

Housing and Property Chamber First-tier Tribunal for Scotland



**Decision of the 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

James Brydie, 10 Kingsmere Road, Wimbledon, London SW19 6PX (“the Applicant”)

First Port Property Services Scotland, 3rd Floor, Troon House, 199 St Vincent Street, Glasgow G2 5QD (“the Respondent”)

Chamber Ref: FTS/HPC/PF/18/0282

Re: 2/9 Wishaw Terrace, Edinburgh EH7 6AF (“the Property”)

Tribunal Members:

John McHugh (Chairman) and John Blackwood (Ordinary (Housing) Member).

DECISION

The Respondent has not failed to carry out its property factor’s duties.

The Respondent has not 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 was, until January 2018, the owner of a flat at 2/9 Wishaw Terrace, Edinburgh EH7 6AF.
- 2 The flat is located within a modern block of similar flats which includes common areas ("the Block").
- 3 The Block is part of a larger development ("the Development")
- 4 The Respondent was at all relevant times the factor of the Development and continues as factor at present.
- 5 On 29 August 2017 the owners of properties within the Block voted to instruct the Respondent to have lighting works to the common areas carried out.
- 6 On 3 October 2017 the Respondent billed the Applicant for the appropriate share of the cost of the works, being £187.73.
- 7 On 12 January 2018 the Applicant sold the Property.
- 8 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services. The duties arose with effect from 1 October 2012.
- 9 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 (1 November 2012).
- 10 The Applicant has, by his correspondence, including his emails of 12, 15 and 24 January 2018, 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.
- 11 The Applicant has failed to notify the Respondent of the source of the property factor's duties which he considers the Respondent has failed to comply with.
- 12 The Respondent has not failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 1 June 2018.

The Applicant was neither present at the hearing nor represented having indicated that he would rely on written submissions.

The Respondent was represented by its Regional Manager, Roger Bodden and its Area Manager, Richard Montgomery.

There were no other witnesses called by either party.

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 2016 as “the 2016 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 “Statement of Services & Delivery Standards” 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 complains of failure to carry out the property factor's duties.

However, the Applicant does not identify a specific duty or the source of such a duty.

The Code

The Applicant complains of failure to comply with Sections 3.2 and 3.4 of the Code.

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

"...SECTION 3: FINANCIAL OBLIGATIONS

While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The overriding objectives of this section are:

Protection of homeowners' funds

Clarity and transparency in all accounting procedures

Ability to make a clear distinction between homeowners' funds and a property factor's funds...

... 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...

...3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property)."

The Matter in Dispute

The single factual matter complained of relates to charging arrangements applied by the Respondent in relation to lighting works in the common areas of the Development. The Applicant complains that the Respondent insists that the Applicant should be liable for those costs even though the works had not been completed some months after the Applicant had sold the Property.

The factual history is that the Respondent identified that the replacement of the lighting in the common areas of the Block had become necessary. The Respondent sought the authorisation of the owners to carry out these works by putting the matter to a vote on 29 August 2017. The required quorum of owners (seven) voted in favour of the works. The Respondent instructed G & B Electrical Contractors on 28 September 2017. On 3 October 2017 invoices were issued to each flat owner for their respective shares of the cost of the works, which worked out at £187.73 per flat.

Some owners raised concerns about the cost and identified an alternative contractor who might be able to do the works more cheaply. The Respondent sought to establish the suitability of that contractor and eventually instructed it to proceed. That process led to a delay in completion of the works.

On 12 January 2018 the Applicant sold the Property. The Applicant's solicitors had requested in advance of the sale that the Respondent provide details of any major works instructed but not yet carried out or any major works carried out or not yet paid for. The Respondent provided details of the electrical works.

By 12 January 2018 the works had not been commenced.

The Applicant has paid all charges invoiced to him by the Respondent with the exception of the charge of £187.73 in respect of the lighting works.

The Respondent's representatives were able to confirm at the hearing that the works had now been completed using the alternative contractor. The overall cost had been slightly cheaper although the new contractor had used a smaller light fitting thereby causing some decorative works to be necessary. The end result was an overall saving of a few hundred pounds. The Respondent's representatives could not advise the exact figure but advised that the net result had worked out at around £10-11 cheaper per flat than the £187.73 figure.

In the circumstances, the Respondent's representatives advised that they had resolved to credit the Applicant's account with that c.£10-11 sum. The Respondent would then require payment of the outstanding balance.

The Respondent considers that the matter is determined by section 11 of the Tenements (Scotland) Act 2004.

Section 11 provides:

"11 Determination of when an owner's liability for certain costs arises

(1) An owner is liable for any relevant costs (other than accumulating relevant costs) arising from a scheme decision from the date when the scheme decision to incur those costs is made.

(2) For the purposes of subsection (1) above, a scheme decision is, in relation to an owner, taken to be made on—(a) where the decision is made at a meeting, the date of the meeting; or (b) in any other case, the date on which notice of the making of the decision is given to the owner.

(3) An owner is liable for any relevant costs arising from any emergency work from the date on which the work is instructed.

(4) An owner is liable for any relevant costs of the kind mentioned in rule 4.1(d) of the Tenement Management Scheme from the date of any statutory notice requiring the carrying out of the work to which those costs relate.

(5) An owner is liable for any accumulating relevant costs (such as the cost of an insurance premium) on a daily basis.

(6) Except where subsection (1) above applies in relation to the costs, an owner is liable for any relevant costs arising from work instructed by a manager from the date on which the work is instructed.

(7) An owner is liable in accordance with section 10 of this Act for any relevant costs arising from maintenance carried out by virtue of section 8 of this Act from the date on which the maintenance is completed.

(8) An owner is liable for any relevant costs other than those to which subsections (1) to (7) above apply from—

(a) such date; or

(b) the occurrence of such event,

as may be stipulated as the date on, or event in, which the costs become due.

(9) For the purposes of this section and section 12 of this Act, "relevant costs" means, as respects a flat—

(a) the share of any costs for which the owner is liable by virtue of the management scheme which applies as respects the tenement (except where that management scheme is the development management scheme); and

(b) any costs for which the owner is liable by virtue of this Act.

(10) In this section, "emergency work", "manager" and "scheme decision" have the same meanings as they have in the Tenement Management Scheme."

The Act only applies to "tenements". Section 26 of the 2004 Act provides:

"26 Meaning of "tenement"

(1) In this Act, "tenement" means a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which—

(a) are, or are designed to be, in separate ownership; and

(b) are divided from each other horizontally,

and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building; and the expression "tenement building" shall be construed accordingly.

(2) In determining whether flats comprised in a building or part of a building are related for the purposes of subsection (1), regard shall be had, among other things, to—

(a) the title to the tenement; and

(b) any tenement burdens,

treating the building or part for that purpose as if it were a tenement."

We are of the view, having regard to the Deed of Conditions and the physical description of the Development and the Property, that the Property is a flat within a tenement and that, accordingly, the terms of the 2004 Act apply.

That being the case, section 11(1) applies to the circumstances of this case. The scheme decision to incur the cost of the lighting works was made by way of the owners' vote on 29 August 2017 and the Applicant became liable for those costs from that date.

Code Section 3.2 deals with the return of sums due to homeowners, which has no application to the facts of the current case.

Code Section 3.4 requires the Respondent to have procedures to refund payments made in advance due to homeowners or to transfer these to new owners upon sale. The Respondent's representatives confirmed, and we accept, that it has such procedures. In this case, the Applicant has not actually made any payment in advance but has incurred a liability in advance of the sale. It is common ground between the parties that the Applicant's solicitor sought and received information regarding the lighting works before the sale and this demonstrates that an appropriate procedure was in place.

We identify no breaches of the Code.

We identify no breaches of property factor's duties.

PROPERTY FACTOR ENFORCEMENT ORDER

As we have identified no relevant breach of the Code or of property factor's duties, no property factor enforcement order ("PFEO") will be made.

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.

J McHugh

JOHN M MCHUGH

CHAIRMAN

DATE: 11 June 2018