

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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

**STATEMENT OF DECISION:** in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”).

Reference number: FTS/HPC/PF/22/2024

Re: Property at 28 Cellarbank and 4 Cellarbank, Edinburgh. EH16 5GT (“the Properties”)

The Parties:

Mr. William Rutherford residing at 45b, Inverleith Gardens, Edinburgh EH3 5PR (“the Homeowner”)

Trinity Factoring Services Ltd., having a place of business at 209, Bruntisfield Place, Edinburgh, EH10 4DH (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) and Ahsan Khan (Ordinary Member)

### Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2021 (“the 2021 Code”) at Section 1 at 1.2, Section 2 at 2.3 and Section 3 at 3.8

### Background

1. By application received between 27 June 2022 and 22 July 2022 (“the Application”) the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the 2021 Code. The Application comprised details of the nature of the alleged breaches, copy email correspondence between the Parties dated between 2 June 2022 and 25 June 2022 and copy formal intimation of the complaints to the Property Factor.
2. On 10 August 2022, a legal member of the Chamber with delegated powers of the Chamber President accepted the Application, referred it to the Tribunal and

issued a Direction directing the Property Factor to lodge a copy of its Written Statement of Services by 7 September 2022.

3. Although the Chamber practice is that a case management discussion (CMD) should be fixed as the initial procedure, a Hearing by telephone conference call was fixed for 19 October 2022 at 10.00 am and was intimated to the Parties by letter dated 17 August 2022. The letter of intimation advised the Parties that written representations must be lodged by 7 September 2022 and instructed Parties how to lodge productions.
4. By letter dated 5 September 2022, the Property Factor submitted a bundle of productions comprising invoices relating to properties other than the Properties, copy email correspondence between the parties to 18 July 2022, copy contractor invoices relating to works instructed at the Properties and a copy of their Written Statement of Services.
5. By Direction dated 23 September 2022, the Tribunal directed the Property Factor to re-submit the documents listed on the Inventory of 17 items in one tabbed bundle, consecutively numbered, with a contents page which clearly identifies each production; to provide a written explanation of the purpose and relevance of the submission of the additional productions, being utility company invoices for properties other than the Properties which have been submitted without an inventory and, in the event that the productions referred to are of relevance, to re-submit the documents with an Inventory in one tabbed bundle, consecutively numbered, with a contents page which clearly identifies each production and that by close of business on 12 October 2022. The Property Factor complied with the Direction on 11 October 2022 and re-submitted the productions as requested.
6. The Homeowner did not submit any further productions or written representations.
7. By email dated 26 September 2022 the Property Factor wrote to the Tribunal requesting a new Hearing date as a number of senior staff would be on holiday 17 – 21 October due to school holidays. The Tribunal sought the views of the Homeowner who objected strongly to a postponement. The Tribunal had regard to the nature of the Application which is not complex and, had regard to Rule 2(e) of the Rules which states that delays should be avoided. The Tribunal replied to the Property Factor on 28 September 2022 by email asking if any member of staff could attend or if the Property Factor could submit written representations. In that email the Tribunal referred to the Hearing in error as a “case management discussion”. No response was received from the Property Factor and so the Chamber administration wrote to the Parties to confirm that the proceedings would go ahead on 19 October 2022 as originally intimated.

## Hearing

8. The Hearing took place on 19 October 2022 at 10.00 by telephone conference call. The Homeowner took part and was not represented. The Property Factor did not take part and was not represented. The Homeowner asked the Tribunal to

clarify if the proceedings were to be a Hearing or a case management discussion and advised that he was ready and prepared to proceed with a Hearing. The Tribunal adjourned briefly to consider the intimations given to the Parties in terms of the Rules and to the effect, if any, of reference to a case management discussion in the Tribunal's email to the Property Factor. The Tribunal noted that a Hearing had been properly intimated in terms of Rule 24 and that there had been no intimation of a case management discussion in terms of Rule 17. Notwithstanding the reference to case management discussion in its email, the Tribunal was satisfied that the proceedings as intimated to the Property Factor was a Hearing. The Tribunal noted that the Property Factor mentioned "hearing" in their postponement request and so took the view that the Property Factor had expected to attend a Hearing.

9. The Tribunal then considered if there was any prejudice to the Property Factor in proceeding with a Hearing in their absence. The Tribunal had regard to the productions lodged by the Property Factor and to a short statement lodged by them explaining their position. The Tribunal took the view that the Property Factor, having been made aware of the Hearing, having had an opportunity to set out their position and the burden of proof resting with the Homeowner, there was no prejudice to proceeding in the Property Factor's absence.
10. The Homeowner confirmed that the crux of his complaint was the way in which the Property Factor has dealt with refunding sums due to him as a result of the Property Factor terminating their contract with the homeowners, the transition to a new factor and the lack of response from the Property Factor in providing documentation. The Tribunal dealt with the Homeowner's complaints in turn under the Code headings as set out in the Application.

### **Written Statement of Services**

The 2021 Code at Section 1.2 states: *"A property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners: within 4 weeks of the property factor agreeing in writing to provide services to them; or the date of purchase of a property (the date of settlement) of which they maintain the common parts. If the property factor is not notified of the purchase in advance of the settlement date, the 4 week period is from the date that they receive notification of the purchase; identifying that they have provided misleading or inaccurate information at the time of previous issue of the WSS.at the earliest opportunity (in a period not exceeding 3 months) where: substantial change is required to the terms of the WSS. Any changes must be clearly indicated on the revised WSS issued or separately noted in a 'summary of changes' document attached to the revised version."*

11. The Homeowner's complaint is that the Property Factor failed to provide a Written Statement of Services ("WSS") for either of the Properties when these were purchased in 2017 and 2019. He stated that it was not possible for him to prove a negative. With reference to the Property Factor's email of 30 June 2022 which states that the WSS were issued on 19 April 2017 and 16 July 2019, the

Homeowner stated that he had received emails but that no WSS were annexed. The only other correspondence received after acquiring the Properties was the Property Factor's invoices.

## **Communications and Consultation**

The 2021 Code at Section 2.3 states: *"The WSS must set out how homeowners can access information, documents and policies/procedures. Information and documents can be made available in a digital format, for example on a website, a web portal, app or by email attachment. In order to meet a range of needs, property factors must provide a paper copy of documentation in response to any reasonable request by a homeowner."*

12. The Homeowner's complaint is that the Property Factor failed to comply with his request to have copies of quotes, invoices and receipts for works affecting the Properties. The Homeowner referred the Tribunal to his email of 22 June 2022 requesting these and to the Property Factor's reply of 24 June 2022 stating that could view these at the Property Factor's offices. The Homeowner maintained that the effect of Section 2.3 is that he has an absolute right to have copies of all quotes, invoices and receipts requested by him. The Homeowner maintained that by failing to send hard copy documents, the Property Factor, in effect, had refused to send them. He stated that part of the information requested by him had now been lodged by the Property Factor as part of their productions.

## **Financial Obligations**

2021 Code at Section 3.8 states *"A property factor must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on the sale of the property)."*

13. The Homeowner explained that he has paid his factoring accounts annually advance in January of each year, the last account being paid in January 2022 for the year to January 2023. The payment covers the management fee, buildings insurance and a projected sum for repairs and maintenance, with the accounts being reconciled at the year end. The Homeowner's complaint in this regard is that the Property Factor has no procedure to refund homeowners who have paid in advance and wish a refund. He maintained that the Property Factor ought to make an immediate refund of sums paid in advance and should not retain funds for a final accounting. He maintained that it was unreasonable for the Property Factor to rely on Section 3.5 of the 2021 Code which allows three months for account reconciliations. The Homeowner's view is that the Property Factor should have a policy statement to cover refunds of all accounts paid in advance regardless of the reason for the request for a refund. His position is that the sale of property reference is an example only and that other situations ought to be covered. He did not accept that the WSS sets out a procedure to refund advance payments and did not accept that the Property Factor's emails of 2 June 2022 - 20 June 2022 set out a procedure. The Homeowner accepted that a partial refund was made in September 2022 and explained that he awaits a refund for

insurance premia. His position is that the terms of Section 3.8 is that an immediate refund should be made and did not accept that the Property Factor could rely on Section 3.5 of the 2021 Code which allows a three-month period to reconcile accounts.

### **Summing Up**

14. The Homeowner gave a brief summation of his case based on his evidence. He stressed that he does not trust the Property Factor and that the Property Factor's actions or lack thereof has meant that he is out of pocket in the sum of £800.00 for the new factor and building insurance. He stated that he seeks compensation for the time spent pursuing the Property Factor, he wishes the Property Factor to issue him with an apology and wishes the Property Factor to be ordered to amend its procedures to comply with the 2021 Code.

### **Findings in Fact.**

15. The Tribunal had regard to the Application in full, the Property Factor's productions and to the Homeowner's evidence at the Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.

16. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;
- ii) The Homeowner is a homeowner in terms of the Act;
- iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 of the Act, being the duty to comply with the statutory codes of conduct;
- iv) The Property Factor is obliged to issue a WSS to the Homeowner and, on the balance of probabilities, did so in April 2017 and July 2019;
- v) The Property Factor has a portal on which information is available;
- vi) The Homeowner pays the Property Factor's invoices annually in advance;
- vii) In January 2022, the Homeowner paid the Property Factor's invoice to January 2023;
- viii) By letter dated 30 May 2022, the Property Factor terminated its factoring contract with effect from 30 June 2022;
- ix) Having paid the Property Factor's invoices to January 2023, the Homeowner is entitled to a refund of charges and costs for the period from 1 July 2022 to January 2023;
- x) The Homeowner requested immediate refund of the sums due to him;
- xi) The Property Factor advised the Homeowner that that they would issue a final account no later than three months after the contract end date;
- xii) The Property Factor partially refunded the Homeowner in September 2022, retaining the sum attributed to the buildings insurance premia.

### **Issues for Tribunal**

17. The issues for the Tribunal are: has the Property Factor breached those parts of the 2021 Code as complained of in the Application.

## Decision of the Tribunal with reasons.

18. Section 19 of the Act states: “(1) *The First-tier Tribunal must, in relation to a homeowner’s application referred to it ... decide (a) whether 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) if so, whether to make a property factor enforcement order.*” Therefore, the Tribunal proceeded to make a decision in terms of Section 19 (1)(a) of the Act.
19. The 2021 Code at Section 1.2. The Homeowner’s complaint is that the Property Factor failed to provide a Written Statement of Services (“WSS”) for either of the Properties when these were purchased in 2017 and 2019. The Property Factor’s position is that the WSS were issued on 19 April 2017 and 16 July 2019. Although the 2021 Code was not in force on those dates, the 2012 Code had similar provisions. The issue for the Tribunal is which scenario is more likely to have occurred on the balance of probabilities and on the evidence before it. The Homeowner did not produce the emails he referred to and so the Tribunal has no conclusive information on whether the WSS were attached to them or not. On the balance of probabilities, it is the Tribunal’s view that the Property Factor did issue the WSS and so the Tribunal decided that the Property Factor has complied with this part of the 2021 Code.
20. The 2021 Code at Section 2.3. The Homeowner’s complaint is that the Property Factor failed to comply with his request to have copies of quotes, invoices and receipts for works affecting the Properties and his firm position is that he has an absolute right to have copies of all documents requested by him. It is the Tribunal’s view that there is nothing in Section 2.3 which supports this assertion. Section 2.3 sets out guidance on how to make information available and accessible: it does impose an obligation to provide information unless reasonably requested. The Homeowner relied on his email of 22 June 2022 which states “*I wish to see ASAP all quotes ....*”. He does not ask for copies of documents and does not say why it is reasonable for him to expect to receive copy documents. It is the Tribunal’s view that the Property Factor’s offer to allow inspection of the documents, which amount to several hundred pages, at a mutually convenient time is appropriate and reasonable.
21. 2021 Code at Section 3.8. The Homeowner’s position is that the Property Factor has no procedure to refund homeowners who have paid in advance and wish a refund. He did not accept that the WSS sets out a procedure to refund advance payments, albeit in respect of the sale of a property, and did not accept that the Property Factor’s emails of 2- 20 June 2022 set out a procedure. He maintained that this part of the 2021 Code obliges the Property Factor to have a procedure to make an immediate refund of sums paid in advance and that they should not retain funds for a final accounting. The Tribunal do not agree with this position. The Tribunal is satisfied that the WSS sets out a refund procedure and that the Property Factor’s email set out their procedure for dealing with refunds which are

not related to property sales. The Tribunal agrees with the Property Factor that the correct approach is as set out in Section 3.5 of the 2021 Code which allows three months for account reconciliations. Accordingly, the Tribunal finds no failure to comply with this part of the 2021 Code.

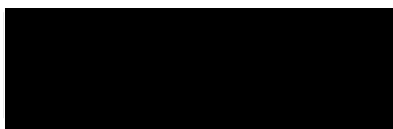
22. Having made a finding of no failure to comply, the Tribunal was not required to consider an order in terms of Section 19(1) (b) of the Act.

23. The decision is unanimous.

24. Although not part of this application, the Tribunal understands from the Homeowner that there is a dispute between the new property factor and the Property Factor as to whether the building insurance premia have been paid to the end of the year. The Tribunal urges the Property Factor to clarify the position with the new property factor and the homeowners as soon as possible.

## **Appeal**

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.



Karen Moore,

Chairperson

27 October 2022