



Decision with Statement of 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 number:

FTS/HPC/PF/23/4029

FTS/HPC/PF/23/4030

FTS/HPC/PF/23/4031

Re: 1 - 9 Jackson Place, Bearsden, Glasgow, G61 1RY (“the Property”)

The Parties:

Mr. James Smith and Mrs Brenda Smith, Flat 1/1, 9 Jackson Place, Bearsden, Glasgow, G61 1RY

Ms Jane Hardie, Flat 2/1, 3 Jackson Place, Canniesburn, Glasgow, G61 1RY

Mrs Marilyn Lyness, Flat 1/3, 3 Jackson Place, Canniesburn, Bearsden, Glasgow, G61 1RY

(“the Homeowners”)

and

James Gibb, 65 Greendyke Street, Glasgow, G1 5PX

(“the Property Factor”)

Tribunal Members

Nicola Irvine (Chairperson) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Practice in relation to paragraphs 3(1), 6(10) of the 2021 Code of Practice and Overarching Standard of Practice 3. The Tribunal made a Proposed Property Factor Enforcement Order, which should be read with this decision.

Background

1. The Tribunal received written representations from the Property Factor on 29 January 2024 and 4 March 2024.
2. A case management discussion ('CMD') took place on 18 March 2024. The Tribunal noted that the sections of the code at issue were 2.5, 3.1, 3.3, 6.10 and 7.1 and overarching standards 1, 2, 3, 6 and 7. The Tribunal made the foregoing directions to the Property Factor:
 - To lodge a copy of the deed of conditions relating to the Property.
 - To provide an explanation as to whether the communal energy supply contract for the Property is a residential or commercial contract.
 - To provide details of the unit rate and standing charge payable to the energy supplier for the common electricity supply for the Property.
 - To provide details of all commission paid to the broker, Indigo Swan, relating to the common electricity supply at the Property.
 - To provide an explanation as to why the energy supplier has issued invoices based on estimates, rather than the actual readings of electricity used.
 - Explain why Indigo Swan were instructed as broker in relation to the energy supply to the Property.
 - To provide details of any price comparison information produced by the broker, Indigo Swan, which was used to make a decision to appoint EDF as the energy provider to the property.
 - The Property Factor is required to comply with this Direction no later than close of business 29 April 2024.
3. The Homeowners lodged further written representations on 27 March 2024.
4. On 16 April 2024, the Tribunal received an email from the Property Factor advising that they would not be attending the Hearing.
5. The Tribunal had the following documents before it:
 - Application by the First Homeowner dated 12 November 2023
 - Application by the Second Homeowner dated 13 November 2023
 - Application by the Third Homeowner dated 13 November 2023
 - Written statement of services
 - Homeowners' complaint letters and correspondence between Homeowners and the Property Factor
 - Property Factor's submission of 29 January 2024
 - Homeowners' submission of 27 March 2024 and 24 June 2024.
6. Both parties had received the documents each had lodged. From the terms of the documents lodged by both parties and the matters that were noted at the CMD, it was clear that there was no factual dispute between the parties. Prior

to the Hearing, the Property Factor had already conceded that it had failed to disclose financial arrangements between Indigo Swan (energy broker) and EDF (the energy supplier). The Tribunal anticipated that a Property Factor Enforcement Order would be the likely outcome. The Property Factor had already made an offer to the Homeowners of £50 for misinformation and £50 for a delay in communication. The Homeowners did not wish to accept the offer or to enter into negotiations, as they did not consider the matter to have been fully resolved.

The Hearing

7. This was a hearing in connection with 3 related applications in terms of rule 43 of the First tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulation 2017, (“the rules”) and section 17 of the Property Factors (Scotland) Act 2011, (“the Act”). The Homeowners attended the Hearing which took place in person at the Glasgow Tribunal Centre. The Property Factor was not present or represented and the Hearing proceeded in their absence.

The Homeowners’ position

8. All 3 Homeowners live in a block of flats known as “Oakview Block” at Jackson Place, Bearsden. All 3 Homeowners made complaints to the Property Factor on the same basis, so there was a commonality to all 3 complaints. The complaints related to the electricity supply to the common parts of Oakview Block and the contractual arrangements made by the Property Factor regarding that supply. As set out in the CMD note a broker was instructed by the Property Factor to arrange utility supply to the common parts of Oakview Block. This contractual arrangement formed the basis of the Homeowners’ complaints. The Homeowners asked several times for details of the commission paid to the broker, but the Property Factor refused to provide that information until after the present applications were submitted. The Homeowners made formal complaints to the Property Factor in October 2023, having exhausted the Property Factor’s complaints procedure. Each Homeowner submitted an application to the Tribunal in November 2023. The Property Factor disclosed to the Homeowners on 4 March 2024 that the commission paid by the utility supplier to the broker is £100 per meter per year. Given that there are 6 meters, the total commission the broker receives is £600 per year. The Property Factor told the Homeowners that they would only disclose details of the broker’s commission to homeowners who asked for that information and they would not provide that information voluntarily to all homeowners. The Homeowners do not have transparency about the utility charges and the Property Factor has failed

to ensure accurate invoices have been charged to the Homeowners in respect of the utility supply to the common parts. The Homeowners updated the Tribunal to state that although there is still a lack of transparency about the utility charges, there had been recent movement. The Property Factor advised Homeowners by letter of 28 May 2024 that an analysis of electricity invoices has been carried out and the Property Factor has rejected an invoice based on an estimated reading which was higher than the actual reading. In the same letter, Homeowners were advised that they will be charge £221.16 each for electricity usage in the Water Pump Room for a period of one year. This is because electricity invoices were previously based on estimated readings. The Property Factor advised that the high usage in the Water Pump Room was largely attributable to the pump, although there was also an electrical heater within the Water Pump Room which also contributed to the high usage. The Homeowners explained that they asked for access to the Water Pump Room and were initially told that homeowners were not to be given access. They were told that a contractor called Ritmac had access to the Water Pump Room and had accessed the Water Pump room on 7 occasions between 23 December 2022 and 30 March 2024. After several requests, the First Homeowner was afforded access. When that Homeowner gained access, he noted that the room was very hot because an electrical heater was on constantly. Prior to the First Homeowner gaining access, the Homeowners were not advised that there was a heater on constantly in the Water Pump Room. The electrical heater has been switched off. The Homeowners' principal objective was to have transparency regarding the utility charges to the common areas and for the Property Factor to do their job in managing the utility contract. The Homeowners had been inconvenienced as a result of the failure of the Property Factor to disclose information about the commission paid to the broker and the failure to ensure accurate billing.

The Property Factor's position

9. The main issue raised by all 3 Homeowners relates to the electricity supply and the appointment of the utility broker. In its written representations, the Property Factor explained why it considered the Homeowners were not entitled to receive details of the commission earned by the utility broker and stated that there had been no breach of the Code. The Property Factor advised that they would be in attendance at the CMD on 18 March 2024. In the subsequent written representations, the Property Factor conceded that there had been a failure to disclose details of commission paid to the utility broker and that information was provided to the Homeowners on 4 March 2024. The Property Factor offered payment of £100 to each Homeowner and that offer was rejected. The Property Factor advised the Tribunal that it would not be

represented at the Hearing and wished to rely upon the written representations lodged.

Findings in fact

10. The Homeowners each own their respective properties within Oakview Block, Jackson Place, Bearsden.
11. The Property Factor is registered as a Property Factor under registration number PF000103.
12. The Property Factor was appointed in August 2019.
13. The Property Factor provides factoring services to the development of which the Property forms part.
14. The Property Factor engaged a utility broker to manage the energy supply to the common parts.
15. Despite the Homeowners' numerous emails from September 2022, the Property Factor refused to disclose detailed of the commission paid to the utility broker.
16. The Homeowners' written complaints were not dealt with timeously and in line with the Property Factor's complaints procedure.

Parts of the code at issue

Overarching Standards of Practice (OSP)

17. OSP1: There was no evidence to suggest that the Property Factor has not complied with relevant legislation. The Tribunal was not satisfied that OSP1 had been breached.
18. OSP 2: Whilst there was no issue about the honesty of the Property Factor, the Tribunal was satisfied that the Property Factor had not been transparent in its dealings with the Homeowners in relation to the utility broker. There was therefore a breach of OSP2.
19. OSP 3: Whilst the Homeowners took issue with the invoices of the utility supplier, there was no evidence that the Property Factor had failed to provide information in a clear and easily accessible way. The Tribunal was not satisfied that OPS3 had been breached.
20. OSP 6: There was no evidence to suggest that the Property Factor had not used reasonable care and skill. The Tribunal was not satisfied that OSP6 had been breached.
21. OSP 7: There was no evidence of discrimination on the part of the Property Factor.

Section 1 – Written Statement of Services (WSS)

22. The Homeowners contended that the Property Factor had not adhered to their WSS, in particular paragraph 2.3. Paragraph 2.3 states “Our authority to act includes, but may not be limited to, the management of core services such as: routine maintenance contracts; on-going repair works; emergency repairs; utilities and utility bills (where applicable); block insurance (where applicable)” The Homeowners were of the view that the Property Factor had failed to comply with its own WSS because it outsourced utilities to a broker. The Property Factor did not address this particular point in its written representations. The Tribunal disagreed with the Homeowners. Although the Property Factor has the authority to manage utilities, that does not mean that the Property Factor must deal directly with utility suppliers. The Property Factor was entitled to instruct a broker to arrange the utilities, albeit the Property Factor still has responsibility for management of utilities.

Section 2 - Communication and Consultation

23. The Homeowners contended that the Property Factor had breached paragraph 2.5 of the Code. There was however no evidence to support this and the Tribunal found that there was no breach of this paragraph of the Code.

Section 3 – Financial Obligations

24. The Homeowners position was that the electricity supplier was engaged in September 2022 and Homeowners did not receive invoices from the supplier until November 2023 and the invoices were based on estimated reading, despite smart meters having been installed. The Homeowners were unable to see what they were being charged for and how it had been calculated. The Tribunal considered that there was no transparency or clarity for Homeowners regarding the utility costs they were asked to pay. There was a clear breach of paragraph 3(1) of the Code.

Section 6 - Carrying out Repairs and Maintenance

25. It was conceded by the Property Factor that they had failed to disclose details of the commission paid to the utility supplier. This was a clear breach of paragraph 6(10) of the Code.

Section 7 - Complaints Resolution

26. The Property Factor did not address any delay on its part in its handling of the Homeowners’ complaints. The Tribunal noted that in relation to the First Homeowner, the Property Factor responded to the initial complaint after 30 days. The Property Factor took 53 days to respond to the second stage complaint. In relation to the Second Homeowner, it took the Property Factor 14 working days to acknowledge the initial response and 37 days to issue a substantive response. In relation to the Third Homeowner, the Property Factor took 13 working days to acknowledge the initial complaint. A further written acknowledgement was issued and the Homeowner 24 working days after the

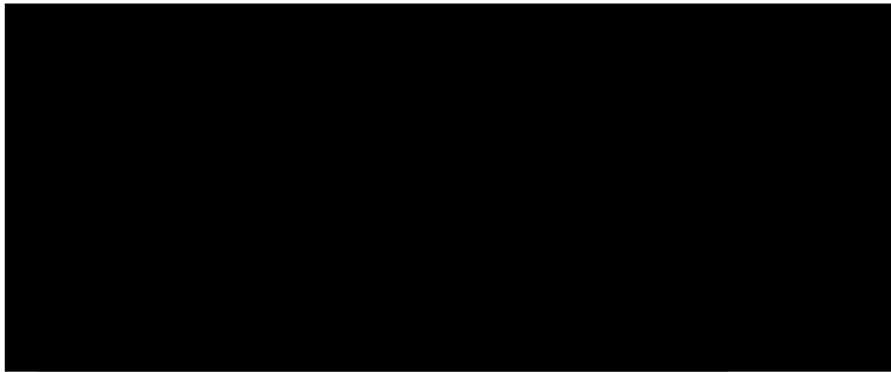
Third Homeowner's complaint was submitted. The Homeowner was advised that a response would be issued by 7 June 2023, which was 50 days after the complaint had been lodged. A substantive response was issued to the Third Homeowner on 19 May 2023. This represents a departure from the Property Factor's complaints procedure as set out in the WSS. This was a clear breach of paragraph 7(1) of the Code.

Reasons

27. The application was in relation to the current version of the code which came into force in August 2021. All of the breaches identified occurred after August 2021. The Tribunal was satisfied that there had been clear breaches of the code. The Homeowners had set out matters clearly in the applications and accompanying documents and there was no factual dispute between the parties. The Property Factor conceded that a breach had occurred in relation to the failure to disclose details of commission paid to the utility broker. The Property Factor did not address the complaint about lack of transparency regarding the invoices from the utility supplier, or the delay in handling the Homeowners' complaints.
28. Turning to the penalty, the Tribunal decided it was fair for the Property Factor to pay each Homeowner the sum of £300 to compensate them for the inconvenience and time spent by them.
29. Section 19 of the Act states: -
 - (2) In any case where the First-tier Tribunal proposes to make a Property Factor enforcement order, it 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 it.
 - (3) If the First-tier Tribunal is 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 First-tier Tribunal must make a Property Factor enforcement order.
30. The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed

to make a property factor enforcement order without seeking further representations from the parties. Failure to comply with a PFEO may have serious consequences and may constitute an offence.

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.



Nicola Irvine

Chairperson of the Tribunal

Dated: 21 August 2024