

Housing and Property Chamber

First-tier Tribunal for Scotland



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
by**

Anne Slater, 67 Eastwoodmains Road, Glasgow G76 7HQ (“the Applicant”)

**Trinity Factoring Services Limited, 209-211 Bruntsfield Place, Edinburgh EH10
4DH (“the Respondent”)**

Reference No: FTS/HPC/PF/22/0955

**Re: Property at Princes Court, 19/11 High Riggs, Edinburgh EH3 9BW
 (“the Property”)**

Tribunal Members:

John McHugh (Chairman) and Andrew Murray (Ordinary (Housing) Member).

DECISION

The Respondent has not failed to carry out its property factor’s duties.

The Respondent has not failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

- 1 The Applicant is the owner of 19/11 High Riggs, Edinburgh EH3 9BW (hereinafter “the Property”).
- 2 The Property is located within a development of flats and associated common areas known as Princes Court (hereinafter “the Development”)
- 3 The Development contains two discrete buildings.
- 4 The first building faces onto Lauriston Street and is divided into 20 individual flats. It operates as an “apart-hotel”.
- 5 The second building faces onto High Riggs and is divided into six sections each with its own common stair and lift providing access to individually privately owned flats.
- 6 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.
- 7 The Respondent is the property factor responsible for the management of common areas within the Development.
- 8 At the time of development and sale of the Development, the Developer referred to each of the individual stairs within the High Riggs building by Block names or numbers.
- 9 The Property is located within the High Riggs building.
- 10 The Property is located within postal address No.19 High Riggs which was previously referred to by the Developer as “Block 1” or “Traquair”.
- 11 The Deed of Conditions refers to the whole High Riggs building as “the Block of Flats”.
- 12 The Deed of Conditions makes provision for the costs of repairs and maintenance to common areas of the Block of Flats to be shared among the owners of flats within the Block of Flats.
- 13 The plan forming part of the Applicant’s Land Certificate (and labelled by her as Document 13) does not form part of the Deed of Conditions.
- 14 The plan produced by the Respondent and executed by the authors of the Deed of Conditions is the plan referred to in the Deed of Conditions.
- 15 The property factor’s duties which apply to the Respondent arise from the Written Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
- 16 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 7 December 2012.
- 17 By email of 6 December 2019 to the Applicant’s husband the Respondent set out its position as to the apportionment of common maintenance and repair costs. This was that because the Deed of Conditions referred to the High Riggs building as “the Block of Flats”, repairs relating to that building would be apportioned on a 1/66 basis among all owners of flats within that building.
- 18 The Applicant has, by her husband’s emails of 10 and 12 February 2022, notified the Respondent of the reasons why she considers the Respondent

- has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 19 The Respondent has not unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place by telephone conference on 8 June 2022.

The Applicant was represented by her husband, Alan Slater.

The Respondent was represented at the hearing by George McGuire, Director of Operations and Callum Seale, Property Manager.

No other witnesses were called by either party.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as “the 2011 Act”; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as “the Code”; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Regulations”.

The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Conditions by Tulloch Homes (Tollcross) Limited recorded 6 November 1998, which we refer to as “the Deed of Conditions” and the Respondent’s Service Level Agreement version 5 dated March 2018 which we refer to as “the Written Statement of Services”.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services and the Deed of Conditions are relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 1 C 7 and 3.2; of the Code.

At the hearing, the Applicant's representative accepted that the provisions of Section 1 of the Code, which relate to the content of a Written Statement of Services, are not relevant to the Application.

The element of the Code relied upon in the Application provides:

...SECTION 3: FINANCIAL OBLIGATIONS...

...3.2 Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor."

The Matters in Dispute

The Applicant complains in relation to the following issue:

The methodology adopted by the Respondent for sharing the costs relating to common repairs.

Essentially, the complaint is that the Respondent is allocating all costs relating to any repairs and maintenance of the building facing onto High Riggs equally among the 66 flat owners within that building. The Applicant contends that the correct approach should instead be to allocate costs relating to each individual stair within the building among the flats within that particular stair.

The Development

The Development was carried out by Tulloch Homes Scotland Ltd (“the Developer”).

The Development contains two buildings and common external areas.

The building facing onto Lauriston Street has a single owner and is known as the Knight Residence. It contains 20 flats. It is operated as an apart-hotel. It is not physically joined to the building facing onto High Riggs.

The building facing onto High Riggs is subdivided into six sections. These were originally called Block 1 (Traquair); Block 2 (Hopetoun); Block 3 (Dalmeny); Block 4 (Ariston); Block 5 (Abbotsford) and Block 6 (Crighton) by the Developer.

They now have postal addresses of 19, 17, 15, 13, 11 and 7 High Riggs respectively.

The High Riggs building contains 66 individual flats. No. 19 contains 17 flats; No. 7 contains nine flats and the remaining blocks have ten each.

The Property is located within Block 1 (Traquair) / 19 High Riggs.

Each of these original “Blocks” has its own front door, stairway and corridors and lifts. These serve only the flats within the “Block” and not any other “Block”. No internal access is possible between any two of the “Blocks”.

The Dispute

The parties agree that the Deed of Conditions dictates how common costs should be apportioned but disagree as to how its terms are to be interpreted.

At Clause FIRST of the Deed of Conditions is the following definition:

““Block of Flats” means the building, containing Flatted Dwellinghouses the solum of which is owned jointly by the Proprietors of the Flatted Dwellinghouses within the Block of Flats but excluding, for the avoidance of doubt, the Lauriston Street Block.”

The definitions section also includes:

“Common Parts” in relation to the Block of Flats means those parts and pertinents of the Block of Flats which do not pertain to any flatted Dwellinghouse including without prejudice to the foregoing:

(i) the solum on which the Block of Flats is erected;...

“Flatted Dwellinghouse” means a lower ground floor, ground floor, first floor, second floor, third floor or fourth floor flat or dwellinghouse located in the Block of Flats and owned exclusively by the Proprietor thereof including the interior faces of all structural walls and columns, the whole of any non-structural part of any wall both faces of which are within the bounds of the Flatted Dwellinghouse, one half in thickness of any non-structural part of any wall which forms the boundary of the Flatted Dwellinghouse, the interior screeding, all plasterwork and wall finishes, the false ceilings (if any) and the interior face of the structural ceiling above and the finish of the floor below, any glazing, the interior face of the window frames, the doors and other entrances, frames and fittings for any of the foregoing, and also such water and sanitary fittings, stopcocks, cisterns, radiators, air, water, electricity, gas and other service wires, ducts and apparatus as serve solely the Flatted Dwellinghouse (and “Flatted Dwellinghouses” means each and every Flatted Dwellinghouse)...

“Lauriston Block” means the building, car parking spaces and amenity areas forming part of the Development and shown delineated and hatched blue on the Plan and forming part of the Development...

...References to the male shall include the female and singular shall include the plural.”

The body of the Deed includes the following:

“Clause THIRD...

...Maintenance of Common Parts

Each Flatted Dwellinghouse shall be held by the Proprietor thereof in all time coming under the obligation of jointly with the other Proprietors of Flatted Dwellinghouses in the Block of Flats of upholding and maintaining in good order and repair and from time to time when necessary renewing and restoring the Common Parts and of cleaning, repainting and decorating the said Common Parts... All expenses and charges incurred under the foregoing obligation and of any other work done or

services rendered in respect of the said Common Parts shall be payable by each Proprietor of a Flatted Dwellinghouse in the Block of Flats in equal proportions.”

There are various references at points throughout the Deed to each Flatted Dwellinghouse and *“the Block of Flats of which it forms part”*.

The Applicant’s Argument

The Applicant considers that the term “Block of Flats” is intended to refer to each of the individual stairs, or blocks, within the building of which No.19 forms part.

The Applicant made reference at the hearing to a plan (lodged as Document 13) which the Applicant has treated as the plan accompanying the Deed of Conditions. That plan has on it a Title number MID74427 and shows the whole Development outlined in red. It shows No.19 shaded blue. This was said by the Applicant’s representative to support the contention that references in the Deed to the “Block of Flats” were to only the “block” highlighted in blue.

It appeared to the Tribunal at the hearing that the plan did not relate to the Deed of Conditions. The Applicant’s representative explained that he had obtained the plan from Registers of Scotland as part of his enquiries of them. The Respondent was able to confirm that it held a full copy of the Deed of Conditions which incorporated a plan. That plan was different to Document 13.

It was agreed that the hearing would be continued to allow production of the Deed of Conditions and plan by the Respondent and that both parties would have a further seven days to make any written submissions arising out of the plan. A Direction to that effect was issued to the parties.

The Respondent duly produced the Deed and plan on 9 June 2022. This was copied to the Applicant’s representative.

Written representations were received from the Applicant’s representative on 16 June 2022. These representations appear in part to extend to matters beyond the issue of the plan itself and we have not had regard to them since the parties were directed only to address matters arising out of the plan (having had the opportunity to make their fuller arguments at the hearing). The Applicant’s written representations assert that the plan produced by the Respondent is “not the correct plan referenced in the applicant’s deed of conditions”. The Applicant regards the “correct Title plan” to be that relating to MID67727 which is the Applicant’s own title to the Property. She has produced a copy of her Land Certificate which attaches a plan. That plan is similar to Document 13 but is not identical.

The Applicant has also highlighted that the Deed contains various references which appear to be inconsistent with the definition of the Block of Flats referring to the whole High Riggs building.

She highlights the references by the original developer to each of the stairs forming part of the building as “blocks”.

She also highlights that the term Block 1 was employed by the Developer in an original 1998 disposition being the first disposition of the Property.

She further highlights that on her Land Certificate for the Property the solum of only No.19 is highlighted in blue on the accompanying plan.

She notes that the definition of Block of Flats in the Deed refers to the solum of the building being owned jointly by the proprietors of the flatted dwellinghouses within the Block of Flats. Given that the ownership position is as per the Land Certificate ie the Applicant (and presumably the other owners of flats within no.19) owns only the solum of No.19 and not the solum of the remainder of the High Riggs building. This is suggestive of the definition of "Block of Flats" in the Deed of Conditions intending to refer only to No.19.

The Applicant also highlights the provisions of the Tenements (Scotland) Act 2004 which define the boundaries of a tenement.

The Deed of Conditions states that the Developer is "about to erect blocks of flatted dwellinghouses". The Applicant notes the use of the plural and is of the view that this must indicate that the Developer was referring to the various stairs within what she considers to be the only block of flats being erected (the High Riggs building). She regards the other building being erected, the Lauriston Street Block, as not being one of flatted dwellinghouses as it was, she says, to be operated by a single owner as provider of accommodation.

The Applicant also notes the definitions section which allows references to the singular to include the plural.

She also observes the use of references at points throughout the Deed to each Flatted Dwellinghouse and "*the Block of Flats of which it forms part*" (emphasis added), which references would appear to be unnecessary if the reference is only to the whole High Riggs building and not to the individual stairs within it.

The Respondent's Argument

The Respondent argues primarily that the definition of Block of Flats in the Deed of Conditions refers to the whole High Riggs building. It also argues that in its charging arrangements it has followed the instructions of the owners association.

Decision

The Deed of Conditions

The starting point in seeking to establish the meaning of the Deed of Conditions is the wording of the Deed itself. If the wording is clear, there is no need to look to the content of other documents.

We note the use of the singular “Block of Flats” in the definitions section. The wording of the definition refers to a building (singular). The definition is clear on its face and appears to apply to the whole High Riggs building.

The definition refers to its solum being jointly owned by the Proprietors of the Flatted Dwellinghouses within the Block of Flats. That seems at odds with the solum as shown on the Applicant’s Land Certificate which shows only No.19 as being the solum owned by the Applicant. However, we note that “Common Parts” is defined in the Deed as “the solum on which the Block of Flats is erected” and that Clause THIRD notes that “each proprietor of a Flatted Dwellinghouse shall have an equal part ownership or pro indiviso right of property in common with the other Proprietors of the Flatted Dwellinghouses in the Block of Flats to the Common Parts.”

There is no overt treatment anywhere within the Deed of the separate stairs within the High Riggs building as separate entities nor any reference to them as individual “blocks”.

As noted above, the plan accompanying the Deed does not represent each stair within the High Riggs building differently.

The Applicant highlights references within the Deed itself which might suggest that a different meaning should be applied to the term “Block of Flats”. For example, on some occasions the Deed refers not just to the Block of Flats but to “the Block of Flats of which [a Flatted Dwellinghouse] forms part”. Those words would be unnecessary if there is only one Block of Flats. However, equally, those words do not necessarily detract from the defined meaning of “Block of Flats” ie while the words may not add anything, neither do they jar with the defined meaning in that each Flatted Dwellinghouse does form part of the Block of Flats. It is stretching matters too far to derive from these additional words “of which it forms part” the proposition that (i) both the reference to “Block of Flats”, although being initial capitalised and therefore the defined term, is intended to be to “block of flats” so that reference is being made to each individual stair within the building and (ii) that “of which it forms part” again refers to the stair since it could equally be said that any Flatted Dwellinghouse forms a part both of the whole High Riggs building and of the stair to which it belongs.

Clause FOURTH (5) makes reference to “any Flatted Dwellinghouse or Block of Flats within which it is erected”. We would reach the same conclusion for the same reasons on this different form of words as we have above in relation to the words “of which it forms part”.

We do not derive any assistance from the wording in the definitions section which provides that references to the singular shall include the plural. We do not consider that this is apt itself to modify the defined term “Block of Flats” such that it reads “Blocks of Flats”. We consider that the reference is only intended to apply to give inclusive meaning to the words of the Deed where appropriate and not itself to be read into a defined term itself to change its meaning. Put another way, the Block of Flats must either be singular or plural; it cannot be both and the definitions section cannot be used simply to change the existing wording permanently to a different meaning.

We note that in the introduction to the Deed it is narrated “WHEREAS we are about to erect blocks of flatted dwellinghouses” (emphasis added). The Applicant seeks to derive assistance from this in that there was to be only one such block - the Lauriston Street Block being intended for different use – and so “blocks” plural must indicate the sub-divisions within the new High Riggs building. It should be noted however that the lower case is used: “flatted dwellinghouses” and so the term is being used in a general sense and not by reference to the defined term with initial capitals “Flatted Dwellinghouse”. “Flatted Dwellinghouse” is defined as being located within the Block of Flats. We note also that the Deed at Clause SECOND notes that “The Lauriston Street Block shall be used solely for the purpose of erection thereon of a building of flatted dwellinghouses or of an hotel or serviced residential accommodation...” It therefore appears to us that the inference which the Applicant wishes to be drawn may not properly be drawn.

Clause THIRD (6) makes a reference to “a Block of Flats” (emphasis added) as opposed to the Block of Flats. That is out of keeping with the idea that there is only one Block of Flats but there is no reasonable basis to assume that this single reference (contained within the section of the Deed explaining the procedure for the Residents Association to give notice to an individual owner that it considers maintenance to be necessary) is an attempt to introduce the concept of multiple Blocks of Flats. The reference might just as well be in error ie “a” was used instead of “the”.

The Plan

As regards the plans which have been produced by the Applicant (originally Document 13 and latterly the plan from her Land Certificate) and referred to by her as the plan accompanying the Deed of Conditions, we note that the plan produced by the Respondent as part of the Deed of Conditions differs from Document 13 and the Land Certificate plan. We find that the plan produced by the Respondent is the correct plan forming part of the Deed. It is marked as being such and signed by the granters of the Deed to this effect.

The copy provided is in black and white but appears to show all of the High Riggs building in the same colour. It shows no apparent variation among the treatment of individual stairs or blocks within the building although it does, as the Applicant notes, show the High Riggs building in a shape consistent with the construction of separate stairs within the building.

We therefore do not find any support from the content of the plan for the argument that individual stairs within the High Riggs building are to be treated as separate blocks.

The plan which forms part of the Applicant’s Land Certificate shows the extent of her ownership and of the Development. It is not the plan which accompanied the Deed of Conditions and cannot be treated as such. No regard can be had to that plan (nor to Document 13 the precise origins of which are not clear) in determining the meaning of the Deed of Conditions.

Extraneous Sources

Having established that the meaning of the Deed can be ascertained from its own terms, there is no need or indeed proper basis to look at extraneous sources such as the original disposition of the Property; the Applicant's Land Certificate; or to other documents which might have used the term "Block" to refer to the various stairs within the High Riggs building. Nor is there any need to consider the instructions given by the Owners' Association to the Respondent or the charging practices which have in fact been adopted by the Respondent over the years. We do not identify the provisions of the 2004 Act being of relevance to the question.

In considering the practical result of the construction of the Deed at which we have arrived, we would observe that there is nothing unusual or untoward.

The construction which the Applicant favours would have led to the cost of common maintenance and repairs relating to the part of the High Riggs building where her flat is situated being shared only among owners within that same part, with her having no responsibility for a share of costs for common repairs to other parts of the building. The construction which we have found to apply leaves her paying for maintenance and repairs to common parts of the whole building including those parts more remote from where her flat is located but, on the other hand, she benefits from the owners of flats in those other parts of the building paying towards the costs of repairs within her stair. That does not seem a particularly surprising result in the context of a single building in shared ownership with common parts.

We have identified no breach of the Code or of property factor's duties and no Property Factor Enforcement Order ("PFEO") requires to be made.

APPEALS

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.



JOHN M MCHUGH
CHAIRMAN

DATE: 23 June 2022