

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision and Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/22/0017

Re : 7 Glenarm Place, Edinburgh EH6 4TQ ("Property")

The Parties:-

Duncan Walker, 7 Glenarm Place, Edinburgh EH6 4TQ ("Homeowner")

James Gibb Residential Factors, 4 Atholl Place, Edinburgh EH3 8HT ("Factor")

Tribunal Members:

Joan Devine – Chairing and Legal Member

Elizabeth Dickson – Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("Tribunal") unanimously determined that the Factor has complied with the Code of Conduct for Property Factors as required by section 14 of the Property Factors (Scotland) Act 2011. In all the circumstances the Tribunal does not propose to make a Property Factor Enforcement Order.

Introduction

1. 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 are referred to as the "Rules". The Homeowner's application to the Tribunal comprised documents received between 5 January and 7 March 2022 ("Application"). A Case Management Discussion was fixed for 18 May 2022.

The Code

2. In the Application the Homeowner complained about breach of section 2.2, 2.4 and 7.2 of the Code. The complaint did not relate to a failure to carry out Property Factor duties.
3. Section 2.2 of the Code states :

"You must not communicate with homeowners in any way which is abusive or intimidating or which threatens them (apart from reasonable indication that you may take legal action). "

Section 2.4 of the Code states :

"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)."

Section 7.2 of the Code states :

"When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel."

Case Management Discussion ("CMD")

4. A CMD took place by teleconference on 18 May 2022. The Homeowner was in attendance. The Factor was represented by Jenny Bole and Holly Wyatt. In advance of the CMD the Homeowner had supplied a copy of their title to the Property. The Factor had provided a written submission dated 11 April 2022.
5. Mr Walker confirmed that he purchased the Property in April 2011. He said that the development of which the Property formed part consisted of around 100 flats and 15 townhouses. He said that there was a grass covered area in the middle of the development. Below that was an underground carpark. He said that there was also above ground parking within the development. He said that Life Property Management were the original factors. The Factor had taken over in 2020. Ms Bole confirmed that the Factor acquired Life Property Management in early 2020 and the two businesses were combined.
6. The Tribunal noted that no copy emails or letters had been produced by Mr Walker to support a complaint under section 2.2 of the Code. The Tribunal asked Mr Walker to explain his complaint under section 2.2. He said that David McAllister of the Factor was abusive on the telephone. He said that when he asked him about the change in the allocation of costs for the underground carpark Mr McAllister was dismissive and said he was not required to communicate with homeowners about the change. He said that Mr McAllister was unprofessional. He said that Mr McAllister hung up the phone on him. He said that Mr McAllister ignored his phone calls and emails. Ms Wyatt said that she was Mr McAllister's line manager and she sat next to him in the office. She said that she had never heard him being abusive or intimidating. She said that the Factor reception had not attempted to put calls through to her from Mr Walker. Mr Walker stated when he phoned reception he was always put through to Mr McAllister and was told it was he who managed the development.
7. The Tribunal asked Mr Walker if he received a written statement of services ("WSS") from the Factor. He said that he did not. Ms Bole said that when the Factor merged

with the previous factor the WSS was notified to homeowners. Mr Walker would have been sent this by email with a link to the WSS. She said that it was also available on the website and the Factor's portal for the development. Mr Walker said that he received bills from the Factor by email. He said he did not recall receiving the WSS. He said he does not always open links on emails.

8. The Tribunal asked Mr Walker to explain his complaint under section 2.4 of the Code. He said that the Factor had changed the procedure for applying charges for the underground carpark. He said that up until June 2021 no townhouse owners had access to the underground carpark. He said that townhouse owners were not allowed to use the underground carpark. He said that he had asked to use it when he acquired the Property in 2011 but was told access was for flat owners only. He said that the Factor did not consult with homeowners before changing the arrangements for the underground carpark.
9. The Tribunal asked Mr Walker if any of the parking spaces within the development, whether above or below ground, were designated for individual flats or townhouses. He said that they were not. He said that owners of flats were free to use parking spaces above and below ground. He said that the Factor had offered to supply him with a fob to access the underground carpark but at a cost of £75. Ms Wyatt told the Tribunal that there was a letter to all homeowners on 8 June 2021 explaining the changes regarding charges for the underground carpark. She said this was sent to Mr Walker by email as he had expressed a preference to receive communications by email. Mr Walker said he did not recall receiving a letter by email on 8 June 2021. He said he did not recall expressing a preference to receive communications by email although that was the way he received bills from the Factor.
10. Ms Wyatt said that it was brought to the attention of the Factor by owners of townhouses that their title permits them to use the underground carpark. She said that the Factor had checked several sets of titles for both flats and townhouses and they were all in the same terms. She said that the deed of conditions registered on 9 June 2008 appeared to apply to all of the properties within the development.
11. As regards section 7.2 of the Code, Mr Walker said that he was not made aware of the complaints procedure. The Tribunal referred to the letter produced by the Factor dated 9 December 2021. Ms Wyatt said that this letter was sent to Mr Walker as an attachment to an email. Mr Walker said that his complaint under section 7.2 was that this was sent as an email and not as a hard copy letter. He said that whilst the letter explained that Mr Walker's complaint could be escalated to the Housing and Property Chamber (with the address and web address being provided) it did not provide detailed advice about how to complain.
12. The Tribunal noted that Mr Walker did not complain about breach of duty by the Factor. He confirmed that was correct.
13. The Tribunal adjourned briefly to discuss matters and then reconvened. The Tribunal asked Mr Walker to explain his understanding of the title to the Property as regards

the underground carpark. He said that the title says he only has to pay for common areas if they are unrestricted. He said that access to the underground carpark was restricted as he does not have a fob and therefore he does not have to pay for the underground carpark. The Tribunal asked Mr Walker to point to the specific wording in the title on which he relied. Mr Walker directed the Tribunal to the Deed of Conditions registered on 9 June 2008 part II section 6(v). The Tribunal asked Mr Walker if he would use the underground carpark and be content to pay for its maintenance if he was provided with a fob. He said that he would use the underground carpark in those circumstances and pay for maintenance.

14. The Tribunal asked Parties if it was accepted that the Deed of Conditions registered on 9 June 2008 (“Deed of Conditions”) applied to all flats and townhouses within the development. Both Parties confirmed that was the case. The Tribunal asked Parties if it was accepted that there were no parking spaces allocated for the exclusive use of particular flats or townhouses, above or below ground, within the development. Both Parties confirmed that was the case.
15. The Tribunal expressed the view that they had sufficient material before them to make a decision without the need for a further hearing and asked Parties if they were content for the Tribunal to do so or whether there was further information that they wished to place before the Tribunal before a decision could be made. Both Parties said that they were content for the Tribunal to proceed to make a decision without a further hearing.

Findings in Fact

1. The Homeowner is the proprietor of the Property.
2. The Factor performs the role of property factor at the development.
3. The Property is a townhouse within a development containing a number of flats and townhouses. Within the development there are carparking spaces above and below ground.
4. The Deed of Conditions registered on 9 June 2008 applies to the Property.
5. There are no carparking spaces allocated for the exclusive use of particular flats or townhouses, above or below ground, within the development of which the Property forms part.

Findings in Fact and Law

1. The Homeowner’s title to the Property includes a pro indiviso share along with the proprietors of the other dwellinghouses within the development of which the Property forms part in and to the Mutual Areas as that term is defined.
2. The definition of Mutual Areas is set out in the Deed of Conditions and includes the carparking spaces used in common but not allocated exclusively to any proprietors.

3. The Homeowner has been conveyed an interest in the underground carpark.
4. The Homeowner is obliged to contribute to the costs of managing, maintaining, repairing and where necessary renewing the underground carpark.

Tribunal Findings and Reasons for Decision

16. As regards the complaint under section 2.2 of the Code the Tribunal determined that there had been no breach of the Code. No evidence had been put before the Tribunal which established that the Factor had communicated in a way which was abusive or intimidating. The Tribunal also noted that a complaint under this section had not been notified to the Factor before the application was made to the Tribunal as is required in terms of section 17(3) of the 2011 Act.
17. As regards the complaint under section 2.4 of the Code the Tribunal the Tribunal determined that there had been no breach of the Code. The Homeowner's complaint in the Application was that he was being charged for maintenance of the underground carpark to which he did not have access. When he had not been charged for cost associated with the underground carpark previously. If the charges were in addition to charges for core services then there may be a basis for complaint under section 2.4. The Tribunal took the view however that the cost of maintenance of the underground carpark was a core service. The Property Factor were correcting a misinterpretation of the Deed of Condition and had informed owners of this. In those circumstances there was no requirement to consult with homeowners. The Tribunal reached this view having considered the terms of the Homeowner's title to the Property.
18. The title is registered under title number MID134587 and is described as follows :

"Subjects within the land edged in red on the title plan being 7 Glenarm Place, Edinburgh EH6 4TQ tinted brown on the plan with the front and rear garden tinted pink on the said plan; together with (one) a pro indiviso share along with the proprietors of the other dwellinghouses within the Development known as Site Q, Western Harbour, Edinburgh in and to the Mutual Areas; declaring the phrase "Mutual Areas" has the meaning ascribed to it in the Deed of Conditions in Entry 2 of the Burdens Section....."

Mutual Areas is defined in the Deed of Conditions as follows :

"Mutual Areas means the entrance road, the foot pavements, the internal roads and the other hard standing areas.....the car-parking spaces (including visitors car-parking spaces) used in common but not allocated exclusively to any Proprietors; ...and the whole other parts which are used in common by the Proprietors".
19. Part II section 6(i) of the Deed of Conditions provides that each proprietor will be granted a right in common to the Mutual Areas. Parties had told the Tribunal that, as matter of fact, no carparking spaces, above or below ground, had been allocated

exclusively to any proprietor. In those circumstances all of the carparking spaces were available to be used in common.

20. Part II section 6(v) of the Deed of Conditions provides :

“The Proprietors who are conveyed an interest in, or who are permitted to park (whether on an exclusive or mutual basis) in the underground Car Park in terms of their title deeds shall contribute to the whole costs of the management, maintenance, repair and where necessary renewal of the Underground Car Park on a joint and equal basis.”

The Homeowner had been conveyed an interest in the underground carpark in terms of his title. In those circumstances he is obliged to contribute to the cost of managing, maintaining, repairing and where necessary renewing the underground carpark. The Tribunal did not regard the fact that the Homeowner did not possess a fob to gain access to the underground carpark as impacting on the terms of the title. That was a practical measure put in place to maintain security. It did however seem to the Tribunal that in the same way as a key to the Property would have been given to the Homeowner when he acquired title to the Property, he should also have been given a fob to access the underground carpark.

21. As regards the complaint under section 7.2 of the Code the Tribunal determined that there had been no breach of the Code. The Homeowner’s complaint under this section was that the letter of 9 December 2021 had been sent by email rather than hard copy and that it did not provide detailed advice about how to complain to the Tribunal. The Tribunal noted that the Homeowner was content to receive bills by email. Section 7.2 required the communication to be “in writing”. The Tribunal regarded the attachment of a letter to an email as sufficient. The Tribunal noted that the letter of 9 December 2021 provided a note of the Tribunal website and full postal address. The Tribunal regarded the provision of that information as sufficient to comply with section 7.2. The Tribunal also noted that a complaint under this section had not been notified to the Factor before the application was made to the Tribunal as is required in terms of section 17(3) of the 2011 Act.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014 a homeowner or property factor 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.



Legal Member

Date: 19 May 2022