Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011 Sections 17(1)(a) and 17(1)(b)

Chamber Ref: FTS/HPC/PF/19/4090

Re: Property at 3/1, 43 St Andrews Square, Glasgow G1 5PP ("the Property")

The Parties:

Miss Corrine Sinclair, Eastra, Stromness, Orkney, KW16 3HS ("the Homeowner")

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Rutherglen, Glasgow G73 1UZ ("the Property Factor")

Tribunal Members:

Neil Kinnear (Legal Member) and Mike Links (Ordinary Member)

DECISION

[1] The Tribunal determined that the Property Factor has not failed to carry out its property factor duties in terms of section 17(1) of the *Property Factors (Scotland) Act 2011* ("the 2011 Act") and has not failed to comply with Sections 1.1a A.b., 2.1, 2.4, 3.3, 5.2, 5.3, 5.5, 5.6, 5.7 and 6.4 of the Code of Conduct for Property Factors as required by Section 14(5) of the 2011 Act.

[2] The Decision of the Tribunal is unanimous.

[3] The Tribunal will also make an order for an award of expenses as taxed by the Auditor of the Court of Session against the Property Factor, on the basis that the Property Factor through unreasonable behaviour in the conduct of the case has put the Homeowner to unnecessary or unreasonable expense in respect of the expense to the Homeowner of preparing for and attending the Hearing of 2nd March 2021, in terms of Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

Introduction

[4] In this Decision the *Property Factors (Scotland) Act 2011* is referred to as "the 2011 Act"; the *Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors* is referred to as "the Code"; and *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended are referred to as “the Rules”.

[5] The Property Factor was a Registered Property Factor and had a duty under section 14(5) of the 2011 Act to comply with the Code.

Background

[6] By application dated 20th December 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1) of the 2011 Act and had failed to comply with Sections 1.1a A.b., 2.1, 2.4, 3.3, 5.2, 5.3, 5.5, 5.6, 5.7 and 6.4 of the Code as required by Section 14(5) of the 2011 Act.

[7] On 16th March 2020 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 31st July 2020 both parties were notified that a hearing by conference call would take place at 10am on 16th September 2020

[8] Thereafter, the Tribunal held a number of hearings concerning preliminary matters in relation to a number of other applications brought by other homeowners at St Andrews Square, who were all represented by the Homeowner, and which applications were dealt with in previous decisions of the Tribunal.

[9] A Hearing was ultimately held on 14th April 2021 by conference call. The Homeowner participated, and was not represented. The Property Factor’s Iain Friel participated, and was not represented.

[10] The Homeowner helpfully confirmed at the outset of the hearing that all of her complaints under the various sections of the Code and in relation to failures of the Property Factor to carry out its property factor duties, and which the Homeowner wished to continue to insist upon, now related to three issues. Other issues which were extant at the time this application was made have now been resolved, and no longer require a decision from the Tribunal.

[11] Firstly, a failure by the Property Factor to negotiate the best rate it could on behalf of the Homeowner and other residents at the development in relation to property insurance.

[12] Secondly, a failure by the Property Factor to negotiate the best rate it could on behalf of the Homeowner and other residents at the development in relation to charges for the supply of electricity.

[13] Thirdly, a failure by the Property Factor to take action to compel a contractor to provide new key fobs for a new door entry system which had been charged to the homeowners, but which were not provided.

[14] The Tribunal heard evidence from the Homeowner, another homeowner at the development, Mr Hogg, and Mr Friel. Ultimately, it became clear to the Tribunal that there was actually very little factual dispute between the parties. The real dispute related to whether the actions taken by the Property Factor were as a matter of principle sufficient or not for the purposes of complying with both the Code and its property factor duties. The disputes can be summarised as follows.

[15] In relation to the first issue, parties were agreed that as a result of enquiries made by the homeowners at the development, it became clear that they were all being overcharged for property insurance. An inappropriately high insurance rate was continuing to be applied as a result of a historic insurance claim, which should not have been.

[16] One of the other homeowners, Mr Hogg, sought a quote from another insurer, which produced a substantially lower premium. He passed this information on to the Property Factor, which raised the issue with its insurance broker. The insurance broker investigated, and obtained a substantially reduced premium. The insurance company applied a lower rate for three years to compensate for the inappropriately high rate which it had been applying.

[17] Mr Friel explained that in order to obtain best rates for all the developments which the Property Factor managed, including the development to which this application relates, the Property Factor used an independent insurance broker, Deacon Insurance Brokers, to obtain the best quote which it could from insurers for all the developments which the Property Factor managed as one block policy. The premium was then apportioned to each development by the broker, and each homeowner was then charged the proportion of the premium relating to their property.

[18] Mr Friel explained that the Property Factor relied on its insurance broker in this regard, and that the Property Factor upon having the issue raised with it immediately in turn raised it with the insurance broker, which then negotiated a reduction to the correct rate with a 3 year discount to reflect the overpayments.

[19] Mr Friel argued that by so doing, the Property Factor had acted properly and in accordance with the Code and its property factor duties.

[20] In relation to the second issue, parties were agreed that there was a communal electricity supply, the charges for which were apportioned between the various homeowners.

[21] The Homeowner noted that the various invoices stated that charges would be reduced by between 8% and 15% if the account payment method was changed to a monthly direct debit arrangement. This option had never been explored or taken up by the Property Factor, resulting in the homeowners paying significantly more than they needed to.

[22] Mr Friel explained that the Property Factor had previously experienced difficulties operating a direct debit method of payment for communal electricity accounts. The difficulty was that if there was a substantial billing error, then large overpayments might be made automatically. The Property Factor's experience was that it was frequently time-consuming and difficult to obtain repayment of amounts already paid, as opposed to contesting the amount shown in a rendered invoice before that was paid.

[23] The Property Factor had now moved to using a broker to arrange the electricity accounts for developments, including the development to which this application relates. The broker obtains the best rates and supplies the electricity in terms of its agreement with the Property Factor.

[24] In relation to the third issue, parties were agreed that a specialist company carried out work replacing the door entry system to some of the properties in the development to which this application relates. They were also agreed that the original quote provided and charged for the provision of three new key fobs for each proprietor which were not in fact provided.

[25] Parties were agreed that the Homeowner and her fellow homeowners raised this issue with the Property Factor, who obtained a refund from the specialist contractor in respect of the non-supply of the new key fobs.

[26] Mr Friel explained that when the Property Factor raised this issue with the specialist contractor, the latter explained that it had been able to re-use existing fobs and as a result did not supply new ones. It agreed to reimburse the cost of the new fobs which it had not supplied, and the refund was credited to the homeowners affected.

[27] There was no meaningful dispute between the parties turning on the monetary amounts involved in these issues. The Homeowner argued that the Property Factor had failed in its duties simply by not negotiating appropriate rates for electricity and insurance, and in not insisting that the specialist contractor supply the key fobs charged for in its original quotation.

[28] Finally, the Homeowner asked the Tribunal to make an award of expenses in her favour in relation to two earlier hearings of this application on 15th December 2020 and 2nd March 2021.

[29] At the former, the Property Factor was granted an adjournment due to its misunderstanding that it was a further no-evidential hearing following on from an earlier hearing concerning legal arguments.

[30] At the latter, the Property Factor did not attend. The Property Factor e-mailed the Tribunal in response to its enquiry regarding its absence and was granted a further adjournment shortly after the hearing commenced due to an error on its part in not arranging for one of its directors to attend, for which it apologised.

[31] Mr Friel accepted that the Homeowner had been put to unnecessary expense due to a failure on the part of the Property Factor to attend the hearing on 2nd March 2021,

and conceded that the Property Factor should be made subject to an award of expenses in respect of that hearing.

Statement of Reasons

[32] Section 17 of the 2011 Act provides:

"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."

[33] Section 17(1) creates two separate grounds of complaint, being failure to carry out the property factor's duties and failure to ensure compliance with the Code. The Homeowner proceeds in this application in respect of both.

[34] However, the Homeowner confirmed that all of her remaining complaints relate to the three issues identified above. The Tribunal therefore requires to decide whether the Property Factor is in breach of the Code or its property factor duties in respect of these three issues in principle, before addressing the particular breaches relied upon by the Homeowner.

[35] On the first issue, the Tribunal concluded that the Property Factor had done all that could reasonably be expected of it. The Property Factor did not itself have the expertise to arrange insurance cover, and appointed an independent insurance broker to do that on behalf of themselves and those that they provided factoring services to.

[36] Upon being advised that the premiums might be higher than they ought to be, they quickly raised that with the broker, who discussed the issue with the insurer, obtained a much-reduced premium, and also obtained a discount on that reduced premium in recompense for the inflated rate previously paid.

[37] The Property Factor advised the Homeowner of this outcome, and adjusted her account accordingly. The Tribunal did not find that approach unreasonable.

[38] Upon the second issue, the Property Factor did not attempt to take advantage of a potential reduction in charges by taking up the option of direct debit monthly payments, but did so for the reasons which Mr Friel explained. The Tribunal did not find that approach unreasonable.

[39] On both the first issue and the second, the Tribunal would observe that rates and charges can vary between providers, and can also vary by negotiation with a provider. Therefore, no-one can ever be certain objectively that they are paying “the best rate”.

[40] The Property Factor used reasonable endeavours to achieve a reasonable rate, and is not an insurer for the Homeowner against the possibility that a better rate might later have been discovered to be available.

[41] With regard to the third issue, the Tribunal concluded that the Property Factor had, once again, used an independent contractor to carry out specialised work. That contractor varied the work done from that in the original quotation as it was able to re-use the existing key fobs.

[42] Upon that being brought to the Property Factor’s attention by the Homeowner, it approached the contractor and obtained a refund in respect of the variation which was passed on to the Homeowner and her fellow homeowners. Again, the Tribunal did not find that approach unreasonable.

[43] With regard to Section 1.1a A.b of the Code, the Homeowner complained that the Property Factor failed to provide financial thresholds for when a quote would be required and when the factor could act without consultation with the homeowners.

[44] Section 1.1a A.b states that the written statement of services should set out "where applicable, a statement of any level of delegated authority, for example financial threshold for instructing work, and situations in which you may act without further consultation".

[45] The Tribunal notes that financial thresholds for instructing work are given as an example, and are not a requirement of this section. Similarly, the section is also qualified by the words "where applicable".

[46] The Property Factor stated that the written statement of services provided was a generic document, and was not suitable to specify particular thresholds for every property. The Property Factor stated, however, that it maintained a float from each property for £200.00 to cover minor works, and that it operated a system where a level of £2,500 of expenditure would require internal authorisation to be obtained to seek payment in advance from homeowners before proceeding. The Homeowner did not dispute these assertions.

[47] In these circumstances, and standing the view the Tribunal has reached on the three issues earlier identified, the Tribunal did not find that the Property Factor was in breach of this section of the Code.

[48] Section 2.4 of the Code states with regard to good communication that "You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)."

[49] For the reasons earlier noted with regard to Section 1.1a A.b of the Code, the Tribunal did not find that the Property Factor was in breach of this section of the Code.

[50] Section 2.1 of the Code states with regard to good communication that "You must not provide information which is misleading or false." The Homeowner contended that the Property Factor provided information which was misleading or false in relation to the way it dealt with the three issues earlier identified.

[51] In circumstances where the Tribunal has accepted that the Property Factor's approach on the three issues was not unreasonable, it has not provided information which was misleading or false and the Tribunal did not find that the Property Factor was in breach of this section of the Code.

[52] Similarly, the Homeowner contended that the Property Factor was in breach of Sections 5.2, 5.3, 5.5, 5.6 and 5.7 of the Code with regard to standards applicable to arranging insurance. In circumstances where the Tribunal has accepted that the Property Factor's approach on the first issue was not unreasonable, the Tribunal did not find that the Property Factor was in breach of these sections of the Code.

[53] With regard to Sections 5.2 and 5.3, the Property Factor provided the insurance details when these were requested. The Homeowner was dissatisfied as a result of a failure to provide historic records relating to earlier periods.

[54] However, it seemed to the Tribunal that where the Property Factor took the matter up with its independent broker, who raised the issue with the insurer, and where suitable adjustments and reductions were made to the premiums as earlier explained in relation to the first issue, the Tribunal did not find that the Property Factor was in breach of this section of the Code.

[55] With regard to Section 5.5, the Homeowner contended that the Property Factor failed to respond in relation to providing historic records relating to earlier periods of insurance. This section concerns the progress of insurance claims, and the Tribunal did not find that the Property Factor was in breach of this section of the Code.

[56] With regard to Sections 5.6 and 5.7, the Property Factor has provided information explaining the process by which it arranged insurance together with insurance particulars, and accordingly the Tribunal did not find that the Property Factor was in breach of this section of the Code.

[57] The Homeowner confirmed to the Tribunal at the Hearing that she was withdrawing her complaints that the Property Factor had breached sections 3.3 and 6.4 of the Code, and her complaint that the Property Factor failed to carry out its property factor duties in terms of Section 17(1) of the 2011 Act.

[58] Finally, with regard to the Homeowner's application for expenses, Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides:
"(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.
(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."

[59] The Tribunal had sympathy with the frustration of the Homeowner with regard to the adjournment of the hearing of 15th December 2020, but did not consider that what appeared to be a genuine misunderstanding constituted unreasonable behaviour on the part of the Property Factor in the conduct of the case.

[60] However, the Tribunal did consider that the Property Factor's failure to attend the hearing on 2nd March 2021 for the reasons it gave was unreasonable behaviour in the conduct of the case which had put the Homeowner to unnecessary or unreasonable expense, and Mr Friel to his credit conceded with apologies that was the case.

[61] The Tribunal will award expenses against the Property Factor and in favour of the Homeowner to cover the expense to the Homeowner of preparing for and attending the hearing on 2nd March 2021.

[62] The Homeowner should prepare an account of the expense to the Homeowner of preparing for and attending the Hearing of 2nd March 2021, and submit that to the Tribunal, which will remit it to the Auditor of the Court of Session to tax and report.

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.

1st June 2021

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Legal Member	**Date**