

Housing and Property Chamber First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”).

Reference number: FTS/HPC/PF/21/3012

Re: Property at Flat 1/3, Greenhead Court, 89, James Street, Glasgow, G40 1BZ (“the Property”)

The Parties:

Mr. Andrew Howie residing at the Property (“the Homeowner”)

James Gibb residential factors, 65, Greendyke Street, Glasgow, G1 5PX (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) and Elaine Munroe (Ordinary Member)

Decision

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

- (i) has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Code of Conduct for Property Factors 2011 (“the 2011 Code”) at Section 6 at 6.9 and Section 7 at 7.1 and
- (ii) has not failed to comply with the Property Factor’s Duties.

Background

1. By application received between 6 December 2021 and 12 January 2022 (“the Application”) the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the 2011 Code and had failed to comply with the Property Factor Duties.

2. The Application comprised the following documents: -(i) application form in the First-tier Tribunal standard application form indicating that the parts of the 2011 Code complained of are Insurance at Section 5.3; Carrying out repairs and maintenance at Section 6.9 and Complaints Resolution at Section 7.1 and alleging a failure to comply with the property factor duties and (ii) copy correspondence between the Homeowner and Property Factor.
3. On 1 February 2022, 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 25 April 2022 at 10.00 by telephone conference call.
4. Prior to the CMD, the Property Factor submitted written representations together with copies of their written statements of services (WSS), its complaints procedure, copy correspondence between the Parties and photographs of the area and building of which the Property forms part. The Homeowner submitted further written submissions with photographs.
5. The CMD took place on 26 April 2022 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Ms. Stead and Mr. Wallace. At the CMD, the Homeowner confirmed that he did not wish to pursue his complaint in respect of Insurance at Section 5.3. The Tribunal advised that a copy of the Title Sheet for the Property would be helpful in identifying the common parts within the development boundary and advised that the Tribunal Chamber would be instructed to provide this to the Tribunal and the Parties.
6. The outcome of the CMD was that a Hearing was fixed and intimated to the Parties. Prior to the Hearing a copy of Title Sheet GLA176565 was issued to the Tribunal and the Parties, and, the Parties made further written submissions and lodged productions.

Hearing

7. The Hearing took place on 24 June 2022 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Ms. Stead and Mr. Wallace.

Section 6 of the 2011 Code at 6.9.

Section 6 at 6.9 states: *“You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.”*

8. The Homeowner explained that this referred to issues arising from garden maintenance work carried out by Mr. D. Hodge and to repairs to the basement and hallway windows carried out by Glasscraft Limited (“Glasscraft”).

9. With regard to the windows, the Homeowner advised that these had been screwed shut, that there was mould at the windows. Although Glasscraft had carried out and invoiced for work, the work had not been successful and the handles remained defective. The Homeowner stated that the windows did not close properly and a complaint raised by him with the Property Factor's previous property manager came to a dead end. The Homeowner maintained that Glasscraft's invoice numbered 2022 and lodged by the Property Factor was not accurate as no new parts had been fitted, the handles were not replaced or repositioned and the invoice is for 18 windows whereas there are only 13 windows in the basement. He maintained that the windows still blow open when it is windy.
10. In response on behalf of the Property Factor, Mr. Wallace and Ms. Stead stated that Glasscraft had carried out the work asked of them and had repositioned the window handles as noted on their invoice and on their report, being an email of 24 May 2022, lodged by the Property Factor. The Property Factor had asked Glasscraft to attend to the repair reported but it would appear that further work might be needed. The number of windows was clarified as being both basement and hallway windows. As this arose at the time when the Property Factor's contract was terminated, the Property Factor had not taken this further.
11. The Homeowner maintained that he did not accept the Property Factor's position on the window repairs.
12. With regard to garden maintenance, the Homeowner stated that he appreciated that that the cost of the garden maintenance was minimal but that he did not see that it was needed as the work was limited to litter picking. The Homeowner referred to an email from the Property Factor's former employees which stated that the garden maintenance contract was for blowing leaves and rubbish from the car park area and lanes, treating moss on each visit and applying weed killer each season, there being no grass as the common areas are concreted. The Homeowner disputed that the maintenance contractor had attended during lockdown and stated that there was no log to prove or evidence his visits. With the reference to the Title Plan and the photographs lodge by the Parties, the Homeowner agreed that the garden maintenance areas were outwith the title extent of the development. He pointed out that the title deeds obliged the development owners to maintain these areas, that access to the underground parking spaces was by way of the lanes and that some parking spaces were on ground to the rear of the building and also outwith the title extent of the development.
13. In response on behalf of the Property Factor, Mr. Wallace stated that as gardener works do not need access to the buildings, it was not usual to have a sign-in sheet or log. He advised that Mr. Hodge had been contacted and had confirmed attendance and confirmed that he had not maintained the lanes, he had only maintained the rear car park areas and that his charge did not include the lanes. Mr. Wallace referred to the Property Factor's production numbered 11, being email from Mr. Hodge dated September 2020. Mr. Wallace said it was his understanding that the lanes were maintained by their adjacent owners.
14. The Homeowner maintained that lanes ought to have been weeded by the garden contractor and referred to the photographs lodged by him showing weeds at the

outside walls of the building. He confirmed that that title extent of the development is the footprint of the building of which the Property forms part.

Section 7 of the 2011 Code at 7.1

Section 7 at 7.1 states: *“You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.”*

15. The Homeowner stated that this part of the Application relates to the way in which the Property Factor dealt with his complaint about its handling of disputed accounts following the change of property factor at 89, James Street at the end of 2020. He explained that he had been instrumental in having his co-owners agree to the change and that the Property Factor had advised his neighbours that he had factoring debt. The Homeowner stated that the Property Factor was aware that he disputed the debt and so should not have advised his co-owners of this. He accepted that he had had considerable factoring debt but had paid all of this except for a sum of £105.00 which he considered was reasonable as his complaints in respect of the windows and the gardening had not been resolved. The Homeowner referred to emails between him and the Property Factor’s staff and lodged with the Application. He stated that there were three unanswered emails to the debt recovery staff. He accepted that other Property Factor’s staff had addressed the issue raised by him but was not satisfied with the response or that it was in line with the complaints process. He maintained that the Property Factor should not have mentioned his debt all as it was under dispute and that the Property Factor had not resolved his complaint about the way this was handled. He submitted that this caused him extreme embarrassment with his neighbours who had challenged him about the debt as it had been distributed to them. He pointed out that part of the cost sought by the Property Factor was a £30.00 late payment charge for the disputed amount and that his complaint to the Property Factor covered this charge.

16. In response on behalf of the Property Factor, Ms. Stead explained the process which had been taken following the owners’ notice to terminate the Property Factor’s contract. She explained that when notice was given in August 2020, the Property Factor issued its standard cease to factor (“CTF”) letter which explained that the contract would terminate in November 2020, that a final account would be issued three months later and that any outstanding factoring costs would be distributed amongst the co-owners. With regard to the Application, Ms. Stead confirmed that the CTF was issued in August 2020, the Property Factor’s contract terminated on 21 November 2021 and final invoices were issued in March 2021. Mr. Wallace and Ms. Stead accepted that the Homeowner had raised complaints in respect of the common charges and stated that these were dealt with by Mr. Wallace, ending in Mr. Wallace’s letter of July 2021 which referred the Homeowner to the Tribunal.

Property Factor Duties.

17. The Homeowner’s complaint under this heading is the way in which the Property Factor dealt with his disputed account and the delays in handling the matter. He maintained that the Property Factor could have been quicker and more efficient in

their dealings and, if they had handled the matter more professionally, they would not have caused his name “to be dirt” with his neighbours. He maintained that advising neighbours of his debt was a data protection breach as he does not have any debt but has an account in dispute. He stated that the amount of the disputed account is around £105.00, being a sum he estimates he is not liable for as he is not happy with the garden maintenance and window repair. The Homeowner accepted that he has not paid the final management fee and other fees. He maintained that, if the Property Factor had advised him of the distribution of debt, he would have settled his account, save for the disputed amount. He advised that previously he had factoring account arrears of around £4,000.00 but had reduced these to £105.00.

18. In response on behalf of the Property Factor, Ms. Stead explained again the process which had been taken following the owners’ notice to terminate the Property Factor’s contract and that the CTF explained that debt would be distributed. She highlighted that the Homeowner had also been advised of this by one of the Recovered Income Team in September 2020. Ms. Stead explained that factoring accounts are issued in arrears and so the final account for the Property was issued in November 2020, which had a balance of £444.77 due by the Homeowner, with 3 months allowed for payment. The final invoice for the development with the distribution of debt was issued on 9 March 2021, at which time the Homeowner owed £344.77, being the sum of £444.77 less £100.00 held by the Property Factor as a float. She stated that this sum remains due. Ms. Stead explained that the £30.00 late payment charge was applied at the August invoice had not been paid.

19. The Homeowner maintained that the amount due by him should be around £105.00 being the amount in dispute but accepted that he had not paid the final management and other costs. He stated that he had reduced his previous debt to £105.00 in 2020 and that the Property Factor’s actions had caused him upset and embarrassment.

Summing -up

20. Both Parties summed- up in line with the evidence led by them.

Findings in Fact.

21. The Tribunal had regard to the Applications in full, the written submissions, the productions lodged and to the evidence at the Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.

22. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;
- ii) The Homeowner is a homeowner in terms of the Act;
- iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 and 17 of the Act, being the duty to comply with the statutory codes of conduct and the duty to comply with the Property Factor’s Duties;
- iv) The Property Factor instructed Glasscraft to carry out windows repairs, which Glasscraft did, although these might not have been fully successful;
- v) On receiving the Homeowner’s complaint about the window repairs, the Property Factor contacted Glasscraft for an explanation, which explanation was received;

- vi) The Property Factor instructed Mr. D. Hodge to carry out garden maintenance work, which Mr. D. Hodge did;
- vii) The extent of the garden maintenance work was clearing leaves and rubbish from common areas, treating moss and applying weedkiller. Pulling and removing weeds was not part of the contract;
- viii) On receiving the Homeowner's complaint about the garden maintenance work, the Property Factor contacted Mr. D. Hodge for an explanation, which explanation was received;
- ix) The Homeowner notified the Property Factor that he disputed the outcome of his complaints and indicated that he was withholding payment of £105.00 in that regard;
- x) The Property Factor's contract was terminated on 21 November 2020 by the development owners by notice given in August 2020;
- xi) The Homeowner's factoring account was in arrears at the time the notice was given to the Property Factor;
- xii) The Property Factor levied a late payment charge of £30.00 in respect of the Homeowner's unpaid invoice of August 2020;
- xiii) The Homeowner disputed the late payment charge as he maintained a dispute in respect of the sum due by him;
- xiv) The Property Factor notified the Homeowner that unpaid factoring accounts would be distributed to co-owners as part of the termination process;
- xv) The Homeowner was given a final invoice in November 2020, which invoice stated that he had an outstanding account of £444.77;
- xvi) The Homeowner did not pay the final invoice in full or in part;
- xvii) The Property Factor issued its final account for the development on 9 March 2021;
- xviii) The final account for the development distributed the Homeowner's debt of £344.77, being the sum stated in the final invoice to him less a float of £100.00, amongst the owners of the development;
- xix) The final account for the development identified the Homeowner as a debtor and
- xx) The Property Factor has a complaints procedure which it followed, although at times, the Property Factor did not deal with correspondence from the Homeowner as promptly as it might have done;

Issues for Tribunal

23. The issues for the Tribunal are: has the Property Factor breached those parts of the 2011 Code as complained of in the Application and has the Property Factor failed to comply with the Property Factor's Duties.

Decision of the Tribunal with reasons.

24. Section 19 of the Act states: *"(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it ... decide (a) whether 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) if so, whether to make a property factor enforcement*

order.” Having heard the Parties, the Tribunal proceeded to make a decision in terms of Section 19 (1)(a) of the Act.

25. The 2011 Code at Section 6 at 6.9 states that the Property Factor must pursue contractors or supplier to remedy the defects in any inadequate work or service provided and if appropriate, should obtain a collateral warranty from the contractor. From all of the evidence before it, the Tribunal is satisfied that the Property Factor, on receiving the Homeowner’s complaints about the gardening maintenance work and the window repairs, took matters up with the respective contractors and received satisfactory explanations. The fact that the Homeowner did not agree with these outcomes is not evidence that the Property Factor did not comply with this part of the 2011 Code as far as it was able to do so, given that its contract had been terminated by the development owners. Accordingly, the Tribunal does not find the Property Factor failed to comply with this part of the 2011 Code.
26. The 2011 Code at Section 7 Complaints at 7.1 states that the Property Factor should have complaints procedures which it should follow. From the WSS and the evidence, the Tribunal is satisfied that the Property Factor complied with this part of the 2011 Code. The submissions and the productions lodged by both Parties show that the Homeowner’s complaint was addressed by the Property Factor in line with its procedures. The fact that the Homeowner’s complaints were not upheld is not evidence that the Property Factor did not comply with this part of the 2011 Code. Accordingly, the Tribunal does not find the Property Factor failed to comply with this part of the 2011 Code.
27. With regard to Property Factor Duties, the Tribunal took the view that the Property Factor had followed its processes and procedures correctly and was not in breach of the General Data Protection Regulations (“GDPR”). The Tribunal was satisfied that the Property Factor carried out the the CTF procedures correctly and had given notice to the Homeowner that his debts, if unpaid, would be made known to and distributed amongst his co-owners. The Tribunal noted that the Homeowner purported to withhold £105.00 as he was of the view that this sum was not due by him due to the quality of the work or services for which it was charged and that he challenged the late payment charge. The Tribunal found that there was no basis for the Homeowner to withhold this sum and that the Property Factor had been entitled to impose the late payment charge. In any event, the Homeowner’s debt to the Property Factor was considerably higher than the sums withheld and challenged. The Tribunal’s view is that the Property Factor’s duties when dealing with common debt are to both the debtor and to the debtor’s co-owners who are jointly and severally liable for the debtor’s share of the debt. The Property Factor’s duty to the Homeowner was discharged when it notified him that it would be seeking recovery of the debt due by him from his co-owners who were obliged to pay his debt in terms of the title conditions. The Property Factor’s duty to the co-owners to whom it was passing the unpaid debt was to provide them with full details of the debt and the debtors so that they might take their own debt recovery action. In these circumstances, disclosure of personal data is not a breach of GDPR. With regard to the complaints procedure, the Tribunal took the view that the Property Factor had followed its procedures, had investigated the Homeowner’s complaints and had provided him with a full response, albeit that the Homeowner was not happy with the response. Accordingly, the Tribunal does not find the Property Factor to have failed to carry out its Property Factor Duties.

28. 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

Signed

Karen Moore, Chairperson

30 June 2022