' Association will be assigned a dedicated, trained and experienced client relationship manager who will be assisted by other members of the team and will be responsible for providing an efficient service. This will include prompt and courteous responses to communications, records of queries in relation to repair works and other significant matters. All correspondence will be in plain English and provided in a timeous manner. CWL will also ensure that all procedures comply with relevant legislation.

2.3 Emergency repairs will be attended to as and when the need arises. If you become aware of any matter requiring urgent attention please contact your client relationship manager immediately. Should an emergency arise out of normal working hours or on a public holiday (e.g. severe water leak, serious electrical fault, storm damage to roof, etc) please call 0131 447 8191. In the event of a gas leak, or if you can smell gas please call Scottish Gas Networks (SGN) on 0800 111999.

2.4 A routine inspection of your development will be carried out by a Charles White Ltd representative once every six weeks.

2.5 In the course of CWL undertaking the routine inspection of your development, we shall where emergency works are identified, instruct the works necessary to mitigate this risk. We shall act based on the following threshold, individual repairs up to the value of £250 exc. VAT, or the aggregate of £20 exc. VAT per client, which ever shall be greater. In exceptional circumstance, works shall be instructed out with this threshold, where the risk is significant and remedial works within the threshold limit would not reduce the risk to an acceptable level. For example, repairs to fire safety system, risk of falling masonry/trees, and water ingress to electrical equipment. Thresholds are per individual repair and in general are on a per block basis for internal repairs or building fabric repairs, or on a development wide basis where related to hard and soft landscaping. For simple defects containable within the threshold a full repair will be instructed, for larger more complicated repairs, interim works to make safe will be undertaken within the threshold, while the full repair is scoped, costed and communicated with clients."

The Respondent expresses the view that it regarded the reported issue as a health and safety concern/emergency and appears to attempt to rely upon the terms of Section 2.5 of its Written Statement to justify spending more than was authorised in terms of its delegated authority.

We do not agree that the works were of the nature of an emergency in terms of Section 2.5. While it is conceivable that missing drain covers might, in some circumstances, lead to a risk eg of persons falling into them, these drains appear to be the downpipes running down the side of the building and not to have been in an area where foot traffic was likely. The Applicant observes that she had supplied a photograph of the affected areas when she had originally reported the repair to the Respondent, so it ought to have been obvious to the Respondent that there was unlikely to be any immediate health and safety concern. If the Respondent had had any doubt, then it could have confirmed the position with the Applicant but it did not do so. Equally, there is no evidence that the contractor was asked to proceed with the repair on the basis that it was a health and safety concern or an emergency. The Respondent's submission indicates that the contractor was asked to attend within five working days.

We therefore find that the Respondent has breached the terms of Section 2.1 of its Written Statement in instructing and charging to owners work in excess of its delegated authority. That said, it should be noted that the value of the works only very marginally exceeded the Respondent's authority.

In addition, we consider that the Respondent's payment of the contractor's invoice without question when it appeared to contain an incorrect description of the works instructed and also appeared to be of a high amount relative to what might have been expected to be a breach of the Respondent's duty under Section 2.1 to carry out its duties with reasonable skill and diligence. Had the Respondent asked the same questions of the contractor as were raised by the Applicant without prompting by the Applicant, it would have discovered the error in the contractor's invoice.

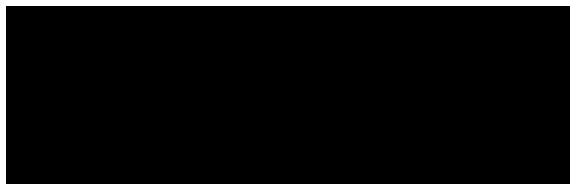
We have not identified any breach of Sections 6.1 or 6.4 of the Code.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

APPEALS

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.



JOHN M MCHUGH

CHAIRMAN

DATE: 16 August 2023

