

Housing and Property Chamber First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/19/2980

8 Broadlie Court, Neilston, East Renfrewshire, G78 3DT ("the Property")

The Parties: -

Marie McBride, 8 Broadlie Court, Neilston, East Renfrewshire, G78 3DT ("the Homeowner")

Levern Property Services Limited, 60 – 70 Main Street, Barrhead, Glasgow G78 1SB ("the Property Factor")

Tribunal Members:

Josephine Bonnar (Legal Member)

Andrew Murray (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 2.1 of the Code of Conduct for Property Factors. It has also failed to carry out its property factors duties in terms of Section 17(5) of the Act in that it failed to advise the Homeowner that additional estimates for a fence repair could be obtained should the Homeowner request same and failed to provide information on how contractors are appointed.

The decision is unanimous

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 Regulations"

The Property Factor 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.

Background

1. By application received between 25 September 2019 and 28 December 2019 the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors. The Homeowner stated that the Property Factor had failed to comply with sections 1, 2.1, 6.3, 6.4, 6.5, 6.7 and 6.8 of the Code. The Homeowner also sought a determination that the Property Factor had failed to carry out its property factor duties in terms of section 17(5) of the Act. The Homeowner lodged documentation in support of the application including emails to and from the Property Factor, copy written statement of services and copy minutes of meetings.
2. On 6 January 2020, a Legal Member of the Tribunal on behalf of the President, referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Glasgow Tribunals Centre, Room 111, 20 York Street, Glasgow on 2 March 2020.

The Hearing

3. The hearing took place before the Tribunal on 2 March 2020. The Homeowner attended. The Property Factor was represented by Mr Ward, their Director of Asset Management.
4. Ms McBride advised the Tribunal that the property is a part of a development comprising two blocks of flats, one with six and the other eight. She has been the owner of the property since 1996. The flats were built in 1988. Lavern Property services Ltd (LPS) became the property factor for the property in 2013.

Property Factor duties – failure to progress fence repair/only using own contractors/failing to advise homeowners that they only use own contractors/refusing to ingather funds of own contractors not used.

5. Ms McBride advised the Tribunal that there is a fence which runs along the boundary of the development with a piece of ground which is currently a vacant site. Planning permission has recently been granted for the erection of houses on the vacant site. The Homeowner and the other proprietors of the flats in the development are responsible for the maintenance and repair of the fence. This has fallen into disrepair. Discussions have taken place at four annual homeowner meetings with the Property Factor, but no progress has been made regarding instruction of the repair. Usually only two homeowners attend these annual meetings, as most of the properties are occupied by tenants. Ms McBride advised the Tribunal that in June or July 2019 she

obtained a quote from her brother in law for the repair of the fence of £2500. She gave this to Emily Connell, an employee of the Property Factor, as she was arranging to obtain estimates from contractors for the work. Ms Connell subsequently phoned her to ask about the measurements of the fence and advised that she was putting together quotes for the repair but didn't have any yet. A letter was then issued to Ms McBride and the other homeowners with two estimates for the work. The first, from Turner Property Services dated 15 August 2019, was for £9946.23. The second, from Archibald Shaw Slaters and Plasterers Ltd, dated 4 July 2019, was for £5990. Ms McBride noted that the date on the A Shaw quote predated her telephone conversation with Ms Connell. The estimate that she had obtained from her brother in law was not issued or referred to in the letter. No meeting was convened to discuss the repair. Homeowners were asked to respond to the letter in writing to confirm if they wanted to instruct the repair and which estimate they preferred. The matter was then discussed at the annual meeting of homeowners in November 2019. The Property Factor advised that they had not received the requisite number of responses to proceed with the repair. They also advised the Homeowner that they had been unable to use the estimate she had obtained because they could only instruct their own contractors, and he was not on that list. Ms McBride then advised the Property Factor that she would arrange for her brother in law to carry out the repair, if they would contact the other homeowners on her behalf and ask them to contact her direct. They agreed to do so. The Property Factor also told her that they would not ingather the funds if their contractors were not involved. Ms McBride advised the Tribunal that she heard nothing further from them regarding the matter until the detailed response to her complaint dated 24 December 2019, a copy of which she lodged with the Tribunal. Ms McBride further advised the Tribunal that the homeowners did not want A Shaw carrying out any work for them as their work had not been satisfactory in the past. A complaint had been made at one of the annual meetings regarding this.

6. Mr Ward advised the Tribunal that LPS is a subsidiary of Barrhead Housing Association Ltd. He explained that it is the Property Factor's practice to use contractors appointed through a procurement process with Public Contracts Scotland. This ensures that the contractors carrying out the work have undergone the appropriate health and safety checks and have the necessary insurance in place. Their main contractor, appointed through this process two years ago, is Turner Property Services, who unfortunately provided the most expensive quote for the fence repair. He confirmed that the use of Public Contracts Scotland has resulted in the "phasing out" of their use of smaller contractors. However, they still require to look beyond their appointed contractors for specialist services, which are required less often. Mr Ward advised the Tribunal that they had asked five contractors to provide estimates for the fence repair but only two had responded. He confirmed that the fence does need to be repaired and that it has been the subject of discussion at annual meetings. He also advised that although their usual practice is to obtain estimates from their appointed contractors, they can look elsewhere and sometimes use "Quick Quotes." They would have done so in this case, if the homeowners had asked for it. Mr Ward further advised that the Property factor has considerable difficulty getting the homeowners in the development

to approve any work, particularly since most of the properties are occupied by tenants. He accepted that the two quotes obtained for the fence were quite high, and very different. They could not have used the quote obtained by Ms McBride as they did not know what specification of the work had been provided. As a result, they could not be sure whether the estimate was comparable with the other two. In response to questions from the Tribunal Mr Ward advised that the Property Factor did tell Ms McBride that they would contact the other homeowners regarding her proposal to arrange the work herself. They put this on hold when she made her application to the Tribunal. He also advised that some of the homeowners don't update them when they change address, and this can cause problems when they need to be contacted regarding repairs. With regard to Archibald Shaw, Mr Ward said that the firm had been used by the Property Factor for many years and he was unaware of any complaint being made.

Property Factor duties - failure to carry out competitive tendering for gardening works.

7. Ms McBride advised the Tribunal that there had been no competitive tendering carried out, they were just told that McDermott Contract Services Ltd would be doing this work. She also advised that McDermotts did not do the work properly, did not sweep up after themselves and had on one occasion skimmed over a grassy area, destroying all the plants there. When she called Emily Connell to complain about this, she was called a liar. She advised that McDermotts now appear to have been replaced by a company called Nurture, who are better.
8. Mr Ward explained to the Tribunal that McDermotts have recently been taken over by Nurture. The employees have transferred over. The changeover went through a transitional phase from October 2019 with Nurture being the appointed contractor from 1 January 2020. He advised that any complaints received regarding the quality of work would have been taken up by the contractors but that he has no knowledge of any specific complaints. With regard to the lack of competitive tendering, Mr Ward advised the Tribunal that when the LPS became the property factor for Broadlie Court, their remit excluded the provision of landscaping and gardening. This was because the development had their own gardener and the homeowners preferred to continue with that arrangement. In August 2018 that arrangement came to an end and the Property Factor was approached about providing gardening services. They arranged, with the homeowners' agreement, to instruct McDermotts, who were their appointed contractor for this kind of work. McDermotts had been appointed through a procurement process and their contract expires in September 2020. In response to questions from the Tribunal Mr Ward confirmed that prior to the expiry of the contract in September 2020, consultation with homeowners will take place regarding the type of gardening service that they want. However, once that information is obtained, there will be a competitive tendering process with a view to appointing one contractor, and the homeowners will not be consulted in relation to that appointment. However, the homeowners will be able to opt out

of the provision of gardening services and appoint their own contractor, as they did before.

Property Factor duties - Defective step repair

9. Ms McBride advised the Tribunal that the Property Factor arranged for a repair to be carried out to a broken step at the entrance to the development. She spoke to the man who carried out the work at the time it was completed. He advised her that he had been told only to replace the broken step but the result of that was that the step was 2 inches higher than the one next to it. One of the residents then had an accident caused by this defect. She phoned LPS to complain. They said they would get it fixed. However, there was a delay of a full week before the defect was fixed, which she considered unsatisfactory given the number of elderly residents in the development who were at risk. She was also unhappy that her complaint was not taken at face value and that Mr Ward had wasted time visiting the development first, rather than just instructing the repair.
10. Mr Ward advised the Tribunal that when Ms McBride phoned LPS to report the defect, she spoke to him. It was a Friday afternoon. He went himself to check the steps on the following Monday and then arranged for the repair, which was carried out a few days later. He advised that he did not consider the delay excessive and that he had to investigate the complaint before instructing the repair, to see what was needed.

Section 1 of the Code

11. The Tribunal noted that the Homeowners complaint in terms of section 1 of the Code is as follows;- Section A "Authority to Act" – no statement of services issued stating the basis of their authority to act or information as to any level of delegated authority; Section B and C – not told that the Property Factor would only use their own contractors, no target times for repairs, not told that they will not ingather funds if their own contractors are not used.
12. In response to questions from the Tribunal Ms McBride advised that she had approached LPS about becoming the property factor because the homeowners were unhappy with their predecessor. Mr Ward advised that the appointment followed a series of meetings with the homeowners, attended by 3 or 4 of them. Thereafter a letter was issued to the homeowners. The majority voted in favour of the appointment. He referred the Tribunal to a copy letter dated 13 March 2013 addressed to Ms McBride. A copy of this had been sent to her with the complaint response dated 24 December 2020 and she had then lodged it with her application to the Tribunal. The letter confirms the appointment and refers to a number of documents being enclosed, including a copy of the written statement of services ("WSS"). He then referred the Tribunal to the current written statement of services, which had also been sent to her with the complaint response. This sets out on page 1 their "authority to act" and includes information about repairs being carried out up to a value of £250 per owner. Repairs which exceed this level will only be instructed if

approved by homeowners and once funds are received. The WSS also details the services to be provided and sets out target times for repairs. Mr Ward confirmed that the version of the WSS sent out in 2013 had a different layout but the content is essentially the same. He conceded that the WSS does not provide any information about how contractors are appointed, but should do so. He indicated that the current WSS is due for review and that he will address that omission as part of the review process. Ms McBride advised the Tribunal that she did receive the letter of 13 March 2013 but that no WSS was enclosed. She did not contact them to query this. She cannot recall being sent a WSS at any time.

Section 2.1 of the Code

13. Ms McBride advised the Tribunal that her complaint under this section relates to her contact with Emily Connell. She referred to her earlier evidence when she stated that Emily Connell told her during a telephone conversation that she was getting quotes for the fence repair but didn't have any yet. However, when the estimates were received the Archibald Shaw quote predated that telephone conversation. The comment made to her on the phone was therefore misleading and false. Mr Ward said that there was nothing to back up Ms McBride's claim about this conversation. He confirmed that he had spoken to Emily Connell whose recollection of the conversation was different. She did not recall discussing whether any quotes had yet been received. Ms McBride also referred the Tribunal to her evidence about giving her brother in law's estimate to Emily Connell. Ms Connell took it from her and did not say that it could not be used, either at the time or when they spoke on the phone about the fence measurements. She did not advise the Homeowner on either occasion that the Property factor only uses their own contractors

Section 6.3 of the Code

14. Ms McBride advised the Tribunal that she hand delivered her letter of complaint/request for information to the Property Factor at the end of September or beginning of October 2019. She did not receive a response. She was subsequently told that they had no record of receiving it and she re-submitted the letter in November 2019. The response was dated 24 December 2019. She accepted that the response did provide an explanation of how contractors were appointed. Mr Ward advised the Tribunal that all mail is processed in the same way, whether it arrives by post or hand. No trace of the hand delivered letter from Ms McBride was found. The letter from November 2019 was received and the response dated 24 December addressed the issues, including the issue of appointment of contractors.

Section 6.4 of the Code

15. Ms McBride advised that the Property Factor is supposed to carry out regular inspections and therefore should prepare a programme of works. She said

that they do neither. Mr Ward advised the Tribunal that inspections are carried out every 6 to 8 weeks, in terms of the WSS. The owners would not necessarily be aware as it would not be usual for the person carrying out the inspection to speak to the homeowners. A programme of works is prepared annually, for the annual meeting of homeowners. He referred the Tribunal to a series of documents entitled "Building Inspection form LPS" dated 2017, 2018 and 2019. He advised that these are the programmes of works prepared for the annual meetings. These were sent to Ms McBride with the complaint response and lodged by her with the Tribunal. He confirmed that if a repair issue is noted during an inspection, a repair line will be raised.

Section 6.5 of the Code

16. Following discussion Ms McBride confirmed that this section had been raised in error and that she does not seek a finding that this section has been breached.

Sections 6.7 and 6.8 of the Code

17. The Homeowner's complaint under these sections is that the Property Factor has not disclosed commission, fees or benefits received from contractors or any financial interest in contractors used. Mr Ward advised the Tribunal that both LPS and its parent company must operate in a completely transparent way. They have no financial interest in any of their contractors and no fees, commission or benefits are received by LPS. As part of the procurement process, they do expect contractors to offer some kind of community benefit such as taking on an apprentice or improving a community green area. This is for the benefit of the community and not the Property factor. Broadlie Court has never been part of any community benefit and therefore no information has been sent to the Homeowner regarding same.

The Tribunal make the following findings in fact:

18. The Homeowner is the heritable proprietor of the property, a flat in a development of 14 properties.
19. The Property Factor has been the property factor for the development since 2013.
20. In June or July 2019 an employee of the Property Factor was given an estimate for a fence repair by the Homeowner. The estimate was for a cost of £2500. The employee did not advise the Homeowner that this estimate would not be issued to the other homeowners.
21. The Property Factor's written statement of services does not contain information regarding the appointment of contractors

Reasons for Decision

Property factor duties – the fence repair

22. It was clear from the evidence that the Property Factor took steps in the summer of 2019 to try to get the boundary fence repaired. It was conceded by the Homeowner that many of the homeowners don't respond to letters about repairs or attend annual meetings. It is therefore not surprising that the property factor did not get the necessary authority to instruct the fence repair, particularly as both estimates are high if compared with the estimate obtained by the Homeowner herself. The Tribunal notes that the Property factor is part of a larger organisation, a housing association, and that contractors are procured through Public Contracts Scotland. However, there is no information about this in the WSS or elsewhere. Ms McBride was told at the annual meeting in November 2019 that the Property Factor only uses its own contractors. This was confirmed in writing to her in the complaint response she received dated 24 December 2019 which states, " Our written statements confirm that we only use our own contractors, so I can only apologise that over this time you were not aware of this. We only use our own contractors to ensure they are checked for health and safety requirements...". "This will explain why we were only able to obtain two quotes for the fence work.". Notwithstanding the terms of this letter, Mr Ward advised the Tribunal that he now accepts that the WSS is silent on the issue of appointment of contractors, something which he intends to address. He also advised that although the Property Factor usually only uses their own contractors, they do look elsewhere when it is appropriate to do so and have made use of "Quick Quotes" from time to time. He advised that they did not do so in this case, because the homeowners did not ask them to do so. The Tribunal is not persuaded by this argument. The Homeowner was clearly not told that she could ask for further quotes. In fact, the information given to her was that the Property Factor would only use their own contractors. It is undoubtedly part of a property factors duties to get repairs carried out at the best price available. It may be that other quotes would have been at a similar level to those obtained. It may also be that the quote obtained by the Homeowner was unrealistic or based on inaccurate specification of the work. However, the Tribunal is satisfied that the Property Factor ought to have offered to obtain further quotes, perhaps from smaller local contractors, before concluding that they could not get the work authorised. The Homeowner did not ask for this because she did not know that she could. The Tribunal is also not clear why the Property Factor failed to write to the other proprietors regarding the Homeowner's proposal to arrange the work herself, after they had agreed to do so. The Tribunal is satisfied that the Property Factor's failure to advise the homeowner about how they appoint contractors, prior to the letter of 24 December 2019, is a failure to carry out its duties. The Tribunal is also satisfied that their failure to offer to obtain further quotes for the fence repair is

also a failure to carry out their property factor duties.

23. The Homeowner had also complained that the Property Factor is unwilling to ingather funds if their contractors are not to be instructed. The Tribunal notes that the reason for this refusal is that the Property Factor is not instructing the work, rather than the choice of contractor. The Tribunal is satisfied that the Property Factor is entitled to refuse to collect funds from homeowners in a situation where the homeowners are arranging work themselves and that no failure to carry out property factor duties has been established with regard to this complaint.

Failure to carry out competitive tendering for gardening work

24. The Tribunal notes that Mr Ward's evidence about how the Property Factor became involved in providing gardening services was not disputed by the Homeowner. The Tribunal also noted that the Property Factor uses Public Contracts Scotland to appoint a landscaping contractor for all gardening work for a fixed term. The Tribunal is satisfied that the Property Factor has not failed to carry out its duties with regard to the current gardening arrangements. Their appointment as factor excluded this service and they stepped in to start providing the service at the request of the homeowners, when their own arrangement with a gardener came to an end. The Property Factor offered their own contractor for the work, and the homeowners accepted this. The Tribunal notes with some concern that, when the current contract ends, the options available to the homeowners appear to be limited. Either they accept the contractor appointed by the property factor, or make their own arrangements. As gardening is now part of the service provided by the Property Factor, it seems reasonable to expect that they would be consulted regarding the appointment of a new contractor. However, that is not the complaint before the Tribunal. With regard to the Homeowners complaint, the Tribunal is satisfied that the Property Factor did not fail to carry out its property factor duties when it offered to arrange gardening services in 2018.

Defective step repair

25. The Tribunal is satisfied that the Property Factor acted promptly to address the defective step repair when it was reported by the Homeowner. The Homeowner was unhappy that Mr Ward came out to inspect the step, rather than just arranging for a contractor to attend, as this led to delay. The Tribunal accepted the explanation that the Property Factor had to inspect to see what was needed before incurring the cost of instructing a contractor, and that a delay of a week was not excessive. No failure to carry out property factor duties was established in connection with this complaint.

Section 1 of the Code

26. Section 1 of the Code states "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". This statement should set out "A.a. a statement of the basis of

any authority you have to act on behalf of all the homeowners in the group” and “B.c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs, and the frequency of property inspections”

27. The Tribunal is satisfied that the Homeowner was sent a copy of the Property Factor’s WSS when they were appointed in March 2013. The letter refers to the document and the Homeowner accepts that she did not contact the Property factor to say the document was not included. There is also reference to the WSS in other correspondence to the Homeowner. The Tribunal is also satisfied that the WSS lodged with the Tribunal set out the basis of their authority to act and the target times for repairs. As previously indicated, the Tribunal is satisfied that the WSS does not contain information about how contractors are appointed or state that they generally only use their own contractors. However, this information is not required in terms of Section 1 of the Code. No breach of section 1 has been established.

Section 2.1 of the Code

28. Section 2,1 of the Code states, “ You must not provide information which is misleading or false”. The Tribunal is not persuaded that the Homeowner was misled by Emily Connell regarding the quote from Archibald Shaw. The Tribunal accepts that a telephone conversation took place and that the Homeowner recalls asking whether quotes had already been received. The evidence from Mr Ward, that he asked Ms Connell and she could not recall the discussion, was not very satisfactory. However, the Tribunal is not satisfied that the comment (if made) was necessarily misleading or false. The date on the estimate does not mean it was sent or received then. It may have been received but not yet seen by Ms Connell. She might have simply forgotten about it. The Tribunal is satisfied that for a breach of this section to be established, the information must have been deliberately misleading or false, and that has not been established.

29. The Tribunal is satisfied that the Property Factor did provide information which was misleading or false regarding the option of obtaining further quotes for the fence repair. It was clear that the information given to the Homeowner at the meeting in November 2019 and in the complaint response dated 24 December 2019 was misleading and false. She was told that they only use their own contractors and not told that they could get other quotes from smaller contractors, not on their approved list. The Tribunal concludes that a breach of this section has been established.

Section 6.3

30. Section 6.3 states “On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in house staff”. The Tribunal is satisfied that the Property Factor’s letter of 24 December 2019 does explain how contractors are appointed and why this process is used. The Tribunal notes that the Homeowner first made the request at the end of September or

beginning of October 2019 when she hand delivered a complaint letter. However, the Tribunal accepted Mr Ward's evidence that the Property Factor could not find or trace the letter in question. The complaint/request was not re-submitted until 25 November 2019, by email. A full and detailed response was issued on 24 December 2019 and a meeting had taken place in between times. The Tribunal is satisfied that no breach of this section of the Code has been established.

Section 6.4

31. Section 6.4 states, " If the core services agreed with homeowners includes periodic property inspections and/or planned programme of cyclical maintenance then you must prepare a programme of works" The Homeowner stated that the Property is supposed to inspect every 6 weeks, that they don't do so and they don't prepare a programme of works. She did not provide any evidence of the alleged failure to carry out regular inspections. The Tribunal was persuaded by Mr Ward's explanation, that the homeowners would not necessarily know that the inspections are taking place as these do not involve any contact with the homeowners. He referred the Tribunal to documents entitled " Building Inspection Form LPS" which are the programmes of works prepared annually for the homeowners meetings. The Tribunal was satisfied that these documents meet the requirements of Section 6.3 and that no breach of this section has been established.

Sections 6.7 and 6.8

32. Section 6.7 states "you must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you" Section 6.8 states "You must disclose to homeowners , in writing, any financial or other interests that you have with any contractors appointed" The Tribunal notes that the letter of 24 December 2019 states that contractors are expected to provide a community benefit as part of their appointment. Mr Ward confirmed to the Tribunal that the Property Factor does not otherwise receive any fee, commission, payment or benefit from any contractor. Furthermore, the Property Factor has no financial interest in any contractor appointed. He explained that, as part of Barrhead Housing Association, they must be open, transparent and accountable at all times. As a result, there is nothing to disclose in terms of these sections of the Code. The Homeowner offered no evidence to dispute this. The Tribunal is therefore satisfied that no breach of these sections of the Code have been established.

33. The Tribunal is therefore satisfied that the Property Factor breached Section 2.1 of the Code with regard to information given to the Homeowner. The Property Factor also failed to carry out its property factor duties in connection with estimates obtained for the fence repair and information provided in connection with same. The Property Factor did not fail to carry out its property factor duties in connection with the gardening contract or step repair. The Property Factor did not breach sections 1 or 6 of the Code.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

Appeals

A homeowner or property factor 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.

Legal Member

Jósephine Bonnar
16 March 2020