



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”) and Rule 24 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Reference number:

FTS/HPC/PF/23/2342 ("the Application")

Re: 2F1, Chilton, Gracefield Court, Musselburgh, EH21 6LL (“the Property”)

The Parties:

Mr. Garry Calder and Mrs. Jane Calder residing at Pyat Shaws Cottage, Longyester, Near Gifford, EH41 4PL (“the Homeowners”)

Charles White Limited, having a place of business at Citypoint, 65 Haymarket Terrace Edinburgh EH12 5HD (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) and David Godfrey (Surveyor and Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Application did not comply with Section 17 of the Act and so dismissed the Application.

Background

1. The Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for five determinations that the Property Factor had failed to comply with the 2021 Code of Conduct for Property Factors (“the “2021 Code”) and in respect of some a failure to comply with property factor duties. The Applications were not conjoined and so were not dealt with together. However, they were dealt with by the same tribunal and heard on the same day both in respect of case management discussions and hearings.

2. The Application comprises the following documents received on 18 July 2023: -
 - (i) First-tier Tribunal standard application form, Form "C2", dated 16 July 2023
 - (ii) copy statutory intimation letter to the Property Factor in respect of the 2021 Code dated 11 May 2023, and
 - (iii) a copy of the Property Factor's Written Statement of Services. This Application complains of the following breaches of the 2021 Code:- OSP at OSP 2, 3, 4, 6, 8,11 and 12, Section 2 Communications and Consultation at Sections 2.1 and 2.7, Financial Obligations at Section 3.1 and Section 6 Carrying out repairs and maintenance at Sections 6.4, 6.6, 6.7, 6.9 and 6.11. The Application complains that the Property Factor failed to provide meaningful answers to questions raised by the Homeowner in respect of a fire safety risk assessment.

3. A legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion (CMD) was fixed 4 September 2023 at 10.00 by telephone conference call. The CMD dealt with four other applications concerning the same Parties and the same Property.

4. Prior to the CMD, the Property Factor lodged written submissions and stated that they had not breached the 2021 Code.

First CMD

5. The first CMD took place on 4 September 2023 at 10.00 by telephone conference call. Mr. and Mrs. Calder were present on the call. The Property Factor was represented by Ms. R. Rae.

6. The Tribunal explained to the Parties that the purpose of the CMD was to take a broad overview of the Application and that the purpose of the CMD was not to hear evidence or to make a decision on the Application and the other applications. The Tribunal advised the Parties that the Application process was a legal process and, although less formal than court proceedings, the terms of the Act and the Tribunal Rules must be followed and that the Homeowner would need to show in what way the Property Factor had failed to comply with the each of breaches of the 2021 Code and the property factor duties and why the Homeowner considered this to be the case. The Tribunal explained that, although information had been provided in the Application and the other applications, it was not the role of the Tribunal as adjudicators, to co-relate this information to the failures complained of and that the Homeowner would need to bring this out in evidence at the Hearing.

7. The Tribunal advised that it would proceed to a Hearing of evidence and stated that it would issue a Direction to the Parties in respect of the evidence required.

Direction 1

8. The Tribunal issued the following Direction:

"1. The Homeowners are directed to :

- i) With regard to each of the Applications, to specify what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon by the Homeowners with reference to the breaches of the specific sections of the 2021 Property Factor Code narrated in each Application and to specify why they consider these acts or omissions to be breaches.*
- ii) With regard to those Applications which allege a failure to comply with property factor duties, to specify (a) which property factor duties have not been complied with, (b) what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon by the Homeowners with reference to these failures and (c) why they consider these acts or omissions to be failures to comply with the property factor duties.*

This Direction should be complied with no later than 13 October 2023 and should be provided by email or hard copy to the Tribunal and the Property Factor.

- 1. The Property Factor is directed to submit any response to the Homeowners' compliance with the above Direction no later than 3 November 2023 by email or hard copy to the Tribunal and the Property Factor.*
- 2. With regard to documentary evidence on which the Parties intend to rely at a Hearing of evidence, both Parties are directed to have regard to Practice Direction No.3 and the "Guidance to Tribunal Administration and Parties Documentary Evidence", copies of which have been issued to the Parties, and to submit productions in a hard copy format, paginated (page numbers) and with an indexed inventory (List of contents).*
- 3. With regard to documentary evidence already submitted, if this is to be relied on at a Hearing of evidence, both Parties are directed to re-submit this in accordance with Practice Direction No.3 and the "Guidance to Tribunal Administration and Parties Documentary Evidence".*
- 4. The Parties are directed that the documentary evidence should be lodged in one bundle for each Party for all Applications.*
- 5. The Parties are directed that the bundles of documentary evidence should be lodged by email or hard copy with the Tribunal and the other Party no later than 14 days before the date of the Hearing to be fixed.*
- 6. The Parties are advised that a copy of the title sheet for the Property should be*

lodged by one of them.”

9. The Homeowner complied with the Direction to an extent. The Property Factor did not submit any further documentation.

First Hearing

10. A Hearing by Webex was fixed for 11 December 2023 at 10.00. The Hearing dealt with four other applications concerning the same Parties and the same Property. The Hearing could not take place due to technical difficulties and, as the Tribunal took the view that Parties did not seem to be prepared, the Tribunal adjourned the proceedings to a further CMD and issued a further Direction. For the sake of completeness, no evidence was heard.

Direction 2

11. The Tribunal re-issued its Direction with amendments to the dates for compliance. Neither Party responded to the re-issued Direction.

Further CMD

12. The CMD took place on 14 March 2024 at 10.00 by Webex, with the Chair taking part by voice call, due to technical difficulties. Again, the CMD dealt with four other applications concerning the same Parties and the same Property.
13. The Homeowner was present and represented by Mr. Calder. The Property Factor was represented by Ms. S. Wilson. It became apparent that the Tribunal may not have had receipt of all the documents. The Tribunal, therefore, adjourned the CMD for the Tribunal administration to ensure that all Parties and the Tribunal members had all of the paperwork.
14. The Tribunal considered Mr. Calder's position in respect of the documents already lodged and took the view that a further CMD would serve no useful purpose and so adjourned the CMD to a Hearing to be fixed and intimated to the Parties.
15. Prior to the Hearing, the Homeowner, by email dated 2 August 2024, submitted a written statement, cross-referenced to documents which were also submitted, in response to Direction 1 and the CMD note following the CMD of 14 March 2024. The Property Factor did not submit anything further.

Second Hearing

16. The Hearing took place on 15 August 2024 at 10.00 by Webinar. Mrs. Calder, the Homeowner was present and represented by Mr. Calder. The Property Factor was represented by Ms. R. Rae. As before, the Hearing dealt with the four other applications concerning the same Parties and the same Property.

Issues for the Tribunal

17. The issues for the Tribunal were a) did the Property Factor breach the 2021 Code breaches as set out in the Application and b) is the Application competent in respect of the procedure set out in Act?
18. The Tribunal, firstly, had regard to Section 17 of the Act which states “(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.”
19. Section 17 (2) of the Act states “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.” The Application does not set out the reasons for considering that the Property Factor has failed to comply with the section 14 duty. The Application refers to a series of questions and answers which discuss the Fire (Scotland) act 2005 and related regulations. The Application does not explain the reasoning that the content of the discussion fails to comply with section 14 duty.
20. Therefore, the Application does not comply with Section 17(2) of the Act.

21. Section 17 (3) of the Act states *“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.* The Tribunal noted that the Homeowner's formal notification letter under Section 17 is dated 11 May 2023 and that the Application is dated 16 July 2023 and lodged on that day. The notification letter lists a number of questions to the Property Factor together with answers purported to have been given by the Property Factor. None of the questions refer to the 2021 Code or to what the breach by the Property Factor might be. The letter ends with a list of a number of Code sections which the Homeowner believes the Property factor to have breached. The letter does not say why the Homeowner believes the Property factor to have breached these sections of the Code and so does not satisfy the terms of Section 17 (3) of the Act.
22. The Tribunal had regard to the background papers which form part of the Application and noted that no correspondence is lodged with the Application which specifically mentions failures to comply with the 2021 Code and the reasons why. The Tribunal had regard to the correspondence lodged on 2 August 2024 by the Homeowner and noted that there is no correspondence which specifically mentions failures to comply with the 2021 Code in respect of the Application.
23. The Tribunal's Directions and CMD Notes set out clearly what is required to satisfy Section 17 of the Act and so the Homeowner is aware of this requirement.
24. Therefore, with regard to the Application, the Tribunal is not satisfied that the Homeowner has given sufficient notice in respect of Section 17 of the Act and so the Tribunal cannot consider the Application.

Decision of the Tribunal and Reasons for the Decision.

25. As the Application does not comply with the Act, the Tribunal dismisses it without Order.
26. This decision is unanimous.

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.

Signed

Karen Moore, Chairperson

16 September 2024