

Housing and Property Chamber First-tier Tribunal for Scotland



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 2016
Chamber Ref: HOHP/PF/16/0092

60 Glencoats Drive, Paisley, PA3 1RW ("The Property")

The Parties:-

Esa Jan residing at 44 Broomhouse Court, Edinburgh EH11 3RN ("the Homeowner") and

Ross and Liddell Limited having a place of business at 60, St Enoch Square, Glasgow G1 4AW ("The Factor") per their Agents Messrs Hardy Macphail, solicitors, 45, Hope Street, Glasgow (" the Factor's Agents").

Tribunal Members

Karen Moore (Legal Member)

Colin Campbell (Ordinary Member)

Decision

The tribunal determined that (i) the factor had not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 1, 2.1, 2.4, 4.2 4.8, 5.3, 5.6, 5.7, 6.3, 6.7 and 6.8 of the Property Factor Code of Conduct ("the Code") and (ii) had not failed to comply with the property factor duties in terms of Section 17(5) of the Act.

Background

1. By application dated 11 October 2016 ("the Application") the homeowner applied to the Homeowner Housing Panel (now the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the factor had failed to comply with Sections 1, 2.1, 2.4, 4.2 4.8, 5.3, 5.6, 5.7, 6.3, 6.7 and 6.8 of the Property Factor Code of Conduct ("the Code") and had failed to comply with the property factor duties in terms of Section 17(5) of the Act.

2. The Application comprised the following documents-
 - I. Application form dated 11 October 2016
 - II. Copy correspondence (email and letter) between the homeowner and the factor;
 - III. Copy invoices for common charges issued by the factor;
 - IV. Factor's written Statement of Services and
 - V. Copy of homeowner's title deed.

3. In response to the Application, the factor submitted written submissions which included a preliminary plea to the tribunal's jurisdiction and lodged productions comprising:-
 - a. Copy application by the homeowner to the HOHP given reference number HOHP/PF/13/0140
 - b. Copy decision of the HOHP under reference number HOHP/PF/13/0140
 - c. Copy correspondence (email and letter) between the homeowner and the factor;
 - d. Copy invoices for common charges issued by the factor;
 - e. Factor's written Statement of Services and
 - f. Copy of the homeowner's title deed, all of which were copied to the homeowner.

4. A Hearing was fixed for 19 December 2016 and adjourned at the request of the homeowner, without objection by the factor to 25 January 2017.

5. Prior to the Hearing the tribunal issued the following Direction: -

"The First-tier tribunal for Scotland (Housing and Property Chamber) ('the tribunal') Direct in terms of Regulation 20 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 that the following be complied with no later than 4 January 2017:-

Direction Part 1

That the Homeowner specifically address by way of a written submission the preliminary point made by the Factor's Agents in their written submissions that, in terms of Section 18 of the Property Factors (Scotland) Act 2011, the tribunal does not have the jurisdiction to deal with the application.

Reason for Direction Part 1

The tribunal consider it necessary that, given the legal significance of the Factor's Agents' preliminary point, the Homeowner should be given an opportunity to consider fully the terms of the preliminary point and, for the benefit of both the tribunal and the Factor, provide a written statement to explain his position thereon.

Direction Part 2

That the Homeowner advise in writing of the current position of the management of the Property in relation to factoring arrangements.

Reason for Direction Part 2

The tribunal consider it necessary to know if the Property is subject to a current factoring contract either with the Factor or with another property manager.”

The homeowner did not comply with the Direction.

Hearing

6. A hearing took place at 10.30 on 25 January 2017 at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. The homeowner was present. Mr Brian Fulton a director of the factor was present. The factor was represented by Mr Ritchie of Hardy MacPhail, solicitors.

Preliminary matters

7. The tribunal first dealt with the homeowner's failure to comply with the Direction. The homeowner explained that he had been abroad and had not received the Direction until recently. The tribunal accepted this explanation.
8. The tribunal then dealt with the factor's submission that the tribunal do not have jurisdiction to deal with the application as an application on similar grounds had been made by the applicant and dealt with by a homeowner housing committee on 11 April 2016. This is the application and decision lodged by the factor as part of its productions.
9. The factor's agent submitted that as the current application was on the same terms as the previous application, the tribunal cannot proceed with it in terms of Section 18(2)(3) of the Act.
10. The tribunal invited the homeowner to comment on this point. The homeowner submitted that the current application was on different grounds and on additional facts.
11. The tribunal had regard to the wording of Section 18(1) of the Act which states:-
“18 (1) The president of the first tier tribunal must decide whether to (a) refer an application under section 17(1) to a first tier tribunal or (b) reject the application.”
12. The tribunal also had regard to the wording of Section 18(4) of the Act which states:-
“(4) The president must, as soon as practicable after rejecting an application, give notice of the rejection”
13. The tribunal took the view that, in terms of Section 18(1), the decision to refer an application a tribunal or reject an application is a mandatory one which vests in the President of the Chamber. If the President's decision is to refer an application

to a tribunal, the application must proceed to the tribunal for determination. The tribunal noted that, in terms of Section 18, there is no obligation on the President to give notice or to give reasons for her decision to refer an application. The tribunal had regard to the factor's agent's submission that without knowing that a decision to refer had been made, the factor could not challenge it and that the first opportunity for challenge was at the Hearing. The tribunal then had regard to its own powers in terms of the Act and noted that Section 19(1) of the Act states: *"The first tier tribunal to which a homeowner's application under section 17(1) is referred must 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.* Accordingly, the tribunal has no power to remit the application back to the President for further consideration in terms of Section 18.

14. The tribunal had regard to the terms of Section 18(2) which states that:-
"The president may reject an application only if the president considers—
(a) that it is vexatious or frivolous,
(b) that the homeowner has not afforded the property factor a reasonable opportunity to resolve the dispute,
(c) where the homeowner has previously made an identical or substantially similar application in relation to the same property, that a reasonable period of time has not elapsed between the applications, or
(d) that the dispute to which the application relates has been resolved.

The tribunal took the view that this is a discretionary decision based on the facts and circumstances of each application. Whilst there might have been reason on the face of the application for the President to exercise this discretion in terms of Section 18(2) (3), there might also have been reason on the face of the application for the President to take the view that the current application differed sufficiently from the previous application in terms of content or grounds or both content and grounds to allow it to proceed. Any opinion formed by the tribunal in that regard would be speculation.

15. In any event, the tribunal were of the firm opinion that it was obliged to proceed to determine the application before it. The tribunal made it clear to the parties, however, that its purpose was to determine the current application and not to review the decision of the previous committee and proceeded to deal with each of the homeowner's complaints in turn.

16. Section 1 of the Code

Section 1 states: *"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.*

The homeowner accepted that he had, in fact, received the written statement and did not wish to pursue this point.

17. Section 2.1 of the Code

Section 2.1 states:-*"You must not provide information which is misleading or false."*

The homeowner stated that this related to the factor failing to reveal commission paid to the factor in respect of the cleaning contract. The homeowner accepted that this had been dealt with in the previous application. On behalf of the factor, the factor's agent submitted that this information had not been revealed as the factor did not receive any commission.

20. Section 2.4 of the Code

Section 2.4 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 services"*

The homeowner stated that this related to various works carried out by the factor including roof repair, insurance and cleaning.

The factor's agent submitted that the obligation in the code is to have a procedure in place for non-core services and that these services are core services. In any event, the procedure is set out in the written statement.

21. Section 4.2 of the Code

Section 4.2 states:-*"If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case."*

The homeowner stated that this refers to the factor passing his unpaid and disputed account to a debt collection agency and to the fact that the homeowner subsequently was refused a mortgage.

The factor's agent submitted that the obligation in the code relates to accounts in dispute and being considered by a tribunal, not simply to all disputed accounts, and that it was speculation that the mortgage refusal arose from the referral to a debt collection agency.

22. Section 5.3 of the Code

Section 5.3 states:*"You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance."*

The homeowner stated that this refers to non-disclosure by the factor of commission received by it for buildings insurance.

The factor's agent submitted that the commission is disclosed on the insurance certificates which had been sent to the homeowner and copies of which had been lodged with the tribunal.

23. Section 5.6 of the Code

Section 5.6 states: "*On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes.*"

The homeowner stated that this refers to the way in which the factor obtains buildings insurance. He stated that this complaint differed from the one determined in the earlier decision as this time his complaint related to the amount of buildings insurance.

The factor's agent addressed this in his written submissions and explained that this had been dealt with in the earlier decision and is no longer relevant as the factor no longer arranges insurance cover for the property.

24. Section 5.7 of the Code

Section 5.7 states: "*If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request.*"

The homeowner stated that he had not received this information.

The factor's agent submitted that the obligation is to provide information if requested and the homeowner had not requested it.

25. Section 6.3 of the Code

Section 6.3 states: "*On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.*"

The homeowner stated that he had not received this information.

The factor's agent submitted that the obligation is to provide information if requested and the homeowner had not requested it. The tribunal questioned the homeowner closely on this point but could not be convinced by him that he had requested the information.

26. Section 6.7 of the Code

Section 6.7 states: "*You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.*"

The homeowner stated that he had not received this information.

The factor's agent submitted that the obligation is to disclose this information and that the insurance commission is disclosed on the insurance certificates and the written statement includes a declaration that there is no other commission.

27. Section 17 property factor duties.

Section 17 (5) of the Act states:- “ *property factor’s duties*” means, in relation to a homeowner (a) *duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner.*”

The homeowner stated that in his opinion the factor failed in this duty by not managing the property properly, by not having enough quotes and by not arranging cheaper services.

The factor’s agent submitted that this allegation is not sufficiently specific and had not been notified to the factor before the Hearing. In any event, the allegation was refuted.

Findings of the tribunal

28. The tribunal took into account the application and accompanying papers, the productions lodged by the parties and the submissions made at the hearing.

29. The tribunal found the following facts to be proved:-

- I. The property is owned by the homeowner and had been managed by the factor;
- II. The homeowner had lodged an earlier application with the then Homeowner Housing Panel on broadly similar facts but on different grounds and this had been determined under reference HOHP/14/0140
- III. The factor had issued a Written Statement of Service to the homeowner;
- IV. The factor declared commission received in respect of arranging insurance;
- V. The factor did not receive any other commission;
- VI. The homeowner had received all information requested by him from the factor;
- VII. The factor did not provide information which is misleading or false.

Decision of the tribunal

30. The issue between the parties and the issue for the tribunal’s determination is: has the factor failed in its Section 14 duty and its property factor’s duties as alleged by the homeowner and as detailed in full in the foregoing paragraphs.

31. The tribunal agrees in full with the submissions put forward by the factor’s agent on its behalf. The tribunal did not find any substance in the homeowner’s submissions to evidence and justify his allegations in respect of

the factor's conduct. In respect of the homeowner's complaints regarding Section 5.7 and 6.3 of the Code, the tribunal questioned the homeowner closely on this point but could not be convinced by him that he had requested the information.

32. The decision is unanimous.

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

K Moore

Karen Moore

Chairperson

07 February 2017