



First-tier tribunal for Scotland (Housing and Property Chamber)

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: Reference number: FTS/HPC/LM/23/2469

Property: 1A Rothesay Terrace, Edinburgh, EH3 7RY (“The property”)

Parties:

Mr Kevin Doerr, residing at 1A Rothesay Terrace, Edinburgh, EH3 7RY (“the Applicant”)

and

James Gibb Property Management Ltd, a company incorporated under the companies Acts and having a place of business at 4 Atholl Crescent, Edinburgh, EH3 8HT (“the Respondent”)

Tribunal Members:

Paul Doyle (Legal Member)

Andrew Murray (Ordinary Member)

Unanimous Decision of the Tribunal

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the respondent has failed to comply with the code of conduct as required by Section 14 of the Property Factors (Scotland) Act 2011, determined that the respondent has breached sections 5.6 & 5.7 of the code of conduct for property factors.

Background

1. By application dated 21 July 2023, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the respondent has breached the code of conduct imposed by Section 14 of the 2011 Act.

2 The applicant says that the respondent failed to comply with Sections 5.3, 5.6 & 5.7 of the code of conduct for property factors effective from 16 August 2021.

3. By interlocutor dated 8 August 2023, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4. The respondent submitted written representations on 11 October 2022. The applicant submitted further written representations on 13 October 2023.

5. A Case Management Discussion took place before the Tribunal by telephone conference at 10.00am on 3 November 2023 at which it was established that the dispute to be resolved between the parties is

(a) Did the applicant properly intimate the full extent of his application in terms of s.17 of the 2011 Act prior to submitting his application to the tribunal?

(b) Has the respondent failed to comply with sections 5.3, 5.6 & 5.7 of the code of conduct for property factors effective from 16 August 2021

6. Both parties agreed that they have provided adequate documentary evidence for this application to be determined without further enquiry. Neither party has anything of relevance to add to their written submissions. Mindful of regulations 2, 17, and 18 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, we proceed to determine this application on the documentary evidence placed before us.

Findings in Fact

7. The tribunal finds the following facts to be established:

(a) The applicant is the owner of the flatted dwellinghouse at 1A Rothesay Terrace, Edinburgh. The property is one of five flatted dwellinghouses in a single converted townhouse. The applicant has owned and occupied the property since September 1999.

(b) The respondent has been responsible for managing the common parts of the larger property known as 1 Rothesay Terrace, Edinburgh (of which the applicant's property forms part) throughout the entire period of the applicant's ownership of the property. As part of the services offered by the respondent, they arrange common buildings insurance for each of the flatted dwellinghouses within the larger property at 1 Rothesay Terrace, Edinburgh

(c) On 21 July 2023 the applicant submitted an application to the First-tier Tribunal for Scotland (Housing and Property Chamber) complaining that the respondent has

failed to comply with the 2021 code of conduct. His complaint relates entirely to the administration of common buildings insurance.

(d) On 6 September 2022, part of the ceiling within the applicant's property collapsed. The applicant contacted the property factor's development manager by email. On 7 September 2022, the respondent instructed contractors to inspect the collapsed ceiling.

(e) On 7 September 2022, the respondent's contractor inspected the damage in the applicant's property and concluded that the damage was caused by wear and tear and not by an insurable risk.

(f) Between 20 September 10 November 2022 the respondent's contractor discussed their findings with the respondent, but neither of the respondent nor their contractor told the applicant that they believed the damage was not caused by an insurable risk.

(g) On 9 November 2022 to the applicant emailed the respondent asking about progress with what he thought was a buildings insurance claim. Between 7 September and 9 November 2022 there had been no direct contact between the applicant and the respondent.

(h) On 10 November 2022, the respondent submitted a claim to the buildings insurers. On 15 November 2022, the buildings insurers declined to indemnify the applicant for the collapsed ceiling damage. There was no contact between the buildings insurers and the respondent's contractor between 7 September 2022 and 10 November 2022.

(i) Between 7 September 2022 and 10 November 2022, the respondent was in discussion with their contractors about the nature and extent of the damage to the ceiling of the property and the cause of that damage. The respondent did not share those discussions with the homeowner until 10 November 2022.

(j) It is possible that a contributing factor to the collapse of the ceiling was the refitting a bathroom in the flat immediately above the applicant's property.

(k) The respondent did not tell the applicant to make his own claim to the buildings insurers. The respondent did not provide the homeowner with details of the buildings insurers prior to 10 November 2022.

(m) Each year the respondent provides the applicant (and his neighbouring proprietors) with details of the common buildings insurance. They provide two documents (i) a summary of cover, and (ii) a certificate of insurance. The insurers provide a policy document which is more than 100 pages long. The insurance policy document includes a list of items and events which are excluded from cover. The documents provided by the respondent do not include that list.

(n) On 14 February 2023, the applicant intimated a complaint that the respondent has breached the code of conduct for property factors in writing to the respondent. The respondent responded on 13 April 23. In the respondent's written statement of services they undertake to respond within 25 working days.

(o) On 15 April 2023 the applicant submitted a second stage complaint that the respondent has breached the code of conduct. He did not receive a response from the respondent until 7 June 2023.

(p) In his letter to the respondent dated 14 February 2023, the applicant clearly specified his complaint that the respondent has breached sections 5.3, 5.6, and 5.7 of the code of conduct.,

(q) On 13 April 2023, the respondent specifically addressed complaints under paragraphs 5.3, 5.6, and 5.7 of the code of conduct. In their response, the respondent conceded that there were delays in making a claim to the insurers.

(r) In the respondent's second stage response dated 7 June 2023, the respondent addresses complaints under paragraphs 5.3, 5.6, and 5.7 of the code of conduct.

(s) In an email dated 12 July 2023, the applicant notified the respondent of his intention to apply to the First-tier Tribunal. In that email, the applicant referred to paragraph 5.6 of the code of conduct alone, but made it clear that he was applying to the First-tier Tribunal because he was not satisfied that the specific complaints made to the respondent in earlier correspondence had been dealt with satisfactorily.

(t) In an email dated 28 June 2023 to the respondent, the applicant said

I am not satisfied with the outcome, as I think you're failing to acknowledge clear breaches of the code.... I am therefore likely to take the matter to the First-tier Tribunal.

THE CODE OF CONDUCT FOR PROPERTY FACTORS

8. The respondent takes a preliminary plea to our jurisdiction of this case. The applicant says that the respondent has breached three parts of section 5 of the code of conduct, but the respondent argues that we can only consider section 5.6 of the code of conduct, because, in his email dated 12 July 2023 which intimated intention to raise an application to the First-tier Tribunal, the respondent only specifically mentions section 5.6 of the code of conduct.

9. S.17 of the Property Factor (Scotland) Act 2011 says

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.

10. The respondent's submission places too narrow an interpretation on section 17 of the 2011 Act. The applicant's emails of 12 July 2023 cannot be read in isolation. In his email of 12 July 2023, the applicant complains that the respondent has not taken his complaint seriously. The emails sent in pursuit of both stage 1 stage 2 complaints make it clear that the applicant says the respondent has breached three separate parts of section 5 of the code of conduct. When the email of 12 July 2023 is read as part of the overall email exchange relating to the applicant's complaint it can be seen that on 28 June 2023 the applicant was asking for a final decision on his

stage 2 complaint so that he could take the complaint, in its entirety, to the First-Tier Tribunal.

11. Complaints that there has been a breach of sections 5.3, 5.6 and 5.7 of the code of conduct are competently before this tribunal.

The Code of Conduct

14. Section 5.3 of the code of conduct says

5.3 A property factor must provide an annual insurance statement to each homeowner (or within 3 months following a change in insurance provider) with clear information demonstrating:

- the basis upon which their share of the insurance premium is calculated;
- the sum insured;
- the premium paid;
- the main elements of insurance cover provided by the policy and any excesses which apply;
- the name of the company providing insurance cover; and
- any other terms of the policy.

This information may be supplied in the form of a summary of cover, but full details must be made available if requested by a homeowner.

15. In the respondent's written statement of services, the respondent says that a full detailed policy document is available on their website and offers emails or hard copies on request.

16. The respondent provides a summary of cover. That summary of cover includes a list of "*significant exclusions to property damage section*".

17. The applicant accepts that the policy document is 100 pages long and not easy reading. The documentary evidence placed before us tells us that the respondent produces a summary of cover containing all of the details asked for by section 5.3 of the code of conduct. There is no breach of section 5.3 of the code of conduct.

18. Section 5.6 of the code of conduct says

5.6. If applicable, a property factor must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. This information must be made available if requested by a homeowner. If homeowners are responsible for submitting claims on their own behalf (for example, for work that is not on common parts), a property factor must take reasonable steps to supply to

homeowners all information that they reasonably require in order for homeowners to be able to do so.

19. The respondent's responses to the stage 1 and stage 2 complaints and the respondent's written submission to this tribunal can easily be read as a concession that mistakes were made in submitting & pursuing an insurance claim by the respondent. The respondent says that, with the benefit of hindsight, they would have left the insurance claim in the hands of the applicant. One of the undisputed facts in this case is that there was a significant delay in submitting the insurance claim. There is merit in the applicant's submission that the respondent did not suggest alternative causes of the ceiling collapse to the insurers.
20. The delay between 7 September 2022 and 10 November 2022 means that the insurance claim was not dealt with promptly and correctly. The respondent did not pass on information from their own contractor to the applicant. There was confusion over who should take responsibility for submitting the insurance claim. All of those factors create a breach of section 5.6 of the code of conduct.
21. Section 5.7 of the code of conduct says

5.7 A property factor must take reasonable steps to keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves if required.
22. The weight of reliable evidence tells us that the applicant thought the buildings insurance claim had been submitted soon after 7 September 2022. On 9 November 2022 he asked the respondent for a progress report, and, perhaps as a result of that request, on 10 November 2022 the claim was finally submitted to the buildings insurance company. Over 9 weeks after the applicant's ceiling collapsed, a buildings insurance claim was submitted by the respondent.
23. The delay of 9 weeks, during which the applicant believed the buildings insurance claim had been submitted and was being considered, leads us to the conclusion that the respondent did not take reasonable steps to keep the applicant informed of the progress of his claim. That amounts to a breach of section 5.7 of the code of conduct.
24. On the facts as we find them to be the respondent has breached sections 5.6 and 5.7 of the code of conduct

Decision

25. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

“Within 28 days of the date of service on the property factor of this property factor enforcement order the property factor must confirm in writing that they will

- (i) approach complaints in an open minded way, and*
- (ii) undertake an audit of their claims procedure and implement any recommendations and improvements required as a result of that audit.*

26. Section 19 of the 2011 Act contains the following:

(2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to them.

(3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), 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, the committee must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

27. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Right of Appeal

28. 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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed

A solid black rectangular box redacting the signature of the legal member.

3 November 2023

Legal Member