

# 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/15/0143**

**Property:-**102, Kintyre Avenue, Linwood, PA3 1RW ("The Property")

### **The Parties:-**

Mr David Bradley residing at 102, Kintyre Avenue, Linwood, PA3 1RW ("the homeowner") and  
Linstone Housing Association Limited having a place of business at 32, Burnbrae Avenue, Linwood, PA3 3DD ("the factor").

### **Tribunal Members**

Karen Moore (Legal Member)  
Mike Links (Ordinary Member)  
Mary Lyden (Ordinary Member)

### **Decision**

The tribunal determined that the factor had not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 2.1, 6.9 of the Property Factor Code of Conduct ("the Code") and had not failed to comply with the property factor duties set out in terms of Section 17(5) of the Act.

### **Background**

1. By application dated 15 October 2015 ("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 Section 6.9 of the Property Factor Code of Conduct ("the Code") as the factor had failed to pursue the contractor instructed by it to remedy the defects in any inadequate work carried out by the contractor. The homeowner also complained that the factor had no authority to instruct the works and that the factor had misled the homeowner in respect of the cost to be paid by him. Although the homeowner did not specify complaints in terms of Section 17(5) of the Act and in terms of Section 2.1 of the Code, the tribunal considered that the substance of the Application amounted to complaints under these headings.

2. The Application comprised the following documents-
  - I. Application form dated 15 October 2015;
  - II. Copy correspondence (email and letter) between the homeowner and the factor;
  - III. Factor's written Statement of Services and
  - IV. Copy of homeowner's title deed.

3. In response to the Application, the factor lodged productions comprising: -
  - a. Copy correspondence (email and letter) between the homeowner and the factor;
  - b. Copy contract documents between the factor and its contractor, E.on, and
  - c. Copy of the estate title deed, all of which were copied to the homeowner.

4. A Hearing was fixed for 30 September 2016.

5. Prior to the Hearing the tribunal issued a Direction requesting the factor to provide following information: -

*an updated Title Sheet for the property;*

*The procedure for appointment of the factor;*

*Scope and nature of the common property;*

*Apportionment of common charges and costs;*

*Procedure for instructing common works;*

*Details of properties owned by them which share the common property;*

*Copies of any correspondence not already supplied by the homeowner and*

*an explanation of the role of E.on and the basis of E.on's appointment;*

The Direction also requested the homeowner to explain reference to Bute Court in his correspondence and to provide photographs of external aspects.

6. At the request of the factor, the tribunal issued a further Direction allowing an extended time for the factor to comply with the Direction. Both parties complied the Direction.

### **Hearing**

7. A hearing took place at 10.30 on 30 September 2016 at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL. The homeowner was present. Mr Gary Dalziel and Mr David Adam of the factor were present.

8. The tribunal had the benefit of the background information provided by the parties in compliance with the Directions. From this, the tribunal was aware that the works in question were a large-scale energy efficiency project, funded in the main by the Scottish Government's Home Energy and Efficiency Programme, and entailing the installation of insulation cladding to the external parts of the block of which the property forms part.

9. The homeowner advised the tribunal that his main concern was the standard of the work carried out by the factor's contractor as evidenced by the photographs which he had lodged with the tribunal. The homeowner questioned the way in which the factor had instructed the works, the quality of the works, whether the instruction of the works was within the scope of the factor's authority as "essential works" and the apportionment of the cost of the works.

10. With regard to the quality of the work, the photographs lodged by the homeowner showed the cladding on the external part of the property to be unfinished. Mr Adam on behalf of the factor agreed that the work did not appear to be of a satisfactory finished and conceded that it had been signed off as complete by the factor's clerk of works. Mr Adam and Mr Dalziel both advised the tribunal that the factor proposed further decoration works to remedy the appearance of the cladding. These works were outwith the scope of the contract with E.on and so would be invoiced to homeowners as a common works in terms of the title deeds.

11. With regard to the factor's authority to instruct the works, the homeowner advised the tribunal that, in its correspondence with him, the factor had stated that the works were "essential", however, the homeowner's view is that the works were desirable and not essential. The homeowner accepted that he had signed a mandate in favour of the factor but had understood that this was simply a 'noting of interest' in the project and not an agreement to having the works carried out. On behalf of the factor, Mr Adam and Mr Dalziel explained that the factor had followed the terms of the title conditions and its written statement of services, and, that in any event, the factor as the majority owner in the block of which the property forms part, the factor had the power to instruct the works.

12. In response to questioning of the parties by the tribunal, it became apparent that it was the contractor, E.on, who project managed the contract for the factor and who carried out most of the communication with the homeowner. It also became apparent that works were carried out by E.on on the homeowner's own property and that the homeowner had been unaware that he might have signed a contract with E.on and that he might have had the option to decide not to take part in the project. The factor advised the tribunal that its records showed that the homeowner had signed a contract with E.on instructing the works to be done. The homeowner's position is that whatever had been signed, if anything, was authority to carry out a gas safety inspection and Energy Performance Certificate (EPC) assessment.

13. With regard to the cost to the homeowner, the homeowner's recollection was that the factor's representative had advised that the works were fully grant funded and that there would be no cost to him. Therefore, he disputed the factor's invoice for a share of the VAT element of the works. The factor explained that as far as the factor had been aware it had always been the case that homeowners would be liable for a share of VAT, which was calculated on an equal apportionment across the

whole development, but that the factor had become aware that the E.on representative had advised some homeowners that the works would be cost free. The homeowner agreed that although the title deeds indicated a range of shares of common costs, the factor's approach was sensible and acceptable.

14. The tribunal considered that it would be helpful to have sight of the contract signed by the homeowner and any other paperwork which the factor might have which could explain how the contract had been implemented. Accordingly the tribunal adjourned the Hearing and Directed the factor to obtain a copy of the contract between E.on and the homeowner.

15. The adjourned Hearing was held on 1 February 2017 at Wellington House aforesaid. The homeowner was not present. Mr Gary Dalziel and Mr David Adam of the factor were present.

16. Prior to the adjourned Hearing, and in response to the Direction made at the Hearing on 30 September 2016, the factor had lodged a copy of the contract between the homeowner and E.on, gas safety certificates and an EPC for the homeowner's own property, which were copied to the homeowner.

17. At the adjourned Hearing on 1 February 2017, the tribunal led Mr Dalziel and Mr Adam through the timeline of these documents. Mr Dalziel and Mr Adam further explained the nature of the contract with E.on and the factor's communication with homeowners. They explained that the initial contact had been in or around November 2013 and it was at this point that the mandate referred to in paragraph 11 was signed by the homeowner. Mr Dalziel and Mr Adam accepted that the purpose of the mandate was indicative and not an authority to agree to works. However, the homeowner had subsequently signed a contract with E.on in respect of the works.

18. At the adjourned Hearing, Mr Adam and Mr Dalziel advised the tribunal that, following the Hearing on 30 September 2016, they had been in contact with E.on with a view to having the cladding repaired and finished properly and that E.on have agreed to do the works. Mr Adam and Mr Dalziel further explained that the contract with E.on for the development of which the property forms part is ongoing and that the remedial works will be carried out under the contract.

19. In response to questioning by the tribunal in respect of the works being "essential", Mr Daziel expressed the view that the works were essential as the works were necessary to improve energy efficiency and the fact that Scottish Government funding was available for a short time made it essential that the factor carry out the works at that time.

### **Findings of the tribunal**

20. The tribunal took into account the application and accompanying papers, the productions and documents lodged by the parties and the submissions made at the Hearings.

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

- a) The property is the external wall of the homeowner's flatted property at 102 Kintyre Avenue, Linwood, also known as Bute Court. The homeowner's title is registered in the Land Register for Scotland under title number REN3351;
- b) The factor is Linstone Housing Association Limited, a social registered landlord and majority owner of the other block at 102 Kintyre Avenue and of the development of which the block forms part;
- c) In terms of the homeowner's title deeds, burden entry 4 of REN335, the factor, as majority owner, has the authority to instruct maintenance, repair, renewal and replacement works, regardless of whether the works are essential or not;
- d) Towards the end of 2013, the factor contemplated applying for government funding for an energy efficiency scheme for the benefit of the residents in the estate managed by it;
- e) In or around November 2013, the factor wrote to homeowners inviting them to express an interest in the project. The homeowner signed and returned a standard template letter expressing an interest in the project;
- f) In January 2014, the factor wrote to homeowners indicating that funding for the project was secured and that owners who wished to proceed would be liable for 5% VAT;
- g) On 10 March 2014, a representative of E.on visited the homeowner and carried out an EPC inspection. At this visit, the homeowners signed a contract with E.on for E.on to carry out works at his flatted property;
- h) On 12 March 2014, a survey of the homeowner's flatted property was carried as part of the preliminary works for the project;
- i) On 24 April 2014, a representative of E.on visited the homeowner and carried out a gas safety inspection and a gas equipment test and survey at the homeowner's flatted property;
- j) During the following months E.on carried out works under the energy efficiency project and completed the works on the block of which the homeowner's flatted property forms part on around September 2014.
- k) The finish of the external cladding works at the homeowner's flatted property is of poor quality and the factor is taking steps to remedy this.

### **Decision of the tribunal**

22. The issue between the parties and the issue for the tribunal's determination is: has the factor failed in its Section 14 duty and Section 6.9 of the Code, which states:- "*You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided*", the tribunal is satisfied that the factor accepts the works carried out by E.on were not wholly satisfactory and that the factor is pursuing this

with E.on. Accordingly, the tribunal finds that the factor has not breached this part of the code.

23. With regard to its Section 14 duty and Section 2.1 of the Code, which states: - *"You must not provide information which is misleading or false"*, the tribunal found that the factor had advised the homeowner in writing that the homeowner would be liable to meet a share of the cost of the works. Accordingly, the tribunal finds that the factor has not breached this part of the code.

24. With regard to the Section 17(5) duty, the tribunal found that the factor has power in terms of the title deeds to instruct the works. In any event, the tribunal is satisfied that by signing the contract with E.on, the homeowner agreed to have the works carried out. The tribunal considered the homeowner's point that the works were not essential. The tribunal took the view that this was of no relevance as the title deeds do not differentiate between "essential" and "non-essential". In any event, the tribunal agreed with Mr. Dalziel that the availability of funding had a bearing on the need to proceed with the contract at that time. Accordingly, the tribunal finds that the factor has not breached this duty.

25. The decision is unanimous.

#### **Review of tribunal's decision**

Any 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 the party must seek leave to appeal from the First-tier tribunal. The appeal must be made within thirty days of the date when the decision was sent to them.

Karen Moore

Karen Moore

Chairperson

14 February 2017