

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

Chamber Ref: FTS/HPC/PF/23/4648 and FTS/HPC/PF/4649

Re: Property at Flat 8, 367 Argyle Street, Glasgow, G2 8LT and Flat 17, 367 Argyle Street, Glasgow, G2 8LT (“the Property”)

Parties:

Mr Mohit Gajri, 12 Corstorphine Bank Drive, Edinburgh, EH12 8RS (“the Applicant”)

91BC, Garscadden House, 3 Dalsetter Crescent, Glasgow, G15 8TG (“the Respondent”)

The Tribunal comprised:-

Ms Ruth O’Hare - Legal Member
Mrs Helen Barclay - Ordinary Member

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the Tribunal’), having made such enquiries as it saw fit for the purposes of determining whether the property factor has complied with the code of conduct as required by Section 14 of the 2011 Act, determined that the property factor has breached the code of conduct for property factors and has failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011. The Tribunal therefore gives notification to parties of its intention to make a property factor enforcement order.

Background

- 1 The Applicant submitted two applications to the Tribunal citing alleged failures by the Respondent to comply with the Property Factors Code of Conduct in respect of the Property. In particular the Applicant alleged that the Respondent was in breach of sections 1.1, 1.2, 3.1 and 3.2 of the Code.
- 2 In support of the application the Applicant provided the following documents:-
 - (i) Notification to Respondent of breach of Code for the purposes of section 17(3)(a) of the Act;

- (ii) Copy email correspondence between the Applicant and the Respondent;
and
 - (iii) The Respondent's Written Statement of Services;
- 3 In summary the Applicant's position was that the Respondent had levied a charge for a portal licence fee, but had failed to provide sufficient advanced notice of the charge and had failed to provide a copy of the corresponding invoice. Furthermore the company charging the fee had common directors and employees with the Respondent and the written statement of services had not been updated to reflect the change.
- 4 By Notice of Acceptance of Application the Legal Member of the First-tier Tribunal determined that there were no grounds upon which to reject the application. Accordingly a case management discussion was assigned for 28 March 2024.
- 5 Following service of the application the Respondent submitted written representations by email dated 6 February 2024. The Respondent produced a redacted copy of an invoice from otagoTech Ltd, confirmation of the VAT registration and number issued to otagoTech Ltd from HMRC and a copy of the advance notification of the charge which was issued on 1 September 2023.

The Case Management Discussion

- 6 The Case Management Discussion took place on 28 March 2024. Mr Gajri was in attendance. The Respondent was represented by Ms Cargill.
- 7 The Tribunal explained the purpose of the Case Management Discussion and the legal test and asked parties addressed her on their respective positions with regard to the alleged breaches of the Code.
- 8 Mr Gajri explained that he had received an invoice on 30 September 2023 which contained a new charge for a portal licence fee in relation to the provision of the portal by otagoTech Ltd. The Respondent had provided a link to a document along with a previous invoice on 1 September 2023 notifying owners of the new charge however they did not disclose that both the Respondent and otagoTech Ltd had directors in common. Furthermore the invoice had been issued two weeks before otagoTech Ltd was incorporated. On 6 October 2023 the Respondent had issued a further communication admitting to having directors in common with otagoTech Ltd. This was after the charge was applied. Mr Gajri explained that numerous requests had been made for a copy of the invoice from otagoTech Ltd however this was not provided until 6 February 2024 when the Respondent submitted a copy in response to the application to the Tribunal. The invoice was heavily redacted. Mr Gajri believes the reason for this was the relationship between the Respondent and otagoTech Ltd. The information regarding the new charge was decided before

otagoTech Ltd were incorporated. Mr Gajri believed that this should have formed part of an increase to the management fee, and should have been limited to bring it in line with inflation.

- 9 Ms Cargill explained that the Respondent had communicated the charge on 1 September 2023 to owners. She referred to the document that had been submitted to the Tribunal in this regard. The charge was valid. Ms Cargill explained that the Respondent had decided to update the online portal for the benefit of all customers. The Respondent would have been entitled to increase the management fee to include the additional cost but instead decided to include it as a separate charge for the sake of transparency. Ms Cargill confirmed that the invoice from otagoTech Ltd had been redacted to prevent sensitive information being disclosed.

Relevant Legislation

- 10 The relevant legislative provisions are the following sections of the Property Factors (Scotland) Act 2011:-

“17 Application to the First-tier Tribunal

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the “section 14 duty”).

(2) An application under subsection (1) must set out the homeowner's reasons for considering that 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.

(3) No such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that 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) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, “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.*

19 Determination by the First-tier Tribunal

(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it under section 18(1)(a), 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.

(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a) give notice of the proposal to the property factor, and

(b) allow the parties an opportunity to make representations to it .

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that 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, the First-tier Tribunal must make a property factor enforcement order.

(4) Subject to section 22, no matter adjudicated on by the First-tier Tribunal may be adjudicated on by another court or tribunal.”

The following sections of the Property Factors Code of Conduct are relevant to this application:-

Section 1.1

A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2011 Act to the First-tier Tribunal for a determination, the First-tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of this Code.

Section 1.2

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:-*

- o agreeing in writing to provide services to them; or*

- o 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;*

- o 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:*

- o 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.*

Section 3.1

While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

Section 3.2

The overriding objectives of this section are to ensure property factors: • protect homeowners' funds; • provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; • make a clear distinction between homeowners' funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor's own funds and fee income.

Findings in Fact

The Tribunal found the following facts to be established:-

- 11 The Applicant is the owner of the properties at Flat 8, 367 Argyle Street, Glasgow, G2 8LT and Flat 17, 367 Argyle Street, Glasgow, G2 8LT.
- 12 The Respondent is the property factor for the block to which the Applicant's properties forms part.

- 13 The Respondent issues invoices to owners at the start of each month. On 1st September 2023 the Respondent issued the Applicant with an invoice for each of the properties. The email accompanying said invoices included a link with information on the introduction of a new charge for a portal licence fee. The provision of the portal was to be managed by an external company, otagoTech Ltd.
- 14 On 1 October 2023 the Respondent issued the Applicant with an invoice for each of the properties. The said invoice contained a charge of £30 plus VAT for the portal fee.
- 15 On 6 October 2023 the Respondent emailed the Respondent with further information regarding the portal licence. The email confirmed that the Respondent's Service Delivery Director had been appointed to the role of Chief Executive Officer at otagoTech Ltd and was in the process of stepping down from his role with the Respondent.
- 16 The Applicant requested a copy of the invoice from otagoTech Ltd on numerous occasions between 18th October 2023 and 12 December 2023. The Respondent did not provide the Applicant with a copy.
- 17 The Respondent has provided a redacted copy of the invoice to the Tribunal. The invoice does not disclose the costs payable to otagoTech Ltd, nor how the charge levied to the Applicant has been calculated.
- 18 As at the date of this decision the Respondent's Written Statement of Services does not disclose the change in service delivery in respect of the provision of the service portal by otagoTech Ltd.

Reasons for Decision

- 19 The Tribunal carefully considered the evidence from both parties in its determination of the matter, both in terms of their written representations and verbal submissions at the Case Management Discussion. The Tribunal was satisfied that the substantive matters were not in dispute and therefore there was no requirement to fix a hearing in the matter. Accordingly the Tribunal considered that it could make a decision at the Case Management Discussion, having sufficient information to do so, and it would not be prejudicial to the parties.
- 20 *Section 1.1 and 1.2 of the Code of Conduct*

The Tribunal was satisfied that the change in service delivery in terms of the transfer of management of the service portal from the Respondent to otagoTech Ltd was a substantial change that should be reflected in the Respondent's Written Statement of Service. The Tribunal noted in correspondence produced

from the Respondent that it was their intention to amend the Written Statement of Service in this regard however as at the date of this decision the Tribunal has not had sight of the updated statement. The Tribunal would also expect, for the sake of openness and transparency, that any inter-relationships between otagoTech Ltd and the Respondent are highlighted in the relevant sections of the statement.

The Tribunal was therefore satisfied that, on the balance of probabilities and based on the information before it, that the Respondent was in breach of Sections 1.1 and 1.2 of the Code.

21 *Section 3.1 and 3.2 of the Code of Conduct*

The Tribunal accepted that the charge for the portal fee was, in principle, a cost that the Respondent was entitled to recover as an operating cost for provision of the service portal. Whilst the Tribunal noted the Applicant's comments in his written submissions that he was unlikely to use the portal on a regular basis, the Tribunal was of the view that it was notwithstanding an administrative facility that the Respondent was entitled to utilise in the delivery of its service to owners. However the Respondent had not been transparent about the calculation of the charge and how that related to the overall fee levied by otagoTech Ltd. The invoice produced by the Respondent from otagoTech Ltd did not disclose any information that would assist the Applicant in understanding this, having been significantly redacted. The Tribunal therefore concluded that the Respondent had not provided sufficient information to assist the Applicant in understanding how the charge had been calculated and was therefore in breach of Sections 3.1 and 3.2 of the Code.

22 Where the Tribunal finds there to be a breach of the Code it must consider whether to make a Property Factor Enforcement Order. The Tribunal thereafter considered what would be appropriate in the particular circumstances of this case. The Tribunal did recognise that Mr Gajri has had the inconvenience of contacting the Respondent and after reminders and prompts had been no further forward, resulting in the application to the Tribunal. The Respondent had failed to provide full details of the charge from otagoTech Ltd despite repeated requests. Whilst it had submitted a copy invoice in response to the Tribunal application this was redacted and contained no information of substance that would assist the Applicant in understanding the charge. Accordingly the Tribunal determined a financial penalty was appropriate in this case and that a payment in the sum of £100 would be fair, proportionate and justified to compensate the Applicant for his inconvenience. The Tribunal also considered, in addition to the financial penalty, that an order requiring the Respondent to update the Written Statement of Services and provide the necessary information regarding the calculation of the charge would be appropriate.

23 Section 19 of the Act states:

(2) In any case where the First-tier Tribunal proposes to make a Property Factor enforcement order, it must before doing so (a) give notice of the proposal to the Property Factor, and (b) allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that 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, the First-tier Tribunal must make a property factor enforcement order.

24 The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties. Failure to comply with a PFEO may have serious consequences and may constitute an offence

25 The decision of the Tribunal was unanimous.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed

Ruth O'Hare
Legal Member

11 April 2024

