



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Chamber Ref: FTS/HPC/PF/20/2250

Re: Property at Forrest Street, Flat 88J, Clarkston, Airdrie, ML6 7AG (“the Property”)

Parties:

Mr Jim Smith (Homeowner), Forrest Street, Flat 88J, Clarkston, Airdrie, ML6 7AG, represented by Mr Thomas Johnstone, solicitor of Whyte Fraser and Co, (“the Applicant”)

Hacking and Paterson (Property Factor), 1 Newton Terrace, Glasgow, G3 7PL , represented by Alastair Leitch, Property Factoring Director (“the Respondents”)

Tribunal Members:

Mr Jim Bauld (Legal member); Ms Elaine Munroe (Ordinary Member)

Background

1. By application dated 21 October 2020, the homeowner applied to the Tribunal for a determination on whether the factor had failed to comply with various sections of the Code of Conduct for Property Factors imposed by section 14 of the Property Factors (Scotland) Act 2011 and to carry out the property factor duties in terms of section 17 (1) (a) of the Property Factors (Scotland) Act 2011 (hereafter referred to as “the Act”).
2. On 2 November 2020 the application was accepted by the tribunal and referred for determination by the tribunal.
3. A hearing was set to take place on 8 January 2021 and appropriate intimation of that hearing was given to the parties.

The Initial Hearing

4. The initial Hearing took place on 8 January 2021 via telephone case conference. The applicant was not personally present but was represented by his solicitor, Mr Thomas Johnstone of Whyte Fraser and Co, The respondents were represented by Alastair Leitch, their Property Factoring Director..
5. It was clear from the representations that the main area of dispute between the parties related to certain charges which the factor had included in their invoices which related to costs involved in respect of lighting/works to a common stairwell. Further disputes had arisen over whether certain invoices which had been raised should only be attributed to owners in the block who were liable for repairs to the "stairwell common parts" as defined in the title to the property rather than to all owners who were liable for works to the whole common parts of the building. The applicant's solicitor had explained that the applicant's flat was not served by the common stairwell and that his flat was contained within one of two "wings" of the block of flats each of which contained two flats which were not accessed via the common stairwell which served six other flats
6. Both parties agreed that the hearing should be adjourned to enable certain documents to be received and considered and for discussions to take place between the parties. Parties agreed that if these discussions led to a resolution of the dispute that they would advise the tribunal and the application could be withdrawn. The parties agreed that if their discussions were not able to resolve the application they would contact the tribunal and asked the tribunal to fix a fresh hearing.
7. Parties were unable to agree resolution and a request was made that a further hearing was fixed.
8. A further hearing in this matter was set to take place by means of a telephone case conference call on the 25th of June 2021 at 10 am. Appropriate intimation was sent to all parties with appropriate details to enable them to connect to the conference call
9. Prior to the further hearing the tribunal received a number of emails and other representations from both parties

The hearing on 25 June 2021

10. The practice generally adopted by the tribunal members in respect of hearings by conference call is that the parties will connect with the conference call and be identified by the tribunal clerk. Once all parties are connected to the conference call, the tribunal clerk will then telephone the tribunal members and they will then dial into the conference call and the hearing will proceed. If parties have not joined by the specified time, the tribunal clerk or another member of the tribunal staff will try to contact the party or their representative to ascertain whether there are any difficulties and to attempt to resolve them .

11. In this case, Mr Johnstone, the representative for the applicant did not join the conference call at 10.00 am. The administration staff of the tribunal telephoned him and were advised that he had attempted to dial the relevant number but that his passcode was being indicated as being invalid. The staff checked the passcode and confirmed it was correct and asked Mr Johnstone to again attempt to join the conference call. He failed to connect to the conference call. Further calls were made by the tribunal staff to Mr Johnstone where he indicated that his mobile telephone had no credit and that he would not be able to join the conference call.
12. The tribunal chairman made telephone calls to the tribunal clerk at 10.08 am, 10.19 am, 10.29 am and 10.33 am to discuss the situation and was kept informed of the situation and the ongoing attempts to resolve the issues raised by Mr Johnstone. The chairman was finally advised by the clerk that Mr Johnstone had now indicated that he would not be joining the conference call and that he was asking the tribunal to postpone the hearing on the basis that he was not able to join the call. During one of the calls between Mr Johnstone and the tribunal staff he confirmed that he had no access to the internet to be able to purchase more credit so would not be dialling in. He stated that he presumed that the tribunal would postpone the hearing to a later date and asked the clerk to call him back and update him later.
13. The respondent's representative, Mr Leitch had joined the conference call on time and was waiting for the tribunal members to join the call while the various efforts to contact Mr Johnstone were being pursued.
14. It should also be noted that the telephone number which is given to parties to join the conference call is an "0800" or "Freephone" number which is intended to ensure that those calling do not incur call charges. However the tribunal is aware that certain mobile phone networks do impose charges for connections to these numbers.
15. The tribunal members joined the conference call at 10:37 and indicated to the respondent's representative the explanation they had been given regarding the failure of the applicant's representative to join the conference call.
16. The tribunal asked the respondent's representative whether the matter should be adjourned to a later date. Mr Leitch was opposed to the matter being adjourned. It was his position that the applicant's representative was a qualified solicitor and that he should have been fully and properly prepared to join a conference call to take part in the tribunal hearing.
17. Mr Leitch indicated that it was his view that since the start of this complaint that the applicant's representative had not wished to try to resolve the matters. The respondents had admitted that they had made errors in some of the invoices but that they had credited a total sum of £300 to the applicant's account as compensation and a gesture of goodwill. The applicant had suffered no financial loss. Mr Leitch indicated that in a telephone discussion with the applicant's representative that a request had been made that the applicant's

legal fees of £420 should be paid. Mr Leitch declined to agree to such a payment ..

18. In addition to a number of charges in respect of the common stairwell which it had been previously acknowledged had been invoiced erroneously to the applicant and had been subsequently re-credited in later invoices, Mr Leitch noted that four invoices were in dispute. One was for a plumbing repair in 2015 involving a burst pipe. The share of that account charged to the applicants was £57.23.
19. The other three invoices which have been disputed related to the installation of an external rear light to the property and repeats to that. The applicants share of those invoices was respect to be £20.16, £5.64 and £7.81. The total amount involved in the four invoices was £90.84.
20. It was Mr Leitch's position that all of these four invoices were properly chargeable to the applicant. It was his submission that they all related to works to the common parts of the whole building not just to the stairwell. It was acknowledged that the applicant was not liable for works/repairs which applied only to the stairwell common parts.
21. Mr Leitch indicated to the tribunal that it was his view that the matter should be dismissed. The property factors had dealt with the complaint, made appropriate amendments to the invoices and had offered and paid a significant credit to the applicant by way of apology and as a gesture of goodwill.
22. The tribunal noted the absence of Mr Johnstone. However the tribunal took into account rule 29 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 which states ***"If a party or party's representative does not appear at a hearing, the First-tier Tribunal, on being satisfied that the requirements of rule 24(1) regarding the giving of notice of a hearing have been duly complied with, may proceed with the application upon the representations of any party present and all the material before it."***
23. The tribunal was satisfied that appropriate intimation of the hearing had been given to the applicant and his representative
24. The tribunal was satisfied that it had sufficient information from the representations, emails and documents lodged on behalf of the applicant to enable it to determine the application in the absence of the applicant
25. The hearing concluded and the tribunal members held a discussion which ended at 10:56 am.
26. Shortly after 11 am the tribunal chairman received a telephone call from the tribunal clerk indicating that the applicant's representative had now joined the telephone case conference. The tribunal chairman instructed the clerk to

advise the applicant's representative that the hearing had been concluded and that a decision would be issued

Discussion and reasons for decision

27. In this application the applicant alleges breaches of the Code of Conduct for Property Factors ("the Code") which has been issued under the Property Factors (Scotland) Act 2011. The application alleges breaches of section 1, section 3 and section 7 of the Code. No specific paragraphs of those sections are identified as being breached.
28. Section 1 of the Code relates to the requirement to provide a written statement of services.
29. There is no suggestion that the respondents in this case did not provide a written statement of services. In their written representations to the tribunal dated 11 December 2020 they provided confirmation that they issued a written statement of services to the applicant in September 2014. They indicated that an updated version was placed on their website in February 2019. The respondents accept that the applicant does not have access to the Internet and will not have seen that version of the written statement.
30. However in the application to the tribunal, the applicant has provided a copy of what appears to be the first page of the respondent's terms of service and delivery standards which forms part of the respondent's written statement of services. Accordingly it appears that the applicants have received a written statement of services and there cannot be any breach of section 1 of the code of conduct. That section simply requires that a written statement is provided and that it contains certain information
31. Section 3 of the code of conduct relates to financial obligations. No specific breach of any paragraph of the section is specified in the application. This section of the code relates to the manner in which property factors deal with homeowners funds, how charges are calculated and that no improper payment requests are made.
32. It seems to be a matter of agreement that certain errors were made in some invoices remitted to the applicant. The applicant has lodged the productions in advance of the hearing which contains a list of what the applicant claims were erroneous charges imposed by the property factors. That production lists eight separate charges relating to the provision of lighting to the common stairwell at the property at Forest Street. The total amount invoiced were £64.35. In all cases these charges have been re-credited to the applicants account.
33. The property factors have accepted that four invoices totalling £90.84 were disputed as narrated above. The respondents have offered a credit to the applicant's account of £100 to cover these invoices

34. In all the circumstances the tribunal found no breach of section 3 of the Code arising from these errors.
35. The final section of the Code which is alleged to have been breached by the applicant is section 7.
36. Section 7 relates to complaints resolution. This section requires that property factors must have a clear written complaints resolution procedure and that they must follow it. It indicates that when the complaints procedure is exhausted that the homeowner should be told that the factor's decision is final and that if they are unhappy they may apply to the tribunal. The Code requires that property factors do not charge for handling complaints
37. The respondents have indicated in their written representations that they have a complaints resolution procedure. They have indicated that it is available in writing on request and that details can be found on their website. They have indicated that they have no record of any specific request from the applicant that a copy of the complaints handling procedure should be issued. A copy was sent to the applicant's representative on 27 November 2020 and was also sent directly to the applicant. The property factors state that they have received no formal complaint from the homeowner. They indicate that the first time any complaint was raised was by means of the letter from the applicant's solicitors in September 2020 . They responded to that correspondence and have attempted to resolve the complaint.
38. It is their position that the application to the tribunal was premature and should not have proceeded. In dealing with the complaint from the solicitor they made a payment of £200 to the applicant's account as compensation and as a gesture of goodwill . They apologised that the invoices had been incorrect and apologised for any inconvenience caused to the applicants. They rectified the incorrect entries. They noted that the applicant's solicitor asked them to make payment of the fees which had been incurred at that stage totalling £420. They declined to make that payment.
39. Subsequent to the first hearing which took place in January, the respondents entered into further correspondence with the applicant's representative and made a further goodwill payment of £100 which was again credited to the applicants account.
40. Section 7 of the Code requires the property factor to have a complaints procedure. It is clear that this property factor has a written complaints procedure. There is no evidence that the applicant followed the complaints procedure. It is evident that the property factors responded to all correspondence from the solicitor instructed by the applicant and have attempted to resolve the complaint.
41. The tribunal unable to find that there is any breach of the code of conduct in respect of this section.

42. The tribunal has carefully considered all the written documents which have been submitted. The tribunal has carefully read the submissions from the parties.
43. The tribunal notes that the applicant was concerned that he was incorrectly invoiced for repairs and maintenance work which relates only to those owners within the block who use the common stairwell. The property factor appears to have acknowledged that some accounts were in error invoiced to the Applicant. They have not only re-credited the account but have made payments totalling £300 as compensation to the applicants.
44. The complaint regarding the installation of the external light raises a separate issue as to whether this was a work of repair or improvement to the common parts of the whole tenement block or whether this was work which should only have been billed to those using the common stairwell.
45. The external light was installed on the external wall of the building. It clearly provides a benefit not just to those who enter the stairwell via the door into the common stairwell but provides illumination to all using the car park including the applicant. If the tribunal was being asked to make a decision in this matter, the tribunal would have concluded that the works involved in the installation of this external light would fall under the types of work which are renewal or improvement of the common parts in terms of paragraph 5 of the Deed of Conditions (registered 19 September 1995) which is shown in the Burdens section of the applicant's land certificate for the property. The tribunal however notes that the payment of £300 by the respondent to the applicant more than covers the costs invoiced in respect of the installation of the external light and subsequent repairs to it
46. The tribunal accordingly takes the view that there have been no breaches of the Code of Conduct which would require the making of the property Factor enforcement order.

Further comments and observations

47. If the tribunal had come to a different view and had determined that the errors made in the invoices by the property factors had breached the Code of Conduct, (possibly also in relation to other parts of the Code not raised in the application) the tribunal would have taken the view that these were relatively minor, involved relatively small amounts of money had been acknowledged by the property factor, that an appropriate apology had been made and that compensation had been offered and paid by the property. In such a situation, if the tribunal had been making a property factor enforcement order in such a situation it is unlikely that any award of compensation would have exceeded the sum of £300 which has already been paid by the property factor.
48. The tribunal also notes that in a letter dated 18 January from the applicant's representative to the respondent, the applicant solicitor indicate that they will

be seeking a “cost order” from the tribunal. Awards of expenses in applications to this tribunal may only be made (in terms of rule 40 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017) “**only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.**“

49. There is no evidence to suggest that the respondents in this case have behaved in any manner which could be described as unreasonable. They have conducted this case entirely appropriately. They have responded to requests from the tribunal for information and representations. They have attended hearings when required and have conducted themselves at all times in an appropriate and professional and respectful manner. The tribunal is unable to conclude that the respondent’s behaviour in the conduct of this case has been unreasonable.
50. The tribunal also notes that the applicant’s representative failed to attend the telephone case conference on 25th June. The tribunal notes the explanation given by the representative that he was initially unable to connect to the telephone case conference and then his indication that he would not take part because his mobile telephone had run out of credit.
51. The tribunal expresses its concern that a solicitor would be so ill-prepared for a tribunal hearing. The tribunal finds it inexcusable that the solicitor, with relevant professional obligations, would not be prepared and ready to take part in the telephone case conference. This tribunal has been conducting hearings by means of telephone case conference for almost a year during the current pandemic restrictions. Many courts throughout the country have similarly been conducting business in this fashion. It is the responsibility of those representing parties to ensure that they are able to attend these telephone case conferences and to comply with their professional obligations. for the reason provided The failure of the applicant’s representative to take part in the hearing, given the reason provided, is to be deplored.

Decision

52. The tribunal accordingly finds that there are no breaches of the Code of Conduct and accordingly decides to make no property factor enforcement order and to dismiss the application.

Legal Member

25 June 2021
Date