

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 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/22/3435

Property address: 2 Cellar Bank, Edinburgh, EH16 5GT (“the Property”)

The Parties

Mr Laurence Errington, 2 Cellar Bank, Edinburgh, EH16 5GT (“the Homeowner”)

Trinity Factoring Services Ltd., 209 Bruntsfield Place, Edinburgh, EH10 4DH (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mr A McFarlane (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with paragraph OSP2 of the 2021 Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Background

1. By application received in the period between 19th September and 20th October 2022, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs OSP2, OSP4, OSP6, OSP11, 3.4 and 6.6 of the 2021 Code. Details of the alleged failures were outlined in the Homeowner’s application and associated documents.

2. By email dated 24th November 2022, the Homeowner informed the Tribunal that removal of the disputed sum of £680 from the Homeowner's account had been actioned by the Property Factor.
3. By email dated 6th February 2023, the Property Factor made written representations and lodged productions.
4. By email dated 10th February 2023, the Property Factor stated they would not attend the Case Management Discussion on 13th February 2023.
5. A Case Management Discussion ("CMD") took place by telephone conference on 13th February 2023. The Homeowner was in attendance. The Property Factor was not in attendance. The outcome was recorded in a note issued to the parties.
6. The Tribunal raised an issue regarding the complaints made under paragraphs OSP 6, 3.4 and 6.6. These appear to refer to matters that occurred during the timescale of the previous 2012 Code, and before the current 2021 Code came into force. The application had been made under the 2021 Code. The Tribunal explained that, in order to consider complaints under the 2012 Code, a further application or an amendment to the current application would have to be made, tying the complaints into the relevant paragraphs of the 2012 Code rather than the 2021 Code.
7. Both parties were asked to consider whether they had lodged sufficient evidence to prove their respective cases.
8. The Tribunal issued a Direction to the Property Factor requesting a copy of its written statement of services.
9. By email dated 20th February 2022, the Property Factor lodged their service level agreement.
10. Notification of a hearing to take place on 2nd May 2023 was made upon parties on 20th February 2022.

The Hearing

11. A hearing took place by telephone conference on 2nd May 2023. Neither party was initially in attendance, but the Homeowner joined the telephone conference shortly after commencement.
12. The Tribunal considered the terms of Rule 29. The Tribunal determined that the Property Factor had been given reasonable notice of the time and date of the Hearing. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Property Factor.

The Homeowner's position

2021 Code – Paragraph OSP2

You must be honest, open, transparent and fair in your dealings with homeowners.

13. The Homeowner said the Property Factor had not complied with this paragraph of the Code. Their invoices were complex and difficult to understand. It was difficult to decode what was being paid for. Requests for clarification were met with the response that a certain sum was owed, but no clarification was provided.
14. The Homeowner said that the sum of £680 was slipped into the invoice dated 4th April 2022 as an entry dated 16th December 2021. The entry read “*Replace the mineral felt under decking area - Development Expenses 3,400.00 1/5 680.00 0.00 680.00.*” The Homeowner said he was not aware what this expense related to. He discussed matters with his neighbours and discovered that it related to works carried out to a neighbouring roof in or around 2018. He raised the matter with the Property Factor, and they eventually explained that it referred to an earlier repair which they said was carried out in 2019/2020, and that the block insurance would not cover the payment. Despite his concerns and complaints in this regard, the Property Factor continued to insist that the Homeowner was liable to pay the sum.

2021 Code – Paragraph OSP4

You must not provide information that is deliberately or negligently misleading or false.

15. The Homeowner said this tied back to events that took place previously. The Property Factor was asking for money that should not be due. They did not admit that it was not due. They said it must be paid.

2021 Code – Paragraph OSP11

You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

16. The Homeowner said the Property Factor refused to reply to his concerns and complaints, and just kept reissuing demands for payment. They continued to come back with the same arguments each time they responded.
17. Responding to questions from the Tribunal as to whether the Property Factor took the Homeowner's complaint through their complaints system, the Homeowner said his complaint was acknowledged but he never got an explanation as to how the money might be due. The Homeowner said there were gaps in the documentation he had provided to the Tribunal, and that probably meant there was nothing relevant received at those times. He said he had picked out the relevant documentation to provide to the Tribunal.

- 18.** The Homeowner said he felt there was no way morally that the money could be due. He was also aggrieved at all the trouble the Property Factor had given the homeowners. He felt this came from incompetence, and said the Property Factor never came up with the building warranty.
- 19.** The Tribunal put the Property Factor's position to the Homeowner, namely that the Property Factor had removed the disputed sum of £680 from the Homeowner's account, and that should be an end to the matter. The Homeowner said the situation took a lot out of him. It caused him a great deal of stress and he had to use a great deal of his time to query and complain. He said he could not quantify what was due to him in terms of compensation, but he ought to be due a payment.

The Property Factor's position

- 20.** The Property Factor's written representations stated:

The Applicant disputed a charge of £680.00 for a roof repair that was not instructed by Trinity Factors. The repair was instructed and paid for by a fellow owner. The owner who instructed the works tried unsuccessfully to claim the money back under the Premier Guarantee. As the owner's claim for recovery was rejected by the scheme administrator, they requested the cost be shared between all owners in the block as the roof is common to all. The Applicant wrote to us on 4 September 2022 asking for the charge to be removed to bring this matter to an end. We wrote to the Applicant on 5 October 2022 to advise the charge had been removed from his account. Inventory Items 1, 2 & 3.

All roof works under the premier guarantee were organised and supervised by Sedgewick on behalf of the scheme administrator. Trinity was not involved in producing the scope of works, contractor selection or supervising the works. Item 4 – scope of works produced by engineer acting for Sedgewick.

We acknowledge the Applicant has found the year end budget reconciliation showing actual costs against budget costs difficult to understand. Attempts have been made to explain the accounting process to the Applicant but unfortunately a misunderstanding still prevails. The Applicant also has access to his online factoring account to check his account balance.

We wrote to the Applicant on 18 November 2015 providing our service level agreement. This is always available on our website to download and view.

It would appear the Applicant's main drive for continuing with the case is to obtain compensation which we feel is not justified. The Applicant requested the charge of £680.00 be removed from his account and this

was done. The Applicant was paying an annual management fee of £127.68 + VAT.

Trinity ceased to factor the Applicant's property as of 30 June 2022.

Decision of the Tribunal

2021 Code – Paragraph OSP2

- 21.** The Tribunal found that there had been a failure by the Property Factor to comply with this paragraph. The Property Factor was not open and transparent in their dealings with the Homeowner in respect of the disputed charge of £680. The way in which this charge was inserted into the April 2022 invoice, purporting to be a charge from December 2021, when it was actually a charge relating to works carried out in 2018 or 2019 was not open or transparent. The lack of explanation as to the location of the works was not open or transparent. It was incumbent upon the Property Factor to clearly identify the works carried out, their location, and the relevant date in their invoicing. The Property Factor failed to do this, causing considerable stress and inconvenience to the Homeowner.
- 22.** The Tribunal considered that the Property Factor's invoices were not complex and difficult to understand, in that, with the exception of the matter referred to above, they appeared to specify the sums due to specific contractors for specific services.
- 23.** The Tribunal made no findings as to whether the sum of £680 ought to have been charged to the Homeowner in the first place. This fell within the 2012 Code of Conduct, and it is open to the Homeowner to make another application in that regard should he so wish.

2021 Code – Paragraph OSP4

- 24.** The Tribunal did not find there had been a failure to comply with this paragraph. The Homeowner's complaint as stated in his application was that the attempt to pass off the charge of £680 as a 2021 repair was a failure to comply with this paragraph. At the hearing, he stated that the failure was in respect of the Property Factor's insistence that the sum was due for payment when it ought not to have been charged to him in the first place. The Tribunal did not find any merit in either argument. As stated above, the Tribunal found the actions of the Property Factor in respect of the invoice and repair not to have been open and transparent, but there was no evidence that the Property Factor had been deliberately or negligently misleading or false in this regard. For the reasons stated in paragraph 21, the Tribunal made no findings in regard to the argument put forward by the Homeowner that the charge ought not to have been made in the first place.

2021 Code – Paragraph OSP11

- 25.** The Tribunal did not find there had been a failure to comply with this paragraph. There was insufficient evidence before the Tribunal to show that the Property Factor had failed to respond to enquiries and complaints within reasonable timescales and in line with their complaints procedure. The Property Factor appeared to have responded to the Homeowner's enquiries and complaints, although they may not have provided the response the Homeowner was seeking. The documentation lodged showed there was ongoing correspondence between the parties in relation to the complaint lodged by the Homeowner. The Tribunal was unable to ascertain whether the complaints procedure had been followed, but there was no allegation before the Tribunal under section 7 of the Code.

Findings in Fact and Law

26.

- (i) The Homeowner is the heritable proprietor of the Property registered in the Land Register for Scotland under Title Number MID130665.
- (ii) The Property Factor registered as a Property Factor under registration number PF000170 on 7th December 2012.
- (iii) The Property Factor provided factoring services to the development of which the Property forms part.
- (iv) The Property Factor ceased to provide services to the Homeowner from 30th June 2022.
- (v) On or around 4th April 2022, the Property Factor issued an invoice to the Homeowner stating that the sum of £680 was due in respect of an unidentified roof repair from December 2021.
- (vi) The roof repair was carried out in 2018 or 2019.
- (vii) The roof repair had not been instructed by the Property Factor. It was instructed by another homeowner who had unsuccessfully tried to reclaim the cost of the repair from the development's Premier Guarantee. The cost was then shared between the five properties affected by the roof issue.
- (viii) In April 2022, the Homeowner began to dispute the sum of £680 with the Property Factor.
- (ix) The Property Factor continued to invoice the Homeowner for the sum of £680.
- (x) The Homeowner repeatedly asked for clarity from the Property Factor in relation to his account and budget reconciliations by email over a period from April to September 2022.

- (xi) The Property Factor responded to the Homeowner's requests for clarity over a period from April to September 2022.
- (xii) On 4th September 2022, the Homeowner asked the Property Factor to remove the charge of £680 from his account by 12th September 2022, failing which, he would take the matter to the Tribunal.
- (xiii) On 19th September 2022, the Homeowner made this application to the Tribunal.
- (xiv) The charge of £680 was removed from the Homeowner's account by the Property Factor on or around 5th October 2022.
- (xv) The Property Factor was not open or transparent in their dealings with the Homeowner in respect of the entry and charge for roof repair in the invoice dated 4th April 2022.

Proposed Property Factor Enforcement Order (PFE0)

- 27.** Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFE0. The Tribunal decided to make a PFE0.
- 28.** In considering the terms of the PFE0, the Tribunal took into account the considerable distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failure to comply with the Code.
- 29.** Section 19 of the Act requires the Tribunal to give notice of any proposed PFE0 to the Property Factor and allow parties an opportunity to make representations.
- 30.** A proposed PFE0 accompanies this decision. Comments may be made in respect of the proposed PFE0 within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of 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.

Helen Forbes
Legal Member and Chairperson
4th May 2023