



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 and 19 of the Property Factors (Scotland) Act 2011.

Reference numbers: FTS/HPC/LM/23/1622 and FTS/HPC/LM/23/1624

Re: Property at Common Amenity Strip of Land, Behind 23 to 61 Silverknowes Eastway, Edinburgh, EH4 5NE (“the Property”)

The Parties:

Mrs Eugina Enahoro, Mr Enahoro Izevbekhai, 25 Silverknowes Eastway, Edinburgh, EH4 5NE (“the Homeowner”)

Hacking & Paterson Management Services, 103 East London Street, Edinburgh, EH7 4BF (“the Property Factor”)

**Legal Member: Lesley A Ward
Ordinary Member Jane Heppenstall**

1.Outcome

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has not failed to carry out their duties in terms of section 17 of Property Factors (Scotland) Act 2011. The Tribunal refused the applications.

Background

2. This was a hearing in connection with two applications in terms of rule 43 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulation 2017, ‘the rules’ and section 17 of the Property Factors (Scotland) Act 2011, ‘the Act’. The Homeowner attended the hearing. The Property factor was represented by Ms Emma Blair, Director of the Property Factor. She was accompanied by Ms Mhairi Epton, Associate Director. For ease of reference in this written decision, Ms Blair will be referred to as the Property Factor and Mrs Eugina Enahoro as the Homeowner. Two case management discussions took place on 6 December 2023 and 14 March 2024. Both parties had lodged written submissions and productions in compliance with the directions made after each CMD.

3. The applications relate to a strip of land adjacent to the Homeowner’s property. There were two applications before the Tribunal: One relating to acts or omissions of

the Respondent on or after 16 August 2021 and the other relating to acts or omissions prior to that date. As the applications progressed through the Tribunal sifting procedure it was agreed that the applications were in relation to the general duties of the Property Factor and not in relation to the code.

4. At the CMD on 14 March 2024 the Tribunal fixed a hearing for evidence to be led. The Tribunal also decided that it would be helpful to carry out an inspection of the garden of the property and the strip of land to the rear, in advance of the hearing.

The inspection

5. The Tribunal members attended at the property on 13 August 2024. The Homeowner and Property Factor also attended. The Tribunal entered the strip of land in question, via a gate and a triangular piece of land, which the parties stated was owned and maintained by the local authority. The Tribunal also entered the lane between the property and number 27 next door. The Tribunal inspected the Homeowner's garden and the strip of land between 23 and 37 Silverknowes Eastway. The Tribunal also walked down from 43 to 61 Silverknowes Eastway and observed the trees to the rear.

The hearing- preliminary matter

6. The Tribunal noted part of the Homeowner's applications related to the arbitration fee. They had paid their one half share but they disputed that they should pay a further 1 % of the remaining half share. The information provided by the Property Factor confirmed that the arbitration fee had been set by the arbiter in advance of the arbitration. The fee and how it was to be apportioned, was communicated to the Homeowner and the other owners in advance of the arbitration. The Property Factor stated that the Homeowner had paid their 50 % of the fee and the remaining 50 % had not been collected as the other homeowners (including the Homeowner) had failed to pay their 1/77 share of their remaining 50 %. They had therefore sent the invoice to the arbiter for him to take whatever steps he saw fit. This matter was not within the gift of the Property Factor and the Tribunal did not propose to hear any evidence on this point.

The Homeowner's position

7. The claim relates to the maintenance of the strip of land behind their property and the other properties from 23 to 37 and 43 to 61 Silverknowes Eastway. In their written statement of services ('WSS') the Property Factor undertook to arrange and administer the maintenance of common property. In 2019 the Homeowner contacted the Property Factor as this piece of land was not maintained and there were overhanging trees that needed cut back. After two years in which nothing was done the matter was brought before the committee (referred to in the title deeds as the Silverknowes Gate Edinburgh Residents Association) and was ultimately referred to arbitration. The Arbiter found in favour of the Homeowner and the Property Factor have still failed to make arrangements for the strip of land to be taken over and maintained. They have also failed to make arrangements regarding the trees which overhang the Applicant's

property and the strip of land.

8. According to the Homeowner, the Property Factor should have written to the other homeowners, pointed out the terms of the Arbitration decision and the deed of conditions, and made it clear that the strip of land was in common ownership and required to be maintained. The Homeowner conceded that there were a range of views on the maintenance of the strip and the trees aired at the meetings of the residents association. The Homeowner did not want to join the committee of the resident's association as she found it hostile and felt there was a perception from some of the other homeowners that she wanted her garden done and wanted the other homeowners to pay for it.

9. The strip of land behind numbers 23 to 37 and 43 to 61 Silverknowes Eastway has overhanging trees from the adjacent properties. There is foliage growing on the path and all around the strip. From 2015 to 2019 the Homeowner would clear the foliage and take off some of the tree branches. As the foliage grew thicker the Homeowner would remove the branches and foliage which protruded through the fence of her property. She has been in communication with the owner of the house who owns the trees. The owner has given permission for her to remove branches. In 2019 when the foliage was thicker and more problematic, the Homeowner looked at the title deeds and took the view that the strip was a common area and should be maintained in common. She conceded that the trees are not her main concern and are a separate issue, but the foliage and the lack of maintenance of the strip of land are her main concern.

10. It was the Homeowner's position that when she first brought matters to the attention of the Property Factor in 2019 they should have consulted with the other owners and the matter should have been dealt with and resolved at that time. The Homeowner also took issue with the steps the Property Factor took in 2023 after the Arbitration Decision was issued.

11. The Property Factor wrote to the homeowners on 20 March 2023 as follows:

We have received the Arbiter's decision in relation to this case. It is their determination that the area behind 23 to 61 Silverknowes Eastway is common amenity ground however the overhanging tree is not. Whilst no maintenance has been undertaken to this area previously under any contract placed by us on behalf of homeowners, we seek the instructions of homeowners to take this forward.

Subject to the provision of costs, we ask that you please log into the Proposed Works area of the My H & P App or Web Portal where you can confirm that wish for this area to be maintained as part of ongoing maintenance contract.

12. The Homeowner's view was that this wording was wrong. At the very least homeowners should have been told that the deed of conditions meant that the strip of land had to be maintained and homeowners should have been asked to opt out with reasons given, rather than be invited to opt in. Additionally, they did not give the

Homeowners an indication of the likely costs in maintaining the strip of land.

13. The Homeowner's position was that the Property Factors pursue her if she does not pay her share of the management fee so by that logic, given the owners have a legal obligation to maintain the strip of land, the Property Factor was therefore inconsistent in the way they approached their duties.

14. One of the committee members came to the Homeowner's door in April 2024 and stated that they were applying to the developer to change the deed of conditions to make each owner who backs on to the strip of land responsible for the portion adjacent to each property.

The Property Factor's position

15. The development was built around 2005 and they were appointed by the builder in the deed of conditions and have acted as Property Factors throughout. The matter of maintenance of the strip of land and the overhanging trees was brought to the Property Factor's attention by the Homeowner in October 2019. It was noted that the strip of ground was common property, but the existing maintenance contract did not cover it and no charges were made to the homeowners. Initially the Property Factor did not think they could access the strip of land to carry out maintenance to it. The strip of land forms part of the development and they have never suggested otherwise. The fundamental issue is not the ownership of the land, but whether they have instructions from the homeowners to maintain it. As they set out in their written submissions, the Homeowner's dispute is with the other homeowners, not with the Property Factor. The way to resolve this matter is for the Homeowner to reach an agreement with the other homeowners.

16. Regardless of the outcome of this application, the Property Factors cannot progress matters to the Homeowner's satisfaction without an agreement with the other homeowners that the strip of land should be cleared and maintained. There are a multiplicity of views. The Property Factor operate under their WSS and they have a schedule of works that covers grass cutting and maintenance of common areas. The strip of land has never been maintained and is not landscaped. It is not covered by the schedule of works. In 2019 they took steps to obtain quotes to clear the area and cut back the trees. However, the Covid pandemic happened and as they described it, they dropped the ball. They did not chase up the quotes and they never materialised. When matters were raised by the Homeowner again in 2020, they apologised, got the gardening contractor to clear the area behind the Homeowner's property and made a refund of one year's management fee.

17. In 2021 one of the homeowners in the row 43 to 61 Silverknowes Eastway asked for work to be carried out to the overhanging trees along the strip of land to the rear. The Property Factor proceeded to obtain quotes to prune the trees. When they were sent out for approval there were a variety of responses from the homeowners, ranging from approval to complete opposition. There was no consensus and the Property Factor suggested that the way forward was to arrange a meeting of the homeowners

in the development and reconstitute the disbanded residents association and committee.

18. The Property Factor had been in contact with some members of an earlier committee who had not formally met since 2013. The members of the committee had not had an AGM since 2013 but still considered themselves to be able to operate as a committee. Those individuals sought to liaise with the Property Factor and expected the Property Factor to pass information on to other owners like the Homeowner and at the same time keep their identity secret. These 'committee members' also prepared a letter dated December 2021 which they expected the Property Factor to distribute whilst they remained anonymous. The Property Factor considered this letter was inaccurate as it did not accept that the strip of land was part of the development.

19. The issue of maintenance to the strip of land in question has become very contentious. In terms of their WSS, where they consider it appropriate to do so, the Property Factor will consult with homeowners and obtain their views before instructing common works. If they had gone ahead and instructed the strip to be cleared, the trees pruned and added the strip on to the maintenance schedule, they would have been brought before the tribunal with different applicants. Those homeowners would be complaining that the Property Factor had acted outwith their powers.

20. Findings in fact

- The Homeowner purchased the property in 2015.
- The property is part of a development called Silverknowes built around 2005. The property is on Silverknowes Eastway.
- The Property Factor have acted as factors for the development since it was built and they are referred to in clause 13 of the Deed of Conditions.
- There is a strip of land behind numbers 23 to 37 and 43 to 61, which is part of the development.
- There are trees along the border of the strip of land which are planted on neighbouring land. The trees overhang the strip of land in places but are not on the strip of land.
- There is a large mature tree which overhangs the Homeowner's property and which is planted in the rear of the garden at 52 Muirhouse Gardens which backs onto the property and is separated by the strip of land.

- This strip of land has never formed part of the maintenance schedule for the development.
- In 2019 the Homeowner asked the Property factor about the pruning of the mature tree and the strip of land behind their property.
- The property factor was unaware of the strip of land until it was brought to their attention.
- They acknowledged that the strip was part of the development.
- They were unaware of how to access the strip until around 2021.
- The property factor initially undertook to obtain quotes for the clearing of the area and the pruning of the trees in early 2020.
- The quotes were never obtained. The Covid pandemic overtook events and the quotes were never followed up by the Property Factors.
- They apologised to the Homeowner, refunded a year's management fee and arranged for the strip of land behind their property to be cleared free of charge as a goodwill gesture.
- The contractor who cleared the part of the strip outside the property did not wish to quote to clear the whole strip.
- The Property Factor received a request for the pruning of trees to the rear of 43 to 61 Silverknowes Eastway by one of the Homeowners. The Property factor circulated a quote for the pruning of the trees and received many negative responses from owners in the development.
- The Property Factor wrote to the Homeowner on 18 January 2022 in response to their complaint, that they did not consider that providing any further details would lead to the outcome they were looking for, namely for the strip of ground to the rear of their property to be maintained. They concluded by saying that they do not believe that they currently have the support to enable works to progress to the strip to the rear of the property.
- The Property Factor facilitated a meeting of the homeowners in the development with a view to the resident's association and committee being reconstituted with a view to resolving matters.
- The committee was re-constituted on 21 April 2022. The first committee meeting took place on 20 May 2022. This meeting was poorly attended and was not quorate however they discussed the Homeowner's letter regarding the

strip of land and the trees and they observed the trees were each individual owner's issue. They did not consider it was practical to consider the strip of land as there was not thought to be any access to it. The committee subsequently refused to accept that the strip of land was actually covered by the Deed of Conditions.

- Ownership of the strip of land and the trees was referred to Arbitration in 2022.
- The newly constituted committee disbanded in October 2022.
- The Arbitration decision was issued on 6 March 2023.
- The Arbiter concluded that the strip of land was within the development and was covered by the deed of conditions. He also concluded the overhanging trees were not part of the development and not covered by the deed of conditions.
- The Property Factor wrote to all of the owners in the development on 20 March 2023 stating that the Arbiter had determined that the area behind 23 to 61 Silverknowes Eastway is common amenity ground and the overhanging tree is not. They also stated that this area has not been covered by any maintenance contract but they seek the instructions of homeowners to take this forward.
- In accordance with their normal practice and as set out in their WSS, the Property Factor decided to consult with the homeowners as to how to proceed with maintenance of the strip of land. They asked all owners to log into the portal and confirm that they wished this area to be maintained as part of the ongoing maintenance contract.
- Owners were not given any proposed costs to maintain the area.
- The Property Factor sent owners a reminder on 6 April 2023.
- They received 31 responses out of a possible 77. 7 homeowners were in favour of maintaining the area and 24 were against.
- The Property Factor wrote to the homeowners on 24 April 2024 stating that in the light of the responses they were closing the consultation and would not be progressing the matter any further.
- The Homeowner wrote to the Property Factor on 30 April 2024 stating that in their view the matter was not closed and they would be pursuing their complaint to the Tribunal.

Reasons

21. It was a matter of agreement between the parties that the strip of land is within the

title of the development, and accordingly, the owners of the 77 properties within the development have an obligation to maintain it. The issue for the Tribunal was whether the Property Factor had acted reasonably in the steps they had taken, both before and after the Arbitration decision of March 2023. The Property Factor narrated in detail the steps taken to notify the owners after the Arbitration decision was received. The Property Factor had never disputed that the piece of land was part of the development. In their letter to the Homeowner of 18 January 2022, they encapsulated the issues both from their perspective and the Homeowner's. They wrote:

From a review of your correspondence, I understand you are seeking the following:

- (1) A commitment to undertake maintenance of the area to the rear of your property and details of what this will entail.*
- (2) An understanding of the position of the Association and the Committee*
- (3) Pruning of the large mature trees backing on to your property (situated within your neighbour's garden).*
- (4) An understanding of the maintenance specification of other areas, including the area directly opposite your property.*

In response to items 1&2 above, I consider these are matters for the collective homeowners to discuss and agree upon. Since the issue of our letter dated 4 October 2021 in relation to the pruning of trees to the rear of your neighbour's properties we have received widely conflicting feedback from homeowners with regard to the proposed works and ownership of the area in question.

They suggested that a meeting of the homeowners to be held to determine matters in the meantime. Regarding point 3 above they wrote:

... Should the collective homeowners consider it appropriate to undertake work to this tree to assist with the issues you are experiencing is, again, a matter to discussion between all homeowners, however until such time as an agreement is reached to do so we do not consider we have authority to undertake any works in this regard.

In relation to point 4, they gave a copy of the specification for the ground works.

22. This letter largely reflected the position of both parties at the hearing. It was the Property Factor's position that they were unable to progress any work to the strip of land until they had clear instructions from the homeowners in the development. They were unlikely to do so whilst the views remained so diverse. The Homeowner also spoke of a recent suggestion to her by the former chair of the committee that some of the homeowner's had approached the builder of the development to try and have the deed of conditions varied. In the Property Factor's view the strip could not simply be added on to the maintenance schedule for the estate as the area required to be cleared and this was an unknown quantity in terms of the likely expense.

23. The Homeowner did not accept this analysis and made a further detailed complaint about the steps the Property Factor had taken to resolve matters. The Property Factor reiterated in their letter of 25 January 2022 (a follow up of their detailed response to their complaint of 28 January 2022) that they did not consider that providing any

further details would lead to the outcome they were looking for, namely for the strip of ground to the rear of their property to be maintained. They concluded by saying that they do not believe that they currently have the support to enable works to progress to the strip to the rear of the property.

24. The Property Factor was of the same view at the hearing: they did not have instructions to arrange for work to the strip of land and they did not anticipate that that was likely to change. They acknowledged that the strip of land was commonly owned and therefore there was a maintenance obligation as set out in the deed of conditions. It was their view at the hearing (and in their written submission on 6 November 2023) that the Homeowner's dispute was with the other homeowners, rather than the Property Factor.

25. The committee was re-constituted on 21 April 2022. The first committee meeting took place on 20 May 2022. This meeting was poorly attended and was not quorate however they discussed the Homeowner's letter regarding the strip of land and the trees and they observed the trees were each individual owner's issue. They did not consider it was practical to consider the strip of land as there was not thought to be any access to it. The committee subsequently refused to accept that the strip of land was actually covered by the deed of conditions and the matter was referred to Arbitration at the Homeowner's request.

26. The Homeowner's position was that the Property Factor had failed to comply with paragraph 3 of WSS which states:

*We act as Property Factors and offer the following Core Factoring Services to the group of homeowners relative to land/property which the group share in common ownership and/or responsibility (common property):
Arranging and administrating maintenance of common property by appointing contractor and service suppliers.*

27. However paragraph 2 of the WSS states:

Where we consider that consultation with the group of homeowners is necessary or that written approval of homeowners is appropriate prior to instructing common works and services we will consult in writing with all homeowners in the group seeking their views and/ or instructions.

28. The Homeowner was essentially challenging the Property Factor's decision to consult with homeowners to obtain instructions prior to carry out any work to the strip of land. They also disagreed with the wording used in the consultation and in their view the Property Factor should have invited homeworkers to opt out stating reasons for doing so, rather than the wording narrated at paragraph 11 above.

29. The Homeowner contended the Property Factor had acted outwith their powers in not pushing ahead with work to the strip of land after the Arbiters report was issued.

The Tribunal was not satisfied that the Property Factor had breached their duties as set out in the WSS. They gave a full and detailed explanation as to why the strip of land was not included in the specification of works and this was not challenged by the Homeowner. The steps they took to consult with the homeowners were in accordance with their WSS and they provided clear and cogent reasons for consulting. The manner of consultation was a matter for the Property Factors. This was in accordance with their usual practice as set out in the WSS. The Homeowner did not present any evidence to suggest the course of action adopted by the Property Factor was one that no professional person would have taken, if acting with ordinary care. The evidence of the Property factor was that after consulting, they were not in a position to proceed with any work to the property. In their view, if they were to proceed, they would then be acting out with their powers and would be likely to have further applications to the Tribunal as a consequence. For the foregoing reasons, the Tribunal was satisfied that the Property Factor had acted with reasonable skill and care and refused the applications.

Appeal rights

Right of Appeal In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Lesley Anne Ward

27 August 2024

Legal Member

Date