



Notes on a Case Management Discussion of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 19 of the Property Factors (Scotland) Act 2011

Reference number: FTS/HPC/PF/23/1149

The Parties:

Mr Andrew Carson, 39 Woodyett Road, Busby, Glasgow G76 8SA (“the Applicant”)

Hacking & Paterson, 1 Newton Terrace, Glasgow, G3 7PL (“the Respondent”)

Tribunal Members:

Nairn Young (Legal Member) and Angus Lamont (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:

- Background
1. This is an application for a property factor enforcement order (‘PFE0’) in relation to the Respondent’s factoring of common property, owned in part by the Applicant. It called for a hearing at 10am on 2 October 2023, by teleconference. The Applicant was on the call in-person. The Respondent was represented on the call by Mr Craig Cosgrove, one of its employees.
 2. Although the matter was calling for a hearing of evidence, neither party was calling any witnesses. Both parties had also tendered written submissions on the application, with documentary evidence. There were therefore only some brief questions asked in order to clarify some details and parties confirmed

that they were happy for the Tribunal to make its decision based on the written materials presented.

- Findings in Fact

3. The Applicant's property is one of a development of 53 homes, the owners of which hold various other areas of land within the development in common.
4. One such area of land is a grassed area adjacent to the Applicant's property, on the boundary of the development.
5. That grassy area has a boundary fence which divides it from the neighbouring land, which is in public ownership.
6. The fence in question has, at various stages in the past, both included and not included a gap allowing passage on foot from the land behind, across the grassy area, to the street.
7. Immediately prior to winter of 2021/ 22, the fence had such a gap; however, on around 7 December 2021, a large tree was blown over at the gap, destroying the fence on either side.
8. The Respondent was engaged as property factor regarding the communal areas within the development in 2019; and presently acts as such under terms of service dated 31 August 2021 ('the terms of service').
9. The Respondent is a registered property factor.
10. Within the terms of service, section 3 is titled, "Services Provided," which states:

"3.1 We act as property factor and offer the following Core Factoring Services to the group of homeowners relative to the land/ property which the group share in common ownership and/ or responsibility (common property):

- Arranging and administering maintenance of common property by appointing contractors and service suppliers.

...

- Advising on maintenance and repair, redecoration and improvements where requested.

...

3.4 Beyond Core Factoring Services, we are able to offer services at an additional cost, to be agreed with homeowners prior to commencement, including:

- Assisting with items of maintenance, repair, decoration and so on considered to be of a substantial nature.

...

3.5 Where a service is provided by us which will incur additional fees, over and above those included within the Core Factoring Services, we will consult you, your appointed representative, or, where necessary, the group of homeowners, in writing, for consent prior to incurring expenditure.”

11. Aside from the mention quoted above in clause 3.4, there is no reference to the Respondent carrying out ‘repairs’ on behalf of the owners in the terms of service.

12. The Applicant has wanted to have the gap closed since before the tree fell.

13. The Applicant’s position rests variously on concerns that he has that: by leaving a gap, a formal right of access will be created there, either as a right of way, under the general right to roam, or as a servitude; that any such

access right would have to be declared as a change to the title position in any home report, leading to a depreciation in value of his and other properties; that the existence of a gap would also encourage anti-social behaviour at the gap; and that potential occupier's liability for persons using the gap to cross the grassy area has not been priced in to the owners' insurance cover.

14. Various of the Applicant's co-owners do not want the gap closed: some on the basis of a belief that a public right of way exists through it.

15. In January 2021, the Respondent suggested to the owners that a gate might be installed at the gap with keys available for them, to allow them access, but restrict access on the part of members of the public.

16. No majority was obtained for that proposal, and it accordingly did not proceed.

17. In support of his proposal to close the gap, over the course of 2021, the Applicant sought the opinion of East Renfrewshire Council ('the Council') as to whether leaving it open could have created a right of way.

18. On 10 November 2021, the Council sent a letter to the Respondent, at the Applicant's behest, giving its opinion that no right of way had been created.

19. In response to further communication from the Applicant on the matter, the Respondent sent an email to him on 7 January 2022 in the following terms:

- It noted that the Council had given its opinion to the effect that there was no right of way through the gap;
- It stated that the reason for the gap having been left to date was that previous efforts to block it had merely resulted in members of the public damaging the fence to create a new gap, incurring repairs costs;
- It pointed out that the terms of service required the Respondent only to administer maintenance of the common property; and, therefore, did not authorise it to carry out work over-and-above that without separate

authority, or to take action against persons taking access through the gap and across the grassed area;

- It suggested, to attempt a resolution of the issue, that the Respondent obtain quotes from contractors to carry out work based on two options: 'Option 1' being to repair the damage caused by the fallen tree, retaining a gap, as immediately prior to the damage being caused; 'Option 2' being to reinstate the fence, unbroken, removing the gap.
- It stated that it would proceed on the basis of the option, "favoured by the majority of owners."

20. The Applicant replied on 10 January 2022, indicating his dissatisfaction with this approach, in particular highlighting that the opinion from the Council re: a right of way had not been forwarded to the other owners; and alleging that the putting forward of Option 1 for consideration was the Respondent exceeding its authority.

21. On 24 January 2022, the Applicant wrote a formal email of complaint to the Respondent regarding its having proposed the two options to owners for resolution of the issue with the fence.

22. On 25 January 2022, the Respondent sent a complaint form to the Applicant for completion.

23. On 1 February 2022, the Applicant completed the complaint form and returned it, attaching a further 5-page paper apart, setting out further details of the complaint.

24. At some point in February 2022, the Applicant and Respondent met to discuss the concerns he set out in his complaint.

25. On 28 February 2022, the Respondent sent a letter to the Applicant referring to the discussion and asking for confirmation that he was satisfied with the following course of action on their part:

- That they would obtain three quotes for the reinstatement of the fence;
- That they would circulate these among the owners, along with the opinion from the Council regarding right of way, indicating that it was their intention to instruct that work;
- That they would consider responses received, stating, “should we receive feedback from a majority of owners that they do not wish us to procure these services, we will have no alternative but to abide by these wishes.”

26. On 1 March 2022, the Applicant replied, confirming that he agreed with this course of action and asking for the Respondent’s position on two points:

- If there were a clear majority against the proposal, defined as 27 owners against, would that mean that the status quo would remain, pending some other proposal being agreed.
- In the same circumstances, would those in opposition have to provide justification for their position (the Applicant expressed his expectation that that would be required).

27. On 4 March 2022, the Respondent replied to the Applicant, answering the first point in the affirmative; and stating that that would then require the owners to come together to discuss an alternative solution.

28. On 28 December 2022, the Respondent sent a letter to homeowners enclosing the most competitive quotation for reinstatement of the fence; the letter from the Council; a further letter from the Scottish Rights of Way and Access Society (‘SRWAS’) confirming there is no recorded right of way through the gap and directing the Applicant back to the Council for its opinion on whether an unrecorded one may exist; and stating:

“It would be our intention to place an instruction [with the contractors identified] to proceed with their proposal on your behalf, unless the collective homeowners let us know before the 16th of January 2023 that you prefer to take a different approach.” [Emphasis as in the original.]

29. On 13 January 2023, the Applicant sent an email to the Respondent indicating that he was aware that some homeowners had complained that the letters from the Council and SRWAS were not conclusive on the question of the existence of a right of way, but offered only an opinion; and stating (among other things):

“The H&P letter is to be re-worded and reissued with the vote extending another 14 days. I am fine with this and would please ask that the reasons for the reissue are made clear in the next letter.”

30. The Respondent issued a letter on 20 January 2023 setting out the situation again, providing an update on the voting progress, and acknowledging that the letters that had been copied previously were only offering an opinion on the right of way issue.

31. The Respondent emailed the Applicant on 23 January 2023, copying the letter of 20 January 2023 to him, and stating (among other things):

“If we have not received a majority decision from the homeowners (27 votes either way) by Wednesday 1st February 2023, we intend to issue a final letter providing the owners with 7 more days to vote before closing the file.”

32. The Respondent sent a further letter to the owners on 6 February 2023, setting out the proposal again, noting the progress of the vote, and stating:

“Unless we receive agreements or objections from a majority of homeowners (27) by Friday 10th January 2023, it is our intention to close our file on the matter.”

33. On 7 February 2023, the Applicant emailed the Respondent indicating his dissatisfaction that its position on the vote had changed, by stating that an absolute majority of owners would have to vote in favour of the proposal for it to proceed.
34. On 13 February 2023, the Respondent emailed the Applicant, acknowledging that its original intention had been to proceed on the basis that, failing a majority of owners objecting, it would instruct the works; but stating that it had changed its approach following it having been established that the letters from the Council and SRWAS regarding the right of way were offering opinions only.
35. The Respondent further indicated, also in the email of 13 February 2023, that it would review the matter again on 17 February 2023 and, if no absolute majority had voted at that point, it would allow 10 more days for voting, before closing the case and following the majority of votes cast.
36. On 17 February 2023, the Applicant emailed the Respondent asking it to refrain from closing the file on the voting; acknowledging that it had been making attempts to get the outstanding votes cast; and saying he had contacted the Council further regarding the issue of the right of way and felt that further information may be forthcoming from them on that.
37. Later on 17 February 2023, the Council replied to the Applicant confirming its opinion that there is no right of way through the gap; however, suggesting that there may be a right of access for the public in terms of the Land Reform (Scotland) Act 2003; and noting that there would be no need to create a formal servitude for such rights to be exercised.
38. The Applicant emailed the Respondent on 21 February 2023, attaching the recent email from the Council and stating, "I now intend to pursue the rights of access under the Land Reform Act and that a servitude right of access now exists on the fence line at 33/39 Woodyett Road [sic]."

39. In that email of 21 February 2023, the Applicant further suggested that the (as he took it) now indisputable existence of a public right of access through the gap meant that, in default of a majority position on the repair, it was obliged to carry through its 'option 1' of a repair to the fence, leaving a gap (see para.18, above).

40. On 2 March 2023, the Respondent replied to the Applicant, in the following terms:

"We note the lengths you have gone to with the local authority and Scotways [SRAWAS] concerning official classification of the current route and thank you for providing details of this to our offices. We will certainly hold this information on file.

Presently, however, there are 23 objections, from homeowners in the estate, against any remedial work being undertaken to the fence.

Although this number does [not] qualify as a majority of the overall ownership, it is a clear majority of those owners who have cast a vote.

My team and I have done our utmost to try to facilitate the reinstatement of the fence, that you requested, and following our initial letter to the owners on 28 December 2022, as you are aware, we have extended the voting timeframe to allow as many homeowners as possible to vote on the proposal (extending to calling and writing to those who had not voted).

At this stage, however, we feel that HMPS has fully exhausted our resources within our Core Services as Property Manager for the development. It is clear, from some of the communications received, that we simply cannot progress this any further. We would, therefore, recommend that you seek a legal opinion on progressing with your wishes, as we have reached an impasse in terms of our role and appointment.

I understand that you will be disappointed with this, however, hope you will understand the level of resource that we have devoted to what is now a dispute/ disagreement between homeowners.”

41. On 6 March 2023, the Applicant emailed the Respondent confirming his intention to make an application to the Tribunal on the basis of his complaint from February 2023.
42. On 7 March 2023, the Respondent replied, indicating it had considered the Applicant’s email under stage 2 of its complaints procedure, but had nothing to add to the position put forward in the email of 2 March 2023; and gave the details of the Tribunal, should he wish to take the matter further.
43. On 10 March 2023, the Respondent sent a letter to the owners stating that 24 objections to the proposed work had been received, as against 17 agreements, and that it was therefore closing its file on the matter.
44. On 16 March 2023, the Applicant emailed the Respondent, referring to the letter of 10 March 2023, and raising again his concern that there would be an impact on the values of properties within the development as a result of the boundary fence being left in disrepair, and the fact (as he considered it) that that would have to be declared in any home report questionnaire. He asked that the Respondent assist him in raising this issue with the other owners, as he considered it part of their role to do so.
45. On 20 March 2023, the Respondent replied, indicating that it considered the issue closed, on the basis of the majority decision, and any further discussion was a matter to be discussed between the owners directly.
46. On 23 March 2023, the Applicant replied again asking for the Respondent to communicate the issue of home report declarations to the other owners.
47. On 27 March 2023, the Respondent again stated it was not willing to do this, it being outside of the terms of service.

- Relevant Law

48. The Property Factors (Scotland) Act 2011 ('the Act') sets out at s.14 (so far as is relevant):

"14 Code of conduct

(1) The Scottish Ministers must from time to time prepare a code of conduct setting out minimum standards of practice for registered property factors (a "property factor code of conduct").

...

(5) A registered property factor must ensure compliance with the property factor code of conduct for the time being in force."

49. The Scottish Ministers have set out such a code of conduct, most recently with effect from 16 August 2021.

50. Section 19 of the Act states (again so far as is relevant):

"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."

- Discussion

51. The Applicant alleges failings on the part of the Respondent in respect of a number of paragraphs of the Code of Conduct for Property Factors ('the Code'). The Tribunal's findings in relation to each alleged breach, based on the facts as found above, will be set out in paragraph order as set out in the Code. The text of the relevant paragraph will be set out in italics and the numberings in these italicised sections are from the Code:

Section 2: Communication and Consultation

2.1 Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.

52. The Applicant's complaint in regard to this section of the Code largely centres around his dissatisfaction with the manner in which the Respondent arranged the vote on whether and how to complete the fence repair; and how it communicated what action would be taken based upon the different possible outcomes of the vote.

53. In relation to the first part of this, his issue is that the Respondent did not provide the owners with any instruction that a failure to repair the fence would be a breach of the burdens contained in their title; or communicate his concern that the changes would have to be reported in home report questionnaires and, thus, have a negative effect on property values. However, neither of these points was uncontroversial, and there was no obligation on the Respondent to make a case for one or other of the options it was suggesting. It rightly suggested to the Applicant that, if he wanted someone to

make that case, he should do so directly to the other owners himself. Para.2.1 of the Code requires the factor to provide information the owners require to understand its (i.e. the property factor's) operations- not to act as a legal or financial adviser.

54. The Applicant also complained under this heading that the Respondent was inconsistent in not referring to the title conditions in its letter of 28 December 2022, having done so in relation to a different fence repair in a letter of 28 November 2022. The context in which that latter reference was made was in explaining how the titles apportioned liability for the repair, so it was quite correct that that reference should have been included. The situation in this case did not require that information to be set out, so the Respondent did not do so. There is no inconsistency; they are simply different situations.

55. In regard to the second point, as to what different outcomes of the vote would mean: the Respondent was clear with the Applicant in its email of 7 January 2022 that it did not have authority to proceed with works to repair the fence unless instructed by the owners to do so. That was, the Tribunal considers, correct, on the basis of the terms of service quoted at para.9, above. (It is worth noting at this point that the Applicant agreed at the hearing that these terms of service are the current terms of the agreement between the owners and the Respondent regarding its factoring of the common property; since in some parts of his written submission, he takes issue with the Respondent referring to having been appointed at a meeting of owners in 2019. The Tribunal has not made any findings in fact in regard to that meeting, or the terms of the Respondent's appointment following it, on the basis that it is irrelevant to the matters before it. It is not at issue between the parties what the terms of service that applied at the relevant time were.)

56. The water became slightly muddied thereafter, however. The Respondent misunderstood its position and initially intended to proceed with the work, unless an absolute majority objected to it going ahead, based on whichever of the two options presented was more popular. On the basis of that misunderstanding, the Applicant was told before any letter was sent to other

owners: “should we receive feedback from a majority of owners that they do not wish us to procure these services, we will have no alternative but to abide by these wishes,” (Para.22, above); which he understood meant that, otherwise, some form of repair would be carried out to the fence. That interpretation was reinforced by the terms of the letter of 28 December 2022, quoted at para.25, above.

57. The Respondent corrected its position to the Applicant, in the email dated 23 January 2023 (para.28, above), and to the other owners, in the letter dated 6 February 2023 (para.29, above). It has been consistent in that position since then.

58. The Respondent did not therefore inform the Applicant correctly of what to expect at the beginning of the voting process. It should have stated, consistent with its email of 7 January 2022, that, failing an absolute majority in favour of one or other option, the status quo would remain. Nonetheless, it appears to the Tribunal that this was a genuine error on the part of the Respondent and not really a failure of communication, per se. When the Respondent realised its error, it communicated effectively to clarify the position and extended the time period for voting to take place. Many aspects of the Respondent’s communications with residents were very good, for example its taking the time to contact non-voters directly. It responded timeously and in a considered and comprehensive way to the Applicant’s considerable volume of correspondence on the fence issue. Overall, the Tribunal therefore does not consider the Respondent to have been in breach of para.2.1 of the Code. If the failing identified were sufficient to constitute such a breach, the Tribunal would not in any event have considered it of sufficient significance to merit the making of a Property Factor Enforcement Order, given the context of otherwise good and accurate communication, and the fact that it did not in the end affect the manner in which the outcome of the vote could have been acted upon. That is ultimately a matter of law. In any case, there was no majority, whether absolute or otherwise, for repairing the fence, after the voting period ended.

59. Finally under this heading, the Applicant suggests the Respondent did not answer his concerns regarding the potential issues regarding access rights, servitudes or a right of way, should option 1 have been selected by the owners. These are all legal questions and the Respondent was quite correct not to offer advice on them. If the Applicant was in doubt regarding the legal position, he should have taken legal advice; if he wished to make a case on these points to his fellow owners, it was his responsibility to do so.

2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS [written statement of services]. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

60. The Applicant makes a bald statement to the effect that his complaint was not dealt with within the timescale set out and that he was not kept informed as to its progress. That is not supported by the facts of the case (see para.67, below). The Applicant's correspondence was responded to quickly and comprehensively. That the Applicant ultimately did not get the outcome to the vote that he wanted was not the fault of the Respondent.

61. For reasons that are not clear, the Applicant also makes reference under this head to alleged failings on the part of the Respondent in terms of the title conditions, by not having maintained the boundary fence, and by having put the question of repair to a vote. It is not the Respondent's responsibility to ensure compliance with the title conditions, but the homeowners'. The Respondent required a majority of owners to support any proposed repairs work it would instruct on their behalf, so it was quite correct to arrange a vote on the issue.

62. The Applicant also refers again to the Respondent's not having given information on what he considers are the consequences of failing to repair the fence to the owners. That point is addressed at para.49, above.

Section 5: Insurance

5.1 A property factor must have, and maintain, an adequate professional indemnity insurance policy, and ensure that it is appropriate for its level of income and type of services offered. This applies to a property factor that is a local authority or housing association unless it is able to arrange equivalent protections through another route. Details of the policy (including name of provider, policy number and summary) or equivalent protections must be made available if requested by a homeowner who wishes to verify the policy is in place.

5.2 Property factors may wish to make homeowners aware of their statutory duty to insure against prescribed risks, such as fire or flood (see section 18 of the Tenements (Scotland) Act 2004, and the Tenements (Scotland) Act 2004 (Prescribed Risks) Order 2007 (SSI 2007/16)).

63. The Applicant's reference to these paragraphs of the Code appeared to be in regard to his concern that the public liability insurance obtained on behalf of the owners by the Respondent would not be sufficient to cover the additional risks engendered by the fence being left unrepaired. Neither of these paragraphs is concerned with that matter. Para.5.1 is in regard to the insurance to be held by the factor. Para.5.2 does not impose a duty ("may wish"); but is also only concerned with informing homeowners of their statutory duties in regard to insurance. There is therefore no breach of these paragraphs.

Section 6: Carrying out Repairs and Maintenance

6.1 This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.

6.2 Property factors may also agree, by contract, to instruct that specific maintenance duties are undertaken by specialist contractors on behalf of homeowners which contribute to fire safety. For example, the requirement in fire safety law to maintain any measures provided in communal areas for the protection of firefighters e.g. firefighters lifts, rising fire mains etc, or to ensure that common areas are kept free of combustible items and obstructions.

64. The Applicant's case in regard to these paragraphs was, first, that the Respondent had failed to have essential maintenance (i.e. the repair of the fence) carried out; and, second, that no maintenance inspections had taken place.

65. There is a distinction between 'repairs' and 'maintenance' and the Applicant in his case conflates the two. The issue with the fence is a repair. In that regard, the Respondent did seek to have the repair done, but was not authorised by the owners to do so. It does not have any further duty under para.6.1 of the Code.

66. Neither of these paragraphs refers to maintenance inspections, so the Tribunal did not consider the question of whether or not maintenance inspections had been carried out was a relevant one, in considering whether their terms had been breached.

Section 7: Complaints Resolution

Property Factor Complaints Handling Procedure

7.1 A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.

The procedure must include:

- *The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.*
- *The complaints process must, at some point, require the homeowner to make their complaint in writing.*
- *Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.*
- *How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.*
- *Where the property factor provides access to alternative dispute resolution services, information on this.*

67. The Applicant suggests that his complaint was not dealt with within the 14 days stipulated by the Respondent's terms of business for stage 1; or the 28 days stipulated at stage 2. While it is correct that the letter setting out the Respondent's response to the Applicant's complaint was sent 27 days following the complaint having been sent, the Respondent was engaging with the Applicant during that time, by meeting with him and discussing the issue he had raised. His complaint was therefore addressed timeously. The stage 2 complaint was only made on 6 March 2023 and was answered on 7 March 2023, well within 28 days. The Tribunal therefore does not consider that there was any failure to apply the complaints handling procedure consistently or reasonably.

68. The Applicant raises various other points under this head that have already been addressed elsewhere. In any case, this paragraph of the code is primarily concerned with the content of the factor's complaints handling procedure and how that is applied: not with whether a homeowner is satisfied by the outcome of the complaints procedure.

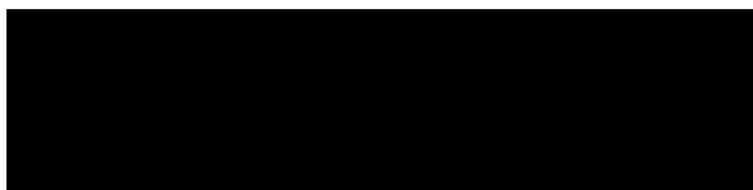
69. For all the reasons set out above, the Tribunal does not consider that there has been a breach of the Code in this case. In those circumstances, it must refuse the application for a Property Factor Enforcement Order.

- Decision

Application refused.

Right of Appeal

In terms of Section 46 of the Tribunal (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.



18 December 2023

Legal Member/Chair

Date