

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/22/4416

Re: Flat 10, Kings Wark Court, 42, The Shore, Leith, Edinburgh, EH6 6QU (“the Property”)

The Parties:

Ms. Noreen Hall residing at Tifty Cottage, Fyvie, Turriff, Aberdeenshire, AB53 8RT (“the Homeowner”) per her representative, Mr. Paul Begg of the same address, (“the Homeowner’s Representative”)

James Gibb Residential Factors having a place of business at 4, Atholl Place, Edinburgh, EH3 8HT (“the Property Factor”)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor:

- (i) failed to comply with the Section 14 of the Act in respect of compliance with the Property Factor Code of Conduct 2021 at OSP 11, and Section 2.7,
- (ii) has not failed to comply with the Section 14 of the Act in respect of compliance with the Property Factor Code of Conduct 2021 at Section 6.4 and
- (iii) failed to comply with the Property Factor Duties in respect of response times and
- (iv) has not failed to comply with the Property Factor Duties in respect of the other matters.

The Tribunal declined to make a Property Factor Enforcement Order.

Background

1. The Homeowner’s Representative made an application on behalf of the Homeowner to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2021 (“the 2021 Code”) and had failed to comply with the Property Factor’s Duties (“the Application”).

2. The Application complained of breaches of the 2021 Code at Overarching Standards of Practice at OSP 11, Communication and Consultation at Section 2.7 and Carrying out repairs and maintenance at Section 6.4. The Application also complained of a failure to comply with Property Factor's Duties with regard to a failure to provide core services under Section 3.2 of the Property Factor's Written Statement of Services (WSS) and a failure to comply with Section 4.7 of the WSS.
3. The Application comprised :- (i) the Tribunal Chamber's standard Form C2; (ii) copy emails between the Parties (iii) copy photo of a window and wall at the Property; (iv) a copy of the WSS and (v) a copy of the Homeowner's title to the Property.
4. A legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion (CMD) was fixed for 23 March 2023 and adjourned to 3 July 2023 at 10.00 when it took place by telephone conference call. The Homeowner was present and was represented by Mr. Paul Begg. The Property Factor was represented by Mr. Roger Bodden.
5. The Tribunal explained that the purpose of the CMD in terms of Rule 17(3) of the Rules is: *"The purpose of a case management discussion is to enable the First-tier Tribunal to explore how the parties' dispute may be efficiently resolved, (b) identifying what facts are agreed between the parties; (c) raising with parties any issues it requires to be addressed; (d) discussing what witnesses, documents and other evidence will be required; (e) discussing whether or not a hearing is required; and (f) discussing an application to recall a decision."*
6. The Tribunal then discussed the issues of the complaint with the Parties. The Tribunal noted these to be the repair to a common window catch and failure to respond to correspondence within a reasonable timescale or within the timescales set out in the WSS. Mr. Begg confirmed that this was the case and explained that the issue with the window is that it is part of the fire safety system and so the mechanical vent is an essential part of the fire and smoke warning system.
7. Mr. Bodden for the Property Factor accepted that the Property Factor had not adhered to the correspondence timescale and advised that the Property Factor is prepared to offer compensation for this failure. Mr. Bodden explained that the mechanical vent system could not be repaired and that an upgrade would cost tens of thousands of pounds. He understood that the system could be operated manually.
8. Mr Begg stated that the system is not "redundant" as in being "no longer required" but has been non-functional for number of years. He stressed that the Homeowner was not asking for an upgrade but for a repair and that as the system required by building regulations is it is a core system and so is part of the Property Factor's core services.
9. The Tribunal reminded the Parties that the purpose of the CMD was to explore how the Parties' dispute may be resolved and advised the Parties that it seemed to the Tribunal that a resolution might be to agree compensation for the Property Factor's

failings and for the Property Factor to seek the views and instructions of the homeowners in respect of work to the window system.

10. Mr. Bodden confirmed that the Property Factor would offer compensation but maintained that the system would require to be upgraded and this is not a core service but an additional service which would incur costs. Mr Begg reinforced that the work to the window system was only one part of the Application's complaints and that the main complaint was the Property Factor's repeated to reply to the Homeowner's complaints. Mr Begg advised that the Homeowner required the security of an order to be certain that the Property Factor will improve its service. He stressed that there have been multiple breaches and failures on the part of the Property Factor.
11. As a resolution appeared to be unlikely, the Tribunal adjourned the CMD to a Hearing of evidence.

Direction.

12. The Tribunal issued the following Direction: *"The Property Factor is directed to:*
 1. *Issue a letter to all of the owners of the building of which the Property forms part to;*
 - a) *advise them of the disrepair to the communal window mechanical vent system,*
 - b) *provide them with the outcome of the Property Factor's investigations into having the system repaired*
 - c) *seek their views on instructing a technical report on options to have the system made good or replaced and*
 - d) *request a reply within 21 days of the date of the letter ;*
 2. *Provide the Tribunal with a copy of that letter and*
 3. *Report to the Tribunal and the Homeowner on the responses received. Personal or sensitive information can be redacted."*
13. The Property Factor complied with the Direction by writing to the owners and issuing a ballot on further work. The Homeowner objected strongly to the Property Factor's approach and wording as it misled owners into believing that the works was outwith the core services and so attracted additional costs. The Tribunal took the view that the wording of the Property Factor's letter and ballot paper satisfied the Direction.

Hearing

14. The Hearing took place on 6 October 2023 at 10.00 at George House, Edinburgh. The Homeowner was again represented by Mr. Begg. The Property Factor was represented by Mr. Bodden accompanied by Mr. Paterson and Ms. Miller
15. The Tribunal advised the Parties that the parameters of the Tribunal's jurisdiction were limited to the complaints raised in the Application in respect of the 2021 Code and to the Property Factor Duties as set out in the Application.
16. The Tribunal noted that the complaints fell into two categories: (i) the Property Factor's compliance with both the 2021 Code and its WSS in respect of

communication response times and (ii) the categorisation of the window opening mechanism system repair as an additional service and not a core service.

Communication Response Times Complaint.

17. The Application complained of failures in respect of Overarching Standards of Practice 11 which states: *You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.*

Communication and Consultation at Section 2.7 which states: *A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.*

Property Factor Duties: Failing to comply with Section 4.7.1 of the WSS in respect of timescales for dealing with notified repairs.

18. Mr. Begg advised the Tribunal that the Property Factor repeatedly failed to respond to enquiries within the timescales specified in its WSS and within reasonable business response timescales. He referred the Tribunal to examples of this failure lodged with the Application and lodged as further productions. His strong position is that the Property Factor's actions were "gross misconduct" and that it was not enough for the Property Factor to say that they had "not strictly adhered" to the timescales.
19. Mr. Bodden agreed, as he had done at the CMD, that the Property Factor accepted this failing and had credited the Homeowner's account with £100.00 by way of compensation. Mr. Begg advised that the compensation was not accepted by the Homeowner as it did not adequately address the Property Factor's failings and did not compensate for the frustration, extra work and stress caused to the Homeowner.
20. The Tribunal noted the Property Factor's acceptance of its failings and noted that Mr. Bodden offered to increase the compensation if Mr. Begg indicated an amount acceptable to the Homeowner.

Window opening mechanism complaint.

Carrying out repairs and maintenance at Section 6.4 which states: *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.*

Property Factor Duties: Failing to provide a core service under Section 3.2 of the WSS.

21. The Tribunal noted from the information before it that this part of the Application and complaint centred on the malfunctioning mechanical window system serving the common landing window close to the Property. The Tribunal noted that this system is operated by an electrically powered push button, which, when operated manually opens the window automatically. The Tribunal noted further that the purpose of the system is to provide venting for smoke in case of fire and that it does not connect to a fire alarm or to the fire service.
22. The Parties agreed that the window system had been inoperable for a considerable time, Mr. Bodden stating that it had been inoperable before the Property Factor took over as property manager and Mr. Begg stating that, although he could not be sure if it was in working order before the Property Factor took over, it had been inoperable for some time.
23. In evidence, Mr. Begg's strong position on behalf of the Homeowner was that the window system fell to the Property Factor as a routine repair in terms of the WSS and the Property Factor Duties, and so, was a repair which the Property Factor ought to have been pursuing as part of the core service and at no additional management cost. Mr. Bodden was equally strong in his opinion that the repair or renewal of the system was an additional service for which the Property Factor is able to charge an additional project management fee. Mr. Begg's position was that the Property Factor was wrong to assert that the window system required to be replaced at a cost of thousands of pounds. Mr. Bodden was clear that the system was beyond repair and that contractors contacted by the Property Factor would not quote for the work.
24. With regard to the specific wording of Section 6.4, Mr. Bodden stated that this section did not apply as the works were not core services. Mr. Bodden agreed that the Property Factor carried out routine inspections but stated that the window system was not part of the inspections. Mr. Bodden explained that the Property Factor had a generic WSS for all properties and that each development had its own specific schedule. With reference to the WSS at Section 4 and to the schedule specific to the Property, Mr. Bodden pointed out that there was no reference to the window system and that core services were limited to a delegated authority of £20.00 plus VAT per flat. With reference to the contractor quote lodged by both Parties, the cost of the work exceeded £20.00 plus VAT per flat.
25. Mr. Begg's position remained steadfast that the window system was part of the core services and referred to the WSS of Aspect, a company which had factored the Property previously and which had been acquired by the Property Factor. Mr. Begg's position was that the Property Factor was bound by Aspect's WSS and so should have been maintaining the window system at no additional cost, albeit he accepted that the co-owners were responsible for the cost of any maintenance or repair. Mr.

Begg's position was that the condition of the window system was in breach of fire safety building regulations and so it was the Property Factor's duty to ensure that the window system was operable. Mr. Begg stated that the window was jammed closed, could not open and so was a hazard if fire broke out.

26. For the Property Factor, Mr. Boddin and Mr. Paterson disagreed that the window could not be opened and stated that it could be opened manually. They stated that the mechanism was a manual one, in any event. Mr. Begg agreed that the mechanism, if in proper working order, was not automatically activated by smoke or heat and that a release button required to be pressed.
27. The Tribunal noted that reference to Aspect's WSS did not assist as it did not specifically mention the window system. The title deeds did not assist as, again, they did not specifically mention the window system.
28. Mr. Begg accepted that the cost of the repair or renewal of the window system exceeded the core service delegated authority level and so accepted that the owners in the development required to agree to the cost. He did not fully accept that the repair or renewal should be a project for which the Property Factor could charge an additional fee but accepted that the WSS made reference to this being the case.
29. With reference to the ballot which the Property Factor carried out in compliance with the Tribunal's Direction, Mr. Begg stated that the Homeowner took issue with the wording in the covering letter which highlighted that the Property Factor would charge a project management fee. His position was that this would put off some owners from agreeing to the work. He accepted that only two owners had responded positively to the ballot.
30. Mr. Boddin, on behalf of the Property Factor, offered to resolve the matter by writing afresh to the owners using a form of wording agreeable to the Homeowner. He offered Mr. Begg the opportunity to word the ballot and to word or approve the covering letter and advised that the Property Factor would waive its additional fee on this occasion. Mr. Begg indicated that he would be prepared to word the ballot but did not think it his place to word the covering letter and become involved in a fee structure. Mr. Begg on behalf of the Homeowner asked if the fire service could be consulted but accepted added that, from his own knowledge, the fire service was unlikely to engage.
31. With regard to an outcome, Mr. Begg on behalf of the Homeowner asked that the Property Factor be ordered to be candid and transparent with the Homeowner and to comply with the timescales in the WSS. He stated that he would leave the level of compensation to the Tribunal.

Findings in Fact.

32. The Tribunal had regard to the Application in full, to the submissions made at the CMD and the Hearing and to all of 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.

33. The Tribunal found Mr. Bodden to be truthful and straightforward in his evidence and submissions. The Tribunal found Mr. Begg to be less so and, at times, the Tribunal doubted if the Homeowner genuinely sought a resolution to the issue of the window system.

34. 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 22 ownership shares;
- iii) As admitted by the Property Factor, the timescales for responding to the Homeowner were not adhered to;
- iv) The Property Factor provided the Homeowner with responses outwith the contracted timescales;
- v) The Property Factor's WSS sets out the core services, the management cost of which is included in the Property Factor's standard management fee;
- vi) The Property Factor's WSS sets out the delegated authority limit of £20.00 plus VAT per property for the core services included in the standard management fee;
- vii) The Property Factor's WSS sets out that the Property Factor is entitled to an additional fee for the management of work outwith the core services;
- viii) The window system is inoperable and has been for some time;
- ix) The window system does not form part of the Property Factor's routine maintenance and inspections;
- x) The window system work is estimated at £54.55 per property excluding the Property Factor's additional fee;
- xi) The window system work is outwith the core services delegated authority level and so is outwith the core services included in the standard management fee;
- xii) If instructed to carry out work to the window system, the Property Factor is entitled to charge an additional management fee or a project management fee.

Decision of the Tribunal with reasons

Communication Response Times Complaint.

35. From the Tribunal's Findings in Fact as set out above, the Tribunal determined that the Property Factor had failed to comply with the 2021 Code in respect of OSP11 and Section 2.7 and had not complied with the timescales set out in WSS at 4.7.1.

36. Having made a finding of failure to comply, the Tribunal then considered if it should make a Property Factor Enforcement Order. The Tribunal's view is that the communication failures all emanate from the same issue and are not repetitive or excessive. The Tribunal's view is that Property Factor mitigated the failure by an acceptance of the failures and by paying an appropriate level compensation to the

Homeowner. The Tribunal, therefore, sees no reason to make a Property Factor Enforcement Order.

Window opening mechanism complaint.

37. From the Tribunal's Findings in Fact as set out above, The Tribunal agrees with the Property Factor that Section 6.4 does not apply as the window system does not form part of the core services inspections. Therefore, the Tribunal determined that the Property Factor has not failed to comply with the 2021 Code in respect of Section 6.4.

38. The Tribunal's view is that Property Factor's WSS is (i) clear in respect of what works are included as a core service for the purposes of being included in the standard management charge and (ii) is clear in respect of what works are not core services and so incur an additional charge. The Tribunal's view is that work required for the window system falls outwith the core services. The Tribunal considers it irrelevant whether the work is categorised as project work which attracts an additional fee or as routine work which attracts an additional fee: it is simply work which attracts an additional fee, regardless. Therefore, the Tribunal determines that the Property Factor has not failed to comply with the Property Factor Duties in this regard.

39. The decision is unanimous.

Appeal

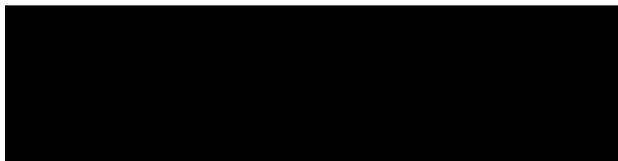
In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Outcome of CMD

The Tribunal adjourned the CMD to a Hearing, the date of which is to be intimated to the Parties. There are no dates to be avoided.

Mr. Bodden advised the Tribunal that the system cannot be repaired and that three contractors had been reluctant to quote for its renewal. He accepted that this information had not been reported to the homeowners.

Signed



Karen Moore, Chairperson

16 October 2023

