

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

Chamber Ref: FTS/HPC/PF/20/1550

The Property: 30/5 Eyre Crescent, Edinburgh, EH3 5EU (“The Property”)

The Parties:-

**Mr Aylmer Millen residing at 5 Hillpark Grove, Edinburgh EH4 7AP
 (“the applicant”)**

**James Gibb Property Management Ltd, a company incorporated under
 the Companies Acts and having a place of business at 65 Greendykes
 Street, Glasgow, G1 5PX
 (“The property factor”)**

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has complied with the code of conduct as required by Section 14 of the 2011 Act, determined that the property factor has not breached the code of conduct for property factors and has not failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011.

Committee Members

Paul Doyle
Ahsan Khan

Legal Member
Ordinary Member

Background

1 By application dated 22 July 2020, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the property factor has breached the code of conduct imposed by Section 14 of the 2011 Act & that the property factor has failed to comply with the property factor’s duties.

2 The application stated that the applicant considered that the respondent failed to comply with Section 2.2.1 of the code of conduct for property factors, breached the property factor’s duties by failing to act fairly and reasonably and is in breach of consumer contract law.

3 By interlocutor dated 20 August 2020, 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 applicant lodged further written representations on 23 September 2020. The respondent lodged further written representations on 24 September 2020.

5. A hearing was held by telephone conference on 7 December 2020. The applicant was present, but unrepresented. Mr N Mayall, accompanied by Ms Kirkwood, represented the respondent. Parties agreed that there is no dispute about the facts in this case. The applicant's position is summarised in his written submission as follows

Essentially the issue turns on the principle of whether changes to the Written Statement of Services (or terms of business), which I contend to be material, can be made by one party to the contract (the Factor) without full illustration and explanation of the changes and without consultation with the other party to the contract (the Homeowners) and without the explicit opportunity to withdraw from the contract; it is not about the propriety of the changes in themselves but rather about the principle of the Factor's right, as agent to the Homeowners, to make and impose such changes unilaterally.

It is contended that the centralising of all enquiries in a remote Client Support Department alone is a material change by its distancing of Development Managers from their historic role of dealing with all enquiries in their Development and in turn the derivation of the knowledge of the Development thereby acquired by operating as a reservoir of information and predictive planned maintenance.

My contention is that the Factor by its acts and omissions in the unilateral imposition of the changes to its Written Statement of Services, without substantive illustration and explanation of the changes, by purporting the changes were solely attendant upon the integration of the LPM business and by avoiding any effort of consultation is in breach of its Section 17(4) obligations to act reasonably, its Section 2.2.1 Communications and Consultation obligations to avoid false and misleading references and its obligations to consultation in compliance with the Unfair Terms in the Consumer Rights Act/Consumer Contract Regulations 1999.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The applicant is the heritable proprietor of the flatted dwellinghouse at 30/5 Eyre Crescent, Edinburgh ("The property"). The respondent has been the property factor for a number of years.

(b) In August 2019, James Gibb Property Management Limited had acquired Life Property Management Ltd, (LPM) another property factoring business. The two businesses were gradually integrated. Each business had its own Written Statement of Services. As part of the assimilation process these two Written Statements were combined into one new document for the integrated

business. The new, combined, Written Statement of Services is based on the previous James Gibb document. In February 2020, the property factor wrote to the applicant (and others) intimating changes to the written statement of services affecting the property.

(c) The Property factor's letter was received by the applicant on 11 February 2020. A section of the letter is headed "Written Statement of Services". Under that heading the respondent wrote, inter alia,

Our new WSS is now available for viewing or download from our website.....if you don't have access to the internet, please call our Client Support Team and we'll be happy to send you a hard copy.

(d) On 12 February 2020 the applicant emailed the property factor complaining that the property factor expects homeowners to compare the two written statements of services to divine what changes have been made, and that the property factor has imposed an additional charge for emergency out of hours response and has done so without consulting homeowners.

(e) There followed an exchange of emails between the parties to this application in which the respondent detailed the changes to the written statement of services, and the applicant complained that a number of the detailed changes were, to his mind, unfair. On 14 April 2020, as part of that email exchange, the property factor set out the detail of the various amendments to the written statement of services.

(f) The property factor maintains a website and provides a mobile phone app which proprietors can consult. The property factor's website includes a members' portal which the homeowner has access to. The property factor's website and the portal provided was regularly and timeously updated with news affecting homeowners, including publication of changes to the property factor's written statement of services.

(g) The property factor amended the written statement of services. The homeowner was not sent a hard copy of the revised written statement of services, but the revised written statement of services was made available on the property factor's website and within the client portal available to the homeowner. The property factor publicised the changes to the written statement of services in their letter received by the homeowner on 11 February 2020.

Reasons for decision

7 (a) Section 2.2.1 of the code of conduct says

SECTION 2: COMMUNICATION AND CONSULTATION

Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:

2.1 You must not provide information which is misleading or false.

(b) There is no great dispute about the facts of this case. In February 2020 the property factor told the applicant that changes had been made to the written statement of services. In April 2020 the property factor emailed the applicant and summarised the detail of the changes to the written statement of services.

(c) The property factor has not provided false or misleading information. The applicant argues that the manner in which changes were made to the written statement of services is wrong and that the property factor's communication in February 2020 was misleading because it concealed the materiality of the changes made to the written statement of services.

(d) On the facts as we find them to be, the information contained in the letter from the property factor, received by the applicant on 11 February 2020, is not misleading. Detailed information was available on the property factor's website from 11 February 2020. When the applicant asked for the detail of the changes which had been made, he was given a full explanation. None of the information provided by the property factor was either false or misleading.

(e) There is no requirement on the property factor to circulate an amended statement of services each time a change is made. The property factor took adequate steps to ensure that every homeowner was properly advised of the amendment to the statement of services. On the facts as we find them to be, the property factor made sure that that amendment was properly publicised. The code of conduct does not demand more of the property factor.

8. Section 17 of the Property Factors (Scotland) Act 2011 says

(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.

9. The applicant says that the property factor failed to act reasonably because changes were made to the written statement of services without consulting the homeowners affected by those changes, and, having made substantial changes to the written statement of services, the property factor refused to explain the nature and effect of the changes.

10. Neither the Code of Conduct nor the 2011 Act place an obligation on the property factor to consult with homeowners before making changes to a written statement of services.

11. The applicant might not like the way the property factor intimated changes to the written statement of services. He might not like the new written statement of services, but there is no evidence to suggest that the property factor acted dishonestly or tried to mislead the applicant. On the contrary, the email exchange between the parties demonstrates the property factor's willingness to engage with the homeowner and provides a series of candid responses to the applicant's enquiries.

12. There is no reliable evidence that the property factor has acted unreasonably, nor is there evidence that the property factor failed to carry out its duties to a reasonable standard

13. Having found that the property factor has not breached the code of conduct, by analogy we find that the property factor did not fail to carry out the property factors duties to a reasonable standard.

14. The applicant argues that the property factor has not complied with the Consumer Rights Act 2015 and the Consumer Contract Regulations 1999. The preamble to the Code of Conduct contains the following:-

Property factors are responsible for ensuring that they conduct their business in a manner that complies with all relevant legislation in addition to the Act and the Code. In particular this covers duties imposed by legislation relating to consumer protection, financial services, consumer credit licences, title conditions, health and safety, data protection and equalities...

The Code is separate from, and additional to, these other statutory and voluntary requirements.

15. This application is made under s.17 of the Property Factors (Scotland) Act 2011. S.17(1) of the 2011 Act defines this tribunal's jurisdiction as follows

(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").

16. Part 2 and Schedule 2 to the Consumer Rights Act 2015 deals with unfair contract terms. The applicant does not specify which parts of the 2015 Act he says have been breached by the property factor. On the facts as we find them to be, we cannot discern a breach of the 2015 Act. In any event, even if we were to find a breach of the 2015 Act, the "enforcers" of the 2015 Act are defined in schedule 5 to the 2015 Act. The First-tier Tribunal for Scotland (Housing and Property Chamber) is not listed in schedule 5 to the 2015 Act.

17. We presume that when the applicant refers to "Consumer Contract Regulations 1999" he means The Unfair Terms in Consumer Contracts Regulations 1999. The applicant does not say which part of The Unfair Terms in Consumer Contracts Regulations 1999 is relevant to this application. The applicant does not specify which clause in the amended written statement of services breaches The Unfair Terms in Consumer Contracts Regulations 1999.

18. The contract between the applicant and the property factor has its foundation in the deed of conditions by Adam Housing Society Ltd dated 12th and recorded GRS Midlothian on 13th December 1990. The written statement of services is the property factor's terms of business. Section 11 of the written statement of services provides a mechanism for terminating the contract. The applicant's complaint that he has not had

the explicit opportunity to withdraw from the contract

is without foundation.

19. Having considered each strand of evidence we find that the application is entirely without merit.

Decision

20. The property factor has neither breached the Code of Conduct nor the property factors duties.

Right of Appeal

21. 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

7 December 2020

Legal Member