

Housing and Property Chamber First-tier Tribunal for Scotland



**Decision 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**

Aylmer Millen, 5 Hillpark Grove, Edinburgh EH4 7AP (“the Applicant”)

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (“the Respondent”)

Reference No: FTS/HPC/PF/18/3060

**Re: Property at 5 Hillpark Grove, Edinburgh
 (“the Property”)**

Tribunal Members:

John McHugh (Chairman) and David Hughes Hallett (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to carry out its property factor’s duties.

The Respondent has 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 is the owner of 5 Hillpark Grove, Edinburgh EH4 7AP (hereinafter "the Property").
- 2 The Property is located within a mixed development of houses and flatted blocks and associated common areas known as Hillpark Grove (hereinafter "the Development")
- 3 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.
- 4 There are 156 individual residential units in the Development. 115 are houses and the remainder are flats.
- 5 The Respondent is the property factor responsible for the management of common areas within the Development.
- 6 The Respondent was appointed to the role of property factor by the developer of the Development.
- 7 The Respondent communicated changes to its Written Statement of Services by way of its April 2018 newsletter.
- 8 The property factor's duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. 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.
- 10 The Applicant has, by his correspondence, including by his emails of 9 and 26 April 2018, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
- 11 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at George House, Edinburgh on 24 January 2019.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by Karen Jenkins, who is employed by it in the role of Client Relationship and Support Manager. No other witnesses were 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 2017 as “the 2017 Regulations”.

The Respondent became a Registered Property Factor on 7 December 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 a Deed of Conditions by MacTaggart & Mickel Limited recorded 4 April 2002, which we refer to as “the Deed of Conditions” and the Respondent’s Written Statement of Services marked as dated June 2014 (updated 1 January 2018) 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.

The Written Statement of Services and the Deed of Conditions are relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 1Fp; 2.1; 2.4; 2.5; 7.1 and 7.2 of the Code.

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

" SECTION 1: 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. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code...

...The written statement should set out:

F. How to End the Arrangement

p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination...

...SECTION 2: COMMUNICATION AND CONSULTATION

2.1 You must not provide information which is misleading or false....

...2.4 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 service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to

an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)...

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...SECTION 7: COMPLAINTS RESOLUTION

7.1 You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.”

The Matters in Dispute

The Applicant complains in relation to the following issues:

- (1) The Respondent acting unilaterally has made changes to the Written Statement of Service.
- (2) The handling of the Applicant's complaint to the Respondent

We deal with these issues below.

(1) The Respondent acting unilaterally has made changes to the Written Statement of Service

The Applicant complains that the Respondent has sought to make changes to the Written Statement of Services. These changes were communicated to residents, including the Applicant, by the Respondent's newsletter of April 2018. The changes were not explained in any detail and there was no opportunity for comment or challenge by the homeowners.

The changes were listed in a two page document entitled "Update to the Written Statement of Services"

The Applicant was concerned that the document was in small print which Miss Jenkins explained had been to accommodate all of the text on two sides of A4 as opposed to being with the intention of making the document hard to read or downplaying the changes.

Miss Jenkins further explained that the contents of update document were not themselves all new changes but that her colleague had included in the document a note of all changes which had taken place since the original Written Statement of Services was produced. There was no way to tell from the document which were new changes and which were changes which had already taken place.

The communication of the changes in April 2018 was, Miss Jenkins accepts, retrospective since the changes were to have had effect from January 2018.

The Applicant considers some of the changes to be minor in nature and makes no complaint about those eg the updating of the name of Transco to Scottish Gas Networks. There are further changes which he considers objectionable although immaterial, such as the request that homeowners advise the Respondent of their plans to extend their properties.

There are other changes which he considers are material and which should be the subject of consultation and agreement with homeowners rather than being imposed by the Respondent. He refers to the obligations imposed by the Consumer Contract Regulations and considers that the changes proposed are sufficiently material to justify homeowners having a right of withdrawal from the contract.

The Applicant is concerned that the Respondent's actions are in breach of its obligations to carry out its duties to a reasonable standard under section 17(4) of the 2011 Act and that the new provisions regarding debt recovery are in breach of related terms of the Deed of Conditions.

He further considers that the way in which the changes have been imposed is itself a breach of the obligations upon the Respondent under section 2 and 4 of the Written Statement of Services itself. He considers the same matters to constitute breaches of Code Section 2.1, 2.4 and 2.5.

He complains in addition specifically of a claim by the Respondent by its email of 19 July 2018 to him that the updated Written Statement of Services was simply a draft was untrue and that such claim was a breach of Code Section 2.1.

Changes to the Written Statement of Services which were of particular concern to the Applicant included the introduction of reference to the Tenements (Scotland) Act 2004. The Development consists of a mix of flats, which are subject to the 2004 Act, and

houses, which are not. The Applicant's property is not subject to the Act and there had been a history of the Respondent confusing arrangements which applied to the flats with those which applied to the houses. Miss Jenkins explained that these changes were, in fact, not new arrangements and had always applied.

The Applicant was concerned about the introduction of clauses outlining the arrangements which exist between it and its insurance brokers. Again, Miss Jenkins explained that these were existing arrangements which were simply now being explained.

The Applicant was further concerned about new debt recovery arrangements introduced by the changes including a charge for title searches and arrangements for the registration of Notices of Potential Liability under the 2004 Act (for the avoidance of doubt, such Notices would not affect the Applicant's property). Again, Miss Jenkins advised that these were not new steps. Until recently, such debt recovery exercises had been carried out by sub-contractors, but the Respondent was now dealing with these in-house, hence the changes to the Written Statement of Services.

The Applicant was concerned about the introduction of a section regarding complaints involving sub-contractors. He feels that that section is unnecessary and an attempt to involve homeowners in a procedure which should not be of concern to them since any complaints should be dealt with between the Respondent and the sub-contractor rather than involving the homeowner.

We do not consider that any of the changes which were made to the Written Statement of Services were material. Further, we cannot identify that the actions of the Respondent in this respect were in breach of the Respondent's property factor's duties nor of the Code. However, the Respondent's communication of the changes could certainly have been better handled to avoid the risk of complaint. For example, it might have been better to advise homeowners in advance of the changes before they took place and to have been clear as to which were new matters and which were simply reflecting existing practice. It might also have been helpful to have provided homeowners with an explanatory note regarding the changes.

As regards the email of 19 July 2018 from Miss Jenkins to the Applicant in which she referred to an attached Written Statement of Services as a draft, we do not consider that Miss Jenkins was misleading the Applicant in that her reference to the draft seems to be a reference to a need to re-format the document which she also mentions in the same email. It is clear that the changes had already been implemented to the Written Statement of Services since they had been communicated in April 2018.

(2) The Handling of the Applicant's Complaint to the Respondent

The Applicant is unhappy that the Respondent has failed to make any meaningful response to his communications and formal complaint and had not responded within the timescales required by the Written Statement of Services, all in breach of the Respondent's Written Statement of Services Section 4 and in breach of Sections 2.5 and 7.1 of the Code.

Miss Jenkins accepted that the Respondent had not followed its Complaints Procedure.

We consider the Respondent's failure in this respect to constitute a breach of Code Sections 2.5 and 7.1. It also constitutes a breach of property factor's duties in respect of

the failure to respond to communications and complaints in terms of the Respondent's Written Statement of Services Clause 4.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

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.

JOHN M MCHUGH
CHAIRMAN

DATE: 18 February 2019