First-tier Tribunal for Scotland (Housing and Property Chamber)

Property Factors (Scotland) Act 2011, section 17(1)

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Regulations 2017, as amended ("the 2017 Regulations")

Chamber Ref: FTS/HPC/LM/18/3392

Hillpark Grove Development, Edinburgh, EH4 7AP
("the Property")

The Parties: -

Mr Aylmer Millen, residing at 5 Hillpark Grove, Edinburgh, EH4 7AP
("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD
("the Factor")

Tribunal Chamber Members

Maurice O'Carroll (Legal Member)
Kingsley Bruce (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has failed to comply with sections 2.5, 6.4, 6.9 and 7.2 of the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act").

It further found that it had failed to carry out the property factor duties as required by section 17(1)(a) of the Act as detailed in the present decision.

Background

1. By application dated 14 December 2018, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 2.5, 6.4, 6.8, 6.9, 7.1 and 7.2 of the Code as imposed by section 14(5) of the Act. He also wished to complain that the Factor had failed to comply with various other duties not specifically provided for in the Code as detailed below.

2. By decision dated 4 February 2019, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.

3. A hearing of the Tribunal was held at 10am on 28 March 2019 at George House, 126 George Street, Edinburgh. The Homeowner appeared on his own to give evidence. The Factor was represented by Karen Jenkins, Client Relations and Support Manager and by Nigel Fyffe, Director of the Property Team for the Factor, each of whom gave evidence to the Tribunal.

4. The Homeowner intimated his concerns regarding the alleged failures in duty on the part of the Factor by emails dated 9 November 2018, 23 November 2018 and 11 December 2018, in compliance with the requirements of section 17(3) of the Act.

Tribunal findings

The Tribunal made the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations:

5. The Homeowner's complaints were comprehensively detailed in the emails noted above and in the course of discussion before the Tribunal. In discussion before the Tribunal, the Factor's duties were discussed, before going on to consider the terms of the Code of Conduct for Property Factors and whether they had been breached by the Factor. The present decision will follow the same order.

6. This is a land management case. It concerns the management of the common parts of the development described below, which are collectively referred to as 'the Property' or 'the development' respectively. The Homeowner purchased the house in which he resides in or about April 2004. It is a free-standing house within the development which consists of 156 households, comprising detached town houses and four blocks of flats. The development was commenced in or about 2002 and was completed in stages until final completion of the 156th unit in or about 2016. The extent of the Property in common ownership was therefore established in or about 2016.

7. The original factor appointed by Mactaggart and Mickel, the house builder who constructed the development, was a company called Safe Hands. The Factor subsequently acquired the business of Safe Hands in or about October 2003 and thereby itself became the factor for the development. No handover documentation was supplied to the Tribunal. Accordingly, it was not possible for it to ascertain the extent of liabilities which passed from Safe Hands to the Factor at the time of the business transfer.

8. The Factor acts as agent for the homeowners within the development as set out in the Title Deeds and within its own Written Statement of Service ("WSS"), both of which were supplied to the Tribunal. The Factor obtains a service charge from the body of homeowners for its services. It is therefore non-gratuitous.

9. The most relevant part of the WSS of the purposes of the present discussion is part 1 which sets out the Factor's Authority to Act. It makes it clear that the

Factors act as agents for the homeowners within the development to the extent provided for in the Deed of Conditions relevant to the development.

10. The Deed of Conditions referred to in the WSS is that recorded by Mactaggart and Mickel, recorded in the General Register of Sasines on 4 April 2002. The relevant parts setting out the obligations of the homeowners within the development and therefore the duties of the Factor as agents are set out in Part FIFTH, Maintenance of Common Parts. The extent of the Common Parts and Central Open Space are set out in the definitions section at clause FIRST of the Deed of Conditions.

11. There was, however, no dispute as to the extent of the common parts under the responsibility of all homeowners or the extent of the maintenance burden. It is accordingly unnecessary to set out the terms of those parts of the Deed in this decision. It should be noted, however that the Common Parts of the development refers to all areas not disponed to individual homeowners and includes "structures in, on or under the Development." It therefore appears to include the drainage system or parts thereof as and when they were completed and transferred from Mactaggart and Mickel to individual proprietors as part of the overall development.

12. The common parts of the development have historically suffered from drainage problems and flooding. The development site slopes from West to East. Contiguous with the development boundary is an area of nature conservation with conservatory at Corstorphine Hill, under the control of the local authority.

13. In order to manage surface water run-off from area controlled by the local authority, the developer installed a land drain running along the western boundary of the development site. Tributaries run off from the main drain and discharge along the norther boundary in to the surface drainage system. There is a soakaway in place as well as the drainage system described. Along the extent of the drains are a number of manholes and silt traps. These are intrinsic to the drainage system and require periodic maintenance to prevent build-up of excessive silt and other blockages.

14. In the opinion of the Homeowner, the drainage arrangements in place at the property are not fit for purpose and have not been constructed with the requisite degree of workmanship. This, he stated, has been the cause of the flooding and drainage issues at the Property.

15. A fundamental part of the homeowner's contention was that the Factor accepted the progressive handover of the drainage system from the developers at the completion of each stage of the development, without proper authorisation from homeowners to do so and without themselves carrying out any form of inspection to ensure that the drains at each stage were fit for their intended purpose and had been constructed with sufficiently competent workmanship. The Factor had, it was said, merely accepted each part of the drainage system as it was transferred to the Property at 'face value.'

16. Miss Jenkins on behalf of the Factor gave evidence to the Tribunal that in August 2016 an initial survey, with the authority of the homeowners, was instructed in relation to the drainage issues with a company called Enviroclean. The results of that survey were inconclusive, so a further investigatory survey was instructed in March 2017. The later investigations involved a CCTV survey over separate sections of the drainage in order that they might be jetted and the issue remedied. This did not result in a resolution of the issue.

17. There was another meeting with homeowners in August 2017 and three tenders were obtained for jet washing, CCTV investigation and to identify remedial works. Mactaggart and Mickel, after an approach from the Factor, cleared the drainage run at its own expense in 2014. Evidently, this was also insufficient to rectify the issue. As at the date of the hearing, the Factor submitted written representations to the effect that a number of meetings with contractors had been arranged. One had been planned for 6 March 2019 and a follow-up meeting or meetings arranged for the end of April.

18. In all, the drainage issue had been known about since around 2010 and yet, by the date of the hearing in April 2019, some nine years later, it had yet to be resolved. The cost to homeowners in relation to these as yet inconclusive ground investigations has amounted to over £40,000.

19. Miss Jenkins indicated in evidence that the Factor had taken over responsibility for the landscape areas but that the responsibility for drainage remained with Mactaggart and Mickel until 2016 when the final phase of the development had been completed. Their actions in carrying out works in 2014 indicated this to be the case, rather than those being by way of goodwill or in order to preserve the good reputation of Mactaggart and Mickel as housebuilders.

Tribunal findings in relation to Factor duties

20. It appeared to the Tribunal that both parties were in error in relation to the management responsibilities which the Factor required to exercise. In the view of the Tribunal, there was no basis upon which to assert that the Factor had limited responsibilities in respect of maintenance of the Common Parts of the development, restricted to landscaping only. It is clear from the Deed of Conditions that responsibility for the Common Parts became the collective responsibility of the homeowners as and when those phases of the development were completed.

21. As the WSS makes clear, the Factor acts as agent for the homeowners. It follows that, as liability for maintenance fell on homeowners as each stage of the development progressed and ownership in it was transferred, so too did the obligation to maintain fall on the Factor as their agents. The Factor was therefore liable to maintain all common parts as of the date of their appointment upon the acquisition of Safe Hands, its predecessor. No satisfactory reason was given in evidence by the Factor as to why their responsibilities would be anything less than that from October 2003 onwards

22. However, the Tribunal considers that the Homeowner goes too far to assert, as he did in evidence, that there was a duty to investigate the state of the drainage arrangements at each successive stage of the handover from Mactaggart and Mickel to homeowners as and when the development was completed. He also asserted that the maintenance of the flatted properties as and when disponed incorporated a duty of investigation. It was further stated by the Homeowner that the Factor had to make checks for patent defects at those times, if necessary, by lifting manhole covers to inspect and check the drainage system to ensure that they were reasonably fit for their purpose. None of these contentions on the part of the Homeowner were accepted by the Tribunal.

23. When invited to consider the relevant terms of the Deed of Conditions, the Homeowner conceded that there was nothing within them that indicated that such a duty of inspection existed. That is perhaps unsurprising as the duty of maintenance primarily falls upon proprietors of the development and then to the Factor as their agents. It would be surprising for a Deed of Conditions to require proprietors to carry out specialist investigations of complex drainage arrangements, which would presumably require engineering expertise, at each phased stage of the handover of the development. Indeed, there is no reference to inspections or the phased transfer of the development in the Deed of Conditions. It follows that the Factors do not have such a duty either.

24. Testing matters another way, the Homeowner was unable to inform the Tribunal as to how the Factor, if it was dissatisfied with the extent of drainage arrangements after such an assessment following inspection, would actually manage to prevent any phased transfer from taking place. He was unable to describe the legal mechanism which was in place to prevent that happening at any stage when Mactaggart and Mickel entered into purchase agreements to sell the respective parts of the development. For this reason also, the Tribunal could not accept the Homeowner's submissions regarding the extent of the Factor's duty.

25. Two other matters arose under this heading: whether the Factors indeed acted as agents and not as principals; and whether they were in breach of their duty not to act in conflict of interest. In relation to the first question, there was no evidence before the Tribunal to suggest that the Factors acted in any capacity other than as agents for the homeowners: the WSS and Deed of Conditions, both indicated that they did. No document demonstrating the contrary was provided.

26. In relation to the second question, the Homeowner was not able to provide any evidence demonstrating any relationship, contractual or otherwise, between the Factor and Mactaggart and Mickel or any other third party. Accordingly, the Tribunal was unable to find that there had been any acting in conflict of interest by the Factor with regard to any third party, including the housebuilder.

27. The Factor does, however, have a duty to react to maintenance issues as and when they arise and to deal with them in as prompt and effective a manner as would any affected homeowner. In carrying out their functions as property factor, the Factor required to exercise ordinary or reasonable skill and care.

This has been expressed by an institutional writer as follows: in non-gratuitous agency, an agent "is obliged to act with that diligence and discretion which a man of prudence uses in his affairs." (Erskine, Institute, III, 3, 37).

28. The Homeowner referred the Tribunal to section 17(4) of the 2011 Act which provides that: "References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard." The Tribunal agreed with the submission by the Homeowner that section 17(4) imports a qualitative requirement on the Factor's duties.

29. It was a matter of admission from Miss Jenkins that the drainage repair issues had not been carried out as expeditiously as they might have been. This is perhaps something of an understatement, given the length of time which has passed since the onset of the issue and the date of the hearing, all without resolution. Even based on Miss Jenkin's assertion that the Factor's maintenance duties in relation to the drainage system only arose since 2016 (which the Tribunal expressly finds against, as discussed above), there has been a delay of over three years which, coupled with a paucity of communication to the body of homeowners (as discussed below), the Tribunal finds to have been an inordinate delay in having matters resolved.

30. The Tribunal also notes evidence from the Homeowner, which it accepts, that both Scottish Water and the local authority took remedial action during that time. Moreover, this was at the instigation of homeowners themselves, and not the Factor.

31. The Tribunal therefore finds that the Factor has failed in its duty as a factor to deal with maintenance issues in relation to the drainage system with ordinary or reasonable skill and care. Using the language of section 17(4), and in addition to this finding at common law, the Factor has not carried out its duties to a reasonable standard.

Tribunal findings in relation to the Code of Conduct

Section 2.5

32. This section of the Code requires factors to deal with enquiries and complaints within prompt timescales. It was accepted by Miss Jenkins that there had been no communication or updates provided to homeowners between 25 October 2018 and 27 March 2019 during which the Homeowner had been attempting to obtain progress in relation to the drainage issue. This is a period of over five months which represents an unacceptable delay and lack of communication contrary to the requirements of the Code, and in terms of the factor's duties generally, as noted above.

33. Reference was also made to the Homeowner's letter of 24 December 2018 which noted that more than 28 days had passed since his earlier communication with no response, in breach of the Factor's own standards as set out in its WSS.

34. The Tribunal therefore finds that the Factor acted in breach of section 2.5 of the Code.

Section 6.4

35. This section provides that where core services in the WSS include periodic property inspections and/or a planned programme of cyclical maintenance, then the Factor must prepare a programme of works.

36. Page 3 of the WSS provides that a routine inspection of the development will be carried out by the client relationship manager once every six weeks. The qualifying part of section 6.4 has therefore been met. It was accepted by Miss Jenkins that no programme of works has in fact been prepared by the Factor, although an undertaking to produce one was given. There was clearly a failure by the Factor to institute a periodic system of maintenance for the drainage system since 2003.

37. Section 6.4 of the Code has therefore been breached by the Factor and the Tribunal so finds. The Tribunal would also note in passing that it was suggested by the Factor that such a programme when produced would stipulate an inspection of the drains once every three years. On the basis of the evidence led, this would appear to be an inadequate frequency, given the serious issues that have been encountered with the drainage system at the development for a period now approaching a decade.

Section 6.8

38. This section requires factors to disclose to homeowners in writing any financial or other interests they may have with contractors appointed.

39. No evidence was led regarding any connection with, or interest in, any contractor appointed to carry out works at the development. Accordingly, the complaint under this part of the Code was not upheld.

Section 6.9

40. This section requires factors to pursue contractors or suppliers to remedy defects in any inadequate work or service provided. Mactaggart and Mickel supplied services in respect of the drainage system in 2014. It was a matter of admission by Miss Jenkins that the Factor did not follow up the work carried out until 2016. This appears to have been based on the misunderstanding of the extent of the Factor's duties as discussed above.

41. A period of over two years before taking any action at all demonstrates a failure on the part of the Factor to pursue the supplier for inadequate work or service provided. As noted above, the works were self-evidently inadequate as the drainage issue remained. Once two years had passed, the time during which remedial action could have been pursued against Mactaggart and Mickel had, for practical purposes, been missed.

42. The Tribunal therefore found that the Factor had breached section 6.9 of the Code.

Section 7.1

43. This section of the Code provides that Factors must have a clear written complaints resolution procedure in place which sets out a series of steps which they will follow, accompanied by reasonable timescales set out in the WSS. The procedure must also include how the factor will handle complaints against contractors. It is the latter part of the section which the Homeowner stated was non-compliant with the Code.

44. The Factor's Complaint Handling Procedure (CHP) is set out at page 15 of the WSS. It sets out the Stage procedure for complaints and sets out timescales. The reader requires to go back to the end of page 14 in relation to complaints against contractors. The section dealing with the CHP follows on from that. It is therefore a matter of implication that a homeowner wishing to complain about a contractor should invoke the CHP and that the relevant timescales will apply.

45. The Tribunal decided, narrowly, that the complaints procedure in relation to contractors is tolerably clear enough to be understood by a reasonably well-informed reader. It therefore does not find that section 7.1 of the Code has been breached by the Factor. It does recommend, however, that the CHP section of the WSS be re-drafted in order to make it clearer.

Section 7.2

46. Section 7.2 of the Code provides that when the in-house complaints procedure has been exhausted without resolving the complaint, the final decision in relation to it should be confirmed by senior management before the homeowner is informed in writing. The letter should also provide details as to how the homeowner may apply to the Tribunal.

47. It was a matter of admission from Miss Jenkins that the requirements of this section of the Code had not been complied with. The final decision regarding the Homeowner's complaint had not been confirmed by senior management and details as to how to apply to the Tribunal had therefore not been provided.

48. The Tribunal therefore finds that the Factor breached section 7.2 of the Code.

Decision

49. The Tribunal finds that the Factor has breached its duty to comply with the Code in respect that it failed to adhere to the terms of sections 2.5, 6.4, 6.9 and 7.2 of the Code, all as required by section 14(5) and 17(1)(b) of the 2011 Act.

50. It further finds that the Factor has failed in its factor duties in terms of section 17(1)(a) of the 2011 Act in that it has failed in its duty as a factor to deal with maintenance issues with ordinary or reasonable skill and care and has failed to

carry out its duties to a reasonable standard as required by section 17(4) of the 2011 Act.

51. A proposed Property Factor Enforcement Notice accompanies this decision. Comments may be made **in respect of the proposed Property Factor Enforcement Notice only,** within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Appeals

52. 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 within 30 days of the date the decision was sent to them.

M O'Carroll

Signed: M O'Carroll Date: 17 April 2019
Chairman