

# **Housing and Property Chamber**

## **First-tier Tribunal for Scotland**

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**Chamber Ref: FTS/HPC/PF/19/0445**

**1 The Gardens, Perceton, Irvine, North Ayrshire, KA11 2ET ("The Property")**

**The Parties:-**

**Mr Rob Copeland, 1 The Gardens, Perceton, Irvine, North Ayrshire, KA11 2ET  
("the Homeowner")**

**Ross and Liddell Ltd, 60 St Enoch Square, Glasgow, G1 4AW  
(" the Property Factor")**

**Tribunal Members:**

**Martin J. McAllister, Solicitor, (Legal Member)**

**Andrew McFarlane, Chartered Surveyor (Ordinary Member)  
(the "tribunal")**

### **Introduction**

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Regulations," the First-tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal" and Ross and Liddell Ltd is referred to as "Ross and Liddell." The housing development of which the Property forms part is referred to as "the Development."

### **Decision**

**The Tribunal determined that the Property Factor had complied with the property factor's duties and had complied with the Code.**

## **Background**

The application made by the Homeowner had been received by the Tribunal on 13<sup>th</sup> February 2019. The application contended that the Property Factor had not complied with the property factor's duties and that it had not complied with sections D, 2.5 and 7 of the Code.

On 12<sup>th</sup> April 2019 a legal member of the Tribunal, acting under delegated powers, referred the application to the tribunal for determination. A Hearing had been fixed on another date to determine matters but had been adjourned at the request of the Homeowner.

On 14<sup>th</sup> March 2019 the Property Factor had written to the Homeowner in response to matters of concern raised by him in his communication to them of 5<sup>th</sup> March 2019. The Tribunal also had a letter sent to it from the Homeowner dated 19<sup>th</sup> March 2019 which included copies of both these communications.

## **Written Representations**

The Property Factor submitted written representations and productions.

The representations refer to the Title Sheet of the Property and the definitions of "Common Parts of the Development" and "Property Manager" contained therein. The representations also refer to the Title Sheet in respect of the treatment of boundaries and the powers of proprietors in calling meetings of the proprietors within the Development. They also refer to the section in the title dealing with delegation of powers to a property manager.

The representations refer to the various matters detailed in the Application:

Section 2.5 of the Code - It is stated that the Respondents do not accept that they have breached the section of the Code in this regard and refer to letters to the Applicant from Brian Fulton and Irene Devaney both of Ross and Liddell and dated respectively 17<sup>th</sup> May 2016 and 14<sup>th</sup> March 2019.

Section 7.2 of the Code - it is stated that the Respondents do not believe that they have breached this section of the Code and reference is made to the said letters of Brian Fulton and Irene Devaney. The representations state that the relevant complaints procedure was sent to the Applicant by Mr Fulton with his letter dated 17<sup>th</sup> May 2016. The representations state that the entitlement to apply to the First-tier Tribunal is referred to in the letter from Irene Devanny dated 14<sup>th</sup> March 2019.

The representations state that the Respondents do not accept that they have failed to carry out the property factor's duties and reference is made to the said letters from Mr Fulton and Ms Devenny.

Mr Copeland had written to the Tribunal with accompanying documents with regard to the Property Factor seeking payment from him of an invoice. He stated that he considered this to be in breach of the Act which stated that such debt recovery should not be actioned against him where he has submitted an application to the Tribunal.

## **Hearing**

A Hearing was held on 6<sup>th</sup> August 2019 in Troon Town Hall. The Homeowner was present and gave evidence.

Mr Eoghan Watt of Ross and Liddell was present and gave evidence. The Property Factor was represented by Mr Michael Ritchie, solicitor.

## **Matters of Agreement**

Parties agreed that the Property is a detached house situated in an estate. It is agreed that the Development contains a number of common areas which are managed by the Property Factor. Some of these are woodland and other areas maintained on a less regular basis and some are areas where there is a more regular regime of maintenance of what would traditionally be considered as landscaped areas.

## **Preliminary Matters**

The matter of the alleged breach of Section D of the Code was discussed. The Homeowner conceded that it was the breach of the written statement of services that concerned him rather than the content. Mr Copeland withdrew that aspect of his application.

Mr Ritchie said that, with regard to alleged breaches of the Code, there were two matters before the Tribunal but that the matters complained of appeared to be in relation to failure to inspect and failure to maintain and that the sections of the Code referred to in the Application did not relate to this. He accepted that the Application also referred to the Property Factor failing to comply with the property factor's duties.

## **Homeowners' Position**

Mr Copeland said that he had moved into his property in 2003 and that management of the estate was passed to Ross and Liddell in 2005. He said that, at that time, it had not been in the best of condition because of areas which had not been fenced which should have been, along with issues with boundary fences and dead trees etc. He said that he did not think that Ross and Liddell had done their job properly. He referred to a right of access enjoyed by a farmer which is contained within the Development's title and indicated this to be marked in yellow on the Title Plan which he produced. He said that the farmer had allowed a fence in this area to get into a state of disrepair and that there had been manure dumped in that area and he said that some of it had, in fact, been dumped on either side of the fence. He said that the fence and gate to this access required to be upgraded.

Mr Copeland stated that there had been a change in the way that areas had been maintained by the Property Factor. He said that, up until three years previously, the Property Factor had maintained the area next to his house but that this ceased. He said that, before the change in approach, the Property Factor had removed fallen leaves, removed rubbish and generally kept the area in a tidy state. He said that it had been nice to look at but that now there were high weeds, rubbish and an accumulation of leaves. He said that he wanted this area reinstated to the programme for more regular maintenance. He said that he also wanted a boundary fence reinstated and which is situated in the area of the access road. He also said that, at the other end of the Development from where his Property is, an owner had encroached upon common ground by the building of a conservatory and that Ross and Liddell had taken no action on this. Mr Copeland conceded that such encroachment did not directly affect him.

### **Property Factor's Position**

Mr Watt said that he was a qualified horticulturist with qualifications in landscaping. He said that the Development was constructed in the gardens of Perceton House, an old manor house which had previously been the offices of Irvine Development Corporation. He said that there were mature trees in the Development and that there was a requirement to periodically obtain a tree surgeon's report.

He said that the area next to the Property is woodland and that in 2017 health and safety concerns had been raised about people going through the area adjacent to Mr Copeland's property and onto a road. One option was to install a low height fence which Mr Watt said was so small that it was difficult to actually call it a fence. He said that there was opposition from residents to this course of action and it was stopped. He said that at that stage he wrote to all the proprietors in the Development and advised them that Ross and Liddell would be changing its approach to managing the area in question. The reasoning adopted by Ross and Liddell was that by not undertaking maintenance people would be discouraged from going through the area. Mr Watt further stated that his letter contained an explanation for this course of action and that this could change if the proprietors wanted it to but that this would need a majority decision.

Mr Watt said that he ceased to be directly responsible for management of the Development in 2017/2018 when he assumed different responsibilities throughout the Company.

Mr Watt said that the area of ground next to the Property had always been classed as woodland and had been so when it was taken over from the Developer. He said that it contained six mature trees.

Mr Copeland said that he did not remember the letter from the Property Factor about the change in approach but that it was not uncommon at that time to get letters every three weeks from Ross and Liddell. Mr Watt commented that this was evidence that the Property was well managed.

Mr Watt said that there had been meetings with residents to discuss various aspects of the management of the Development.

He said that it was a matter for the proprietors to take any action they saw fit with regard to the moving of the boundary/ erection of the conservatory. He said that it was not the function of a property factor to "police" the deeds.

Mr Watt said that there are periodic tree surveys done and that these are not done to a fixed programme. He said that such matters are always difficult when a specific requirement for a regular schedule of inspection is not contained within the deeds of a Development. He said that he could only arrange for such inspections to be carried out when there were sufficient funds and authorised by the proprietors of the houses in the Development.

Mr Watt said that the area beside the Property is maintained on an irregular basis and probably once a year or so.

Mr Watt said that, with regard to the access track, Ross and Liddell repaired the gate at the front and that, as far as he is concerned, the post and wire fence at the track which the Homeowner has concerns about is the responsibility of the neighbouring farmer and is a stockproof fence. Mr Copeland said that the gate had been erected by McTaggart and Mickel, the company which had erected the Development. The Homeowner said that the Council are dealing with the manure which had been classed as fly tipping.

Mr Watt said that the farmer had been spoken to with regard to fencing issues.

Parties addressed the Tribunal on the Code and the alleged breaches

## **Section 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.*

Mr Copeland said that in 2016 he communicated with Mr Watt who was the then property manager and got no satisfaction so he then wrote to Ms Irene Devenny, a Director of Ross and Liddell. He said that his letter to Irene Devenny was sent on 4<sup>th</sup> April 2016 and that this was acknowledged on 5<sup>th</sup> April 2016 when he was advised that it had been passed to Mr Brian Fulton to respond. He said that he did not get a substantive reply. The papers before the Tribunal include a letter from Mr Fulton to the Homeowner dated 17<sup>th</sup> May 2016. Mr Copeland said that he had never received the letter. Mr Watt said that it had been sent. Mr Copeland said that, even if he had received the letter, it would not have been sent within the twenty one days provided for in the written statement of services. Mr Copeland said he only got a copy of the letter in November last year when Brian Fulton of Ross and Liddell provided him with a copy.

Mr Copeland had copied the Homeowners Housing Panel into his 2016 correspondence and thought that it was dealing with the matter. He said that he then

realised that an application had to be made and did so in 2019. He confirmed that he had done nothing on the matter between 2016 and 2019.

## **Section 7.2**

*When your in- house complaints resolution 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 (now the Tribunal).*

Parties referred to the letter of 17<sup>th</sup> May 2016 which Mr Copeland said he did not receive. Mr Watt said that the complaints process stopped at that point because Ross and Liddell had not received a response to that letter.

In support of its position, Mr Ritchie referred the Tribunal to the two letters referred to in his written representations.

The letter of 17<sup>th</sup> May 2016 was written by Mr Brian Fulton who was a director of Ross and Liddell. It constituted a response to matters raised by the Homeowner in his letters of 4<sup>th</sup> April, 5<sup>th</sup> April, 15<sup>th</sup> April and 5<sup>th</sup> May all 2016. In that letter there is reference to Mr Copeland being directed to the Property Factor's complaints process. The letter gave detailed responses to various matters raised by the Homeowner in his Application.

The letter from Mrs Devenny dated 14<sup>th</sup> March 2019 provided a response to The Homeowner's email of 5<sup>th</sup> March 2019. The letter enclosed a copy of the letter of 17<sup>th</sup> May 2016 and stated that the Homeowner did not respond or follow up any matter. The letter referred to the Homeowner being able to engage the Ross and Liddell complaints process.

## **Alleged breach of Property Factor's Duties**

Mr Copeland said that the area of ground at the side of his house is an eyesore and that he wants it to be made good and returned to the condition it was in before the change to the maintenance schedule.

He stated that the boundary fences along the track and the gate and fencing to either side of the gate should be made good and that he believes that Ross and Liddell have a responsibility to deal with this aspect and he also stated that Ross and Liddell have fallen down in their duties by not inspecting and, where necessary, maintaining all areas of the Development and also dealing with any boundary infringements. Mr Watt said that it was a matter for a Property Factor to determine how a development was to be managed and that it is always subject to the will of the proprietors. He cited an example of an occasion where a meeting had been called and proprietors had not agreed with proposals put to them by Ross and Liddell. Mr Copeland agreed that this was the case and that on that occasion he was fully supportive of what the Property Factor was proposing. Mr Watt said that there is often a difference of opinion as to how a development is managed.



## Submissions

Mr Copeland said that he had stated what he wanted done and in what respect he considered the Property Factor had failed to carry out the Property Factor's duties. He also referred to the Code and said that his letter of complaint had not been responded to within the timescale set out in the written statement of services. He said he never received a response but that, even the response which the Property Factor said they had sent had not been sent timeously.

Mr Copeland said that he wanted the Tribunal to consider the matter about debt recovery which he had referred to in his representations.. He said that he is being pursued by the Property Factor for an outstanding account and he said that in terms of the Act this should not happen. The Tribunal asked Mr Copeland to highlight the section of the Act he considered relevant. He was unable to do so. Mr Watt stated that the sum being sought was nothing to do with the matter before the Tribunal. Mr Copeland was referred to Section 4.2 of the Code where it was stated that, in a case relating to a disputed debt, a property factor is not able to apply interest or late payment charges in respect of the disputed items during the period that the Tribunal is considering the case. The Tribunal indicated that the mere fact of an application before the Tribunal did not mean that a property factor was prohibited from recovering sums properly due and that, in any event, the Application was not about a disputed debt.

Mr Ritchie conceded that his clients had been in technical breach of Section 2.5 of the Code by not replying within the timescale set out in their written statement of services and he submitted that such a breach would not warrant the making of a property factor enforcement order.

Mr Ritchie contended that there was no breach of Section 7.2 of the Code and that this was not engaged because the letter of 17<sup>th</sup> May had not been responded to. He referred to the letters from Mr Fulton and Ms Devenny which had been referred to in his written submissions.

Mr Ritchie said that, as far as the alleged failure to carry out the property factor's duties, is concerned, his clients are required to manage the Development as they saw fit and subject to the wishes of the majority of proprietors from whom they had delegated authority. He said that, in terms of the title conditions, the proprietors have the power to call a meeting and direct the Property Factor to do specific repairs or maintenance. He said that Mr Copeland's view on how the Development should be managed was not universal. He said that no evidence had been led to support the contention that his clients had not complied with the Code or had failed to carry out the property factor's duties. He said that the question of alleged encroachment by one owner on to land owned in common was not a matter for the Property Factor but for the proprietors in the Development.

## **Tribunal's Deliberations**

The members of the Tribunal found Mr Copeland and Mr Watt to be credible. The question which they had to determine was whether the evidence supported the Application. Mr Copeland had a view on the way the Development should be managed. He accepted that he had not called a meeting of proprietors to try and get support for his views. The major issue which he seemed to have was in relation to the ground adjoining the Property and also the access track and fencing in that area which are also near his house. The Tribunal got no sense from the evidence that this was a situation where the Property Factor was not active. It called meetings of proprietors where appropriate and wrote to them on a regular basis. Indeed it was Mr Copeland who said that, at times he would receive letters from the Property Factor every three weeks. Ross and Liddell had taken a decision on how to deal with the land adjoining the Property and the Tribunal considered that it was entitled to make that decision and to manage the land in a certain way until directed otherwise by the majority of the proprietors in the Development. The Tribunal concluded that Mr Copeland could have chosen to call a meeting of proprietors and put his views to them. He acknowledged that he had attended a meeting called by the Property Factor where he had been in the minority although supporting the Property Factor's proposal.

The Tribunal could come to no view about whether or not the letter of 17<sup>th</sup> May 2016 had been received. It was sent outwith the timescale set out in the written statement of services. Mr Ritchie's submission was that this should be dealt with as a technical breach not worthy of a property factor enforcement order. Section 19 (1) (b) of the Act states that the Tribunal should determine whether or not to make a property factor enforcement order where it finds that there is a breach of the Code. In the particular circumstances of the case before it, the Tribunal considered that it was a minor breach and that it was not necessary to make a property factor enforcement order.

Mr Copeland did nothing on his complaint between 2016 and 2019. He said that he thought that the matter was being dealt with by the Homeowner Housing Panel because he had copied it into his communication to the Property Factor. He accepted that he had been mistaken but said that he had had a period of ill health while at the same time running his own business. The Tribunal did not consider that there was any breach of Section 7.2 of the Code since it did not consider that the complaints process had been exhausted.

In coming to its view on alleged breaches of the Code, the Tribunal accepted that there was no certainty about whether or not Mr Copeland received the letter of May 2016 but it noted that he had not chased matters up and that whilst he thought that copying something to the Homeowner Housing panel would be sufficient for it to deal with his concerns nevertheless there was a gap of almost three years before he took matters up again.

The Tribunal considered that the issue of an encroachment on common ground was a matter for proprietors in the Development and not for the Property Factor.

In connection with Property Factor's duties, the Tribunal had no evidence before it to support the contention that the Property Factor had failed to comply with these duties.



It managed the Development and the common areas of land within it although it was clear that it was not done in accordance with Mr Copeland's wishes.

The Tribunal determined that the Property Factor had complied with the property factor's duties and had complied with the Code.

## **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.**

Martin J. McAllister,  
Legal Member of the  
First-tier Tribunal for Scotland

13<sup>th</sup> August 2019