



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under section 17 (1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/LM/23/2092

Re: Property at Woodilee Village, Lenzie (“the Property”)

Parties: Ewan Miller, 31 Cramond Drive, Lenzie, G66 3UX

RMG Scotland Ltd, Unit 6, 95 Morrison Street, Glasgow, G5 8BE

Tribunal Members:

Karen Kirk (Legal Member) Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) refused the application.

1. Attendance and Representation

This was a Case Management Discussion to consider the application dated 26th June 2023 brought before the First-tier Tribunal for Scotland Housing and Property Chamber by the Applicant in terms of Section 17(1) of the Property Factors (Scotland) Act 2011. (The discussion took place by teleconference.

The Applicant was present personally.

The Respondent was represented by Aaron Kane, for BTO Solicitors LLP 48 St Vincent Street Glasgow G2 5HS.

2. Preliminary Matters

The Tribunal noted that the Respondent had lodged written representations and the Applicant had also responded to same by written representation. The Tribunal acknowledged receipt.

No further preliminary matters were discussed.

3. Case Management Discussion - Summary

For the Applicant

The Applicant set out that he considered the Respondents had breached Section 7.3 of the code by the charging the said homeowners for handling complaints. He explained he was part of the lay reps committee which ran a vote of homeowners in the development. It was decided at the AGM to remove the factor by vote and to replace. The Respondent property factor challenged the mechanism. The Applicant had resided in the property for 13 years. In regards to the removal of the factor, he himself and another resident brought complaints and raised them with the FTT. The complaints were not successful as the Applicant submitted that the FTT determined that it was not in their remit to decide the complaint and the recommendation was to proceed to court.

The Applicant advised that following this FTT decision the Respondent applied its legal fees for the case to the homeowners. The Applicant objected to this being charged back to all residents and considered this specifically was a breach of section 7.3 of the code. He submitted that it seems wrong that if an individual raises a complaint and they decide to take it to the FTT that the property factor can engage a lawyer and the homeowners will need to pay for it.

The Applicant submitted that claim handling meant the full process including the Tribunal if it could not be resolved. This is the final stage of the complaint.

For the Respondent

The Respondent's representative adopted the written submissions lodged and explained that the Respondent denies any breach of Section 7.3 of the code. He said the Respondents sought advice on the validity of the purported termination by the homeowners, and communicating with the Committee who represented the homeowners. Thereafter the Applicant applied to the FTT for a determination that the Respondent had breached its duties under the code.

Following that application being unsuccessful the Respondent applied legal invoices to the home owners which covered advice and thereafter Tribunal representation.

The Respondent's representative stated that the conduct which cannot be charged for except if explicit in the title deeds is the "handling" of complaints. His submission was that there had been no charges applied for handling of complaints.

The Respondent's position as submitted was that clause 2 of the Deed of Conditions applied and that "all expenses and charges incurred for any work done or undertaken or services performed in terms of furtherance of the provisions of the clause" could be obtained. The submission was that in terms of this clause the Property Factor is empowered to manage the development and undertake such actions, perform such services, and incur such costs as considered necessary for the proper performance of its functions. One of the Property Factor's functions is ensuring observance and compliance with the provisions of the title deeds.

The Respondent's representative submitted that the Applicant seemed to accept there would be a measure of legal fees recoverable about termination of property factors appointment. He sought to distinguish between his own application and complaint and the ongoing tribunal matter. The Respondent's representative said that the Applicant sought there was no distinction and the complaint and Tribunal related to the same matter. The submission for the Respondent was that the work was distinguished in the invoices. He referred to the invoices lodged and the fact some related to advice on the ongoing dispute but that from 29th Aug 2022 charges related to representation at the FTT application. The submission was that the home owner's property factor/agent should not be out of pocket and the property factor is the agent.

The Tribunal raised with the Applicant about whether there had been an application for expenses made at the Tribunal and it was confirmed there had not been as the test in Rule 40 he considered was not met. The submission was the property factor was entitled to recharge legal expenses and that is what they did. The Respondent suggested that had the application been successful the Respondent may have not sought to recharge the expenses but accepted that the rationale of expenses following success does not apply to the FTT and Rule 40 applied for Tribunal matters.

4. Findings in Fact

1. The Tribunal was satisfied that a decision could be made at the Case Management Discussion and to do so would be in the interests of the parties, in the interests of justice and having regard to the Overriding objective. There

were no material matters of fact that were in dispute. The Tribunal had before it all necessary evidence and detailed written representations from both parties. The matter concerned whether there was a breach of Section 7.3 of the Code.

2. Section 7.3 of the Code states:

“A property factor must not charge homeowners for handling complaints unless this is explicitly provided for in the property titles.”

3. Parties have been involved in a long running dispute with a number of homeowners within the development at Woodilee Village, Lenzie, following the homeowners’ purportedly terminating the Property Factor’s appointment.
4. Two homeowners raised their own FTT applications in respect to the 2011 Act against the Respondent and the Applicant’s application was determined under ref: FTS/HPC/LM/22/1998.
5. The application by the Applicant under said reference was unsuccessful and the Tribunal held that in their view it was not within its powers to determine whether the EGM had been competently convened or whether the decision to terminate the property factors’ appointment was valid. There was a clear dispute between the Parties as to the legal interpretation of the Deed of Servitudes and Conditions affecting the development and this was rightly a matter for a court to determine, if the Parties could not reach agreement.
6. No application for expenses was made under Rule 40.
7. Legal Invoices after the conclusion of the application before the FTT were applied to the Homeowners.
8. Legal expenses of whatever nature are not work or services related to the “handling of complaints”. The handling of complaints and adhering to the Respondent’s written terms of service in regards the complaints process is a separate matter to the Respondent engaging legal advice and or representation.
9. The Application is refused on the basis that the charges applied that the Applicant alleges constitute a breach of Section 7.3 of the Code are not relevant as they are not claim handling charges.

5. Reasons for Decision

The Tribunal heard detailed oral submissions from both parties. The Tribunal also had the benefit of detailed written representations. There had been an ongoing dispute between parties culminating in a FTT raised by the Applicant against the Respondent. The FTT had considered it was not within their statutory powers to determine whether the EGM had been competently convened and stated it was a matter for Court if agreement could not be reached. No court application has been made. The Tribunal had some sympathy with the Applicant on the basis that the Respondent’s had taken the decision to instruct legal representation before the FTT and then sought to recharge all the homeowners for same without seeking expenses before the Tribunal. This is especially on the basis that the Tribunal can only award expenses in limited circumstances. The matter of legal representation rather than advice did not seem explicitly provided for in the title deeds. However the Tribunal was clear that legal

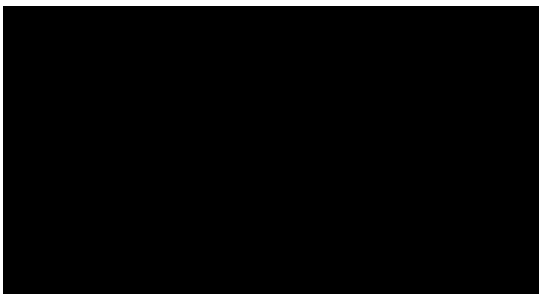
expenses was distinct from claim handling services such as responding to complaints, seeking to resolve same, phone calls and generally adhering to a property factors written terms of services on complaints. For this reason the application was refused.

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.

Since an appeal is only able to be made on a point of law, a party who intends to appeal the tribunal's decision may wish to request a Statement of Reasons for the decision to enable them to identify the point of law on which they wish to appeal. A party may make a request of the First-tier Tribunal for Scotland (Housing and Property Chamber) to provide written reasons for their decision within 14 days of the date of issue of this decision.

Where a Statement of Reasons is provided by the tribunal after such a request, the 30 day period for receipt of an application for permission to appeal begins on the date the Statement of Reasons is sent to them.



Legal Member/Chair

06 November 2023

Date