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

Alan Finlayson, 84/6 Chesser Crescent, Edinburgh EH14 1SE ("the Applicant")

Ross & Liddell, Greenbelt Group Limited, McCafferty House, 99 Firhill Road, Glasgow G20 7BE ("the Respondent")

Re: 84/3-6 Chesser Crescent, Edinburgh EH14 1SE ("the Property")

Chamber Ref: FTS/HPC/PF/19/4002

Tribunal Members:

John McHugh (Chairman) and Elaine Munroe (Ordinary (Housing) Member).

DECISION

The Respondent has 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 flats at 84/3; 84/4; 84/6 and 86/4 Chesser Crescent, Edinburgh EH14 1SE.

2 The Applicant was, until 12 June 2019, the owner of 84/5 Chesser Crescent, Edinburgh EH14 1SE.

3 The Property is located within a larger Development of purpose built flats within multiple blocks and shared amenity areas ("the Development").

4 The Respondent acts as the factor of the Development.

5 On 25 September 2019 the Applicant wrote a letter to the Respondent. This complained of a delay in the provision of the final account for flat 84/5; requested a copy of the Written Statement of Services and asked for details of allegations by the Respondent that the Applicant had employed threatening language in his dealings with the Respondent's staff.

6 The Respondent received the letter of 25 September on 1 October 2019.

7 The Respondent responded initially by formal acknowledgment letter of 3 October 2019 and then by substantive letter dated 30 October 2019.

8 The letter of 30 October 2019 enclosed a copy of the Written Statement of Services.

9 The letter of 30 October 2019 indicated that a cheque and final account had been sent to the Applicant's solicitor on 19 September 2019.

10 The letter of 30 October 2019 declined to discuss the issue of the allegations of threatening language and advised that that matter had already been dealt with in previous correspondence.

11 The Applicant was dissatisfied with the Respondent's response.

12 The Respondent's Director, Alexander Cassidy wrote to the Respondent a letter dated 29 September 2016 which advised that the Respondent would only allow communication by the Applicant in the form of letter addressed to Mr Cassidy.

13 The letter of 29 September 2016 indicated that this policy was being adopted because of racist and abusive language used by the Applicant towards the Respondent's staff in emails and in telephone conversations.

14 The Applicant had sent an email to an employee of the Respondent on 13 May 2016 in which he indicated that he would book a room in a hotel and invited her to visit him.

15 The Applicant had sent a further email to the same employee on 29 September 2016 in which he had written that it was "time to get back to Scouseland". The employee originated from Liverpool.

16 The employee had reported the content of these two emails to the Respondent's director, Alexander Cassidy. She reported to him that she had been concerned by them.

17 Section 7ii of the Written Statement of Services specifies that an apportionment fee will be charged to owners at the time of the sale of their property.

18 On 20 May 2019 the Respondent wrote to the Applicant's solicitor who was instructed in the sale of the Property to advise that an apportionment fee would be charged.

19 On 19 September 2019 the Respondent wrote to the Applicant's solicitor enclosing a final account and cheque.

20 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor.

21 The Applicant has, by his correspondence, including that of 9 January 2020 2019, notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its obligations to comply with its duties under section 14 of the 2011 Act.

22 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 15 June 2022.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by Francesca Glendinning, solicitor and by Alexander Cassidy, one of its directors.

Neither party called additional witnesses.

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 1 November 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 the Respondent’s Service Level Agreement dated June 2019 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 does not complain of failure to carry out the property factor’s duties.

The Code

The Applicant complains of failure to comply with Sections 1 bullet point 3; 1.1a.D.m.; 2.5; 3.1 and 3.2 of the Code.

The elements of the Code relied upon in the Application provide:

"SECTION 1: WRITTEN STATEMENT OF SERVICES

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel

for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies);*
- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.*

1.1a For situations where the land is owned by the group of homeowners

The written statement should set out:

A. Authority to Act

a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided

c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements

e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
j. how often you will bill homeowners and by what method they will receive their bills;
k. how you will collect payments, including timescales and methods (stating any choices available).Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements

l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure (see Section 7: Complaints resolution);
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest

o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement

p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination…

*…**SECTION 2: COMMUNICATION AND CONSULTATION…***

… 2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)…

*…**SECTION 3: FINANCIAL OBLIGATIONS…***

… 3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

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 factual matters complained of relate to:

(1) Delay by the Respondent in providing a Written Statement of Services to the Applicant.

(2) Refusal by the Respondent to Communicate with the Applicant by electronic means.

(3) Arrangements concerning charges on the sale of a property.

(4) Allegations that the Applicant had used threatening language.

We deal with these issues below.

(1) The failure of the Respondent to provide a Written Statement of Services

The Applicant complains that he wrote to the Respondent on 25 September 2019 requesting a copy of the Respondent's latest written statement of services. The Respondent acknowledged having received his letter on 1 October 2019 but did not provide the Written Statement of Services until it issued a letter dated 30 October 2019 which the Applicant received on 6 November 2019.

The obligation under Section 1 of the Code is to provide the Written Statement of Services within four weeks of it being requested ie by 29 October 2020 but that obligation only arises during the first year of the factor being registered, which is not the situation here.

We note that the Respondent advised that its Written Statement is available online. The Applicant advises that he was unable to download it.

We accept the evidence of the Respondent that its Written Statement of Services was first issued to the Applicant in 2012. The Applicant acknowledges that he has asked for and received a copy of the Written Statement every year since then.

The Applicant also complained of a delay in the response to his complaint letter. However, the Written Statement of Services allows a total of 31 working days, 10 working days for acknowledgement and a further 21 working days for a substantive response. An acknowledgement letter was issued by the Respondent on 3 October and the substantive response on 30 October. Therefore both responses fell within the time limits specified in the Written Statement.

We identify no breach of the Code.

(2) Refusal by the Respondent to Communicate with the Applicant by electronic means

The Applicant complains that the Respondent insists that it will only receive communications from him by post addressed to one of its directors. It refuses to accept emails from him. He finds this inconvenient and in breach of Code Sections 1.1aD.m. and 2.5.

The Respondent put this measure in place on 29 September 2016 following upon an email addressed to the Respondent's staff member, Rita Glendenning advising her that it was "time to get back to Scouseland".

In an earlier email of 13 May 2016 to Ms Glendenning he indicated that he was booking a room in a hotel and had invited her to visit him which, his email stated "might be more fun than staying in the office until midnight to keep the customer satisfied".

Ms Glendinning had brought both emails to the attention of the Respondent's Director, Alexander Cassidy. Mr Cassidy reported that Ms Glendenning had been concerned by their content.

Mr Cassidy explained that the Respondent wished to protect its staff from inappropriate messages. The new policy was communicated to the Applicant by a letter dated 29 September 2016 written by Mr Cassidy.

The Applicant's view is that his emails were not offensive. At the time of his 13 May email, he reported as having been on good terms with Ms Glendenning. He rejected any suggestion that his invitation might reasonably have been interpreted by a reader as an invitation for an encounter of a sexual nature.

The Applicant reported that his relationship with Ms Glendenning had deteriorated by the time of his 29 September email. He held Ms Glendenning responsible for communicating the content of a letter he had written to the block insurers which had resulted in refusal of a claim and adverse response by the insurers as to his conduct. That was why his email had attached a music file called "Back Stabbers". He was aware that Ms Glendenning originated from Liverpool and that was why he had made the comment about her returning to Scouseland. He did not think that the Respondent should have regarded that comment as either racist or offensive. He did not think that the Respondent was entitled to apply a policy restricting his right to communicate by email. He inferred from the content of Code Section 2.5: "*You must respond to enquiries and complaints received by letter or email*

within prompt timescales" that homeowners had an absolute right to communicate with property factors by email. Code Section 1.1aD.m. contains similar wording.

We agree with the Respondent's position that although the Code makes reference to complaints being made by email, the Code does not provide a positive general obligation upon factors to allow communication by email, far less prevent a factor from refusing to receive emails from those homeowners who it considers to have sent inappropriate email communications.

We find there to have been no breach of the Code in this regard.

(3) Arrangements concerning charges on the sale of a property

The Applicant sold one of his flats (84/5) on 12 June 2019. He complains that the Respondent took until early October to send him a final invoice; statement of account and repayment of his float contribution. He had had to chase up the issue himself by letter of 25 September 2019. He discovered that the documents had been sent by the Respondent to his solicitor on 19 September 2019 (although that letter was not received by the Applicant's solicitor).

He is unhappy that the Respondent has charged an administration fee of £80 plus VAT for dealing with the apportionment of costs at the time of the sale. He complains that there has been a breach of Code Section 3.1 which requires financial information to be provided within three months of the termination of the account.

The obligation in Code Section 3 is to provide the financial information within three months "*unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)".*

Three months in this case would be until 12 September 2019.

The Respondent has explained that that the final account information was provided on 19 September 2019. It has explained that a power bill was awaited from E.on and that without this the Applicant's account could not be finalised. The E.on bill was received on 4 September 2019.

It appears to us that that provided sufficient time for the Respondent to have sent the final account and payment to the Applicant in time for the 12 September deadline. We do not consider that there was good reason to delay until 19 September. We consider there to be a breach of the Code in

this respect. We do however accept that the delay was very short and the impact on the Applicant was minimal.

The parties agree that the £80 plus VAT apportionment fee is detailed in the Written Statement of Services. The Respondent has explained that it communicated that this fee would be charged to the Respondent's solicitor who acted in the sale of the Property by way of a letter dated 20 May 2019 (although the Applicant said he had been unaware of that communication).

We do not consider the charging of the apportionment fee itself to constitute a breach of the Code.

(4) Allegations that the Applicant had used threatening language

The Applicant had complained that the Respondent had alleged that he had used threatening language when dealing with its staff. He denies having done so. He had asked the Respondent to provide details of the alleged use of threatening language but they had refused.

At the hearing, the Applicant accepted that he could identify no breach of the Code in this respect and withdrew this head of complaint.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

We have a wide discretion as to the terms of the PFEO we may make. In this case we consider there was only a very minimal breach of one aspect of the Code with little detriment caused and the terms of the proposed PFEO reflect those facts.

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: Original Decision Issued 16 June 2022. This Revised Decision Issued 14 July 2022.