

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/24/1658

Property: 1/120 Homeross House, Edinburgh EH9 2QZ (“the Property”)

The Parties:-

Ms Maureen Buist, 1/120 Homeross House, Edinburgh EH9 2QZ (“the homeowner”)

FirstPort Property Services Scotland Limited, registered under the Companies Acts (03829468), having their registered office at Queensway House, 11 Queensway, New Milton, Hampshire BH25 5NR and having a place of business at Marlborough House, Wigmore Place, Wigmore Lane, Luton LU2 9EX (“the property factors”)

Tribunal Members: George Clark (Legal Member/Chairman) and Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland Housing and Property Chamber determined that the property factors have not failed to comply with OSP2 and OSP5 of the Property Factors Code of Conduct effective from 16 August 2021 and have not failed to comply with Section 2.8.3 of their Written Statement of Services.

Background

1. By application, dated 11 April 2024, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011 (“the Act”). She alleged failures to comply with OSP2 and OSP5 of the Property Factors Code of Conduct effective from 16 August 2021 (“the Code”) and with Section 2.8.3 of their Written Statement of Services (“WSS”)

2. The homeowner's complaint, in summary, is that the development of which the Property forms part has two large communal gardens. Garden A is accessed from the communal laundry and Garden B is entered via a door from Garden A. The property factors have allowed residents with ground floor flats abutting a communal garden to have an excess of plants and personal items in the communal garden. The same residents have been permitted to pay to have alterations to and landscaping of this garden. There is no evidence that any of these concessions were discussed or agreed beforehand with the wider group of homeowners as would have been required if there had been a proposal to change the status of communal ground in the development. The garden areas were formerly managed by a group of interested residents, but when contractors became involved, residents were informed that only the managers (employees of the property factors) could instruct the gardeners. There are "House Rules", under which residents wishing to sit outside may bring a lightweight chair to the garden and place it on the grass. Those with ground floor flats may do likewise and can also place potted plants on the small step area outside their doors. A visit in late 2022 with the property factors' Area Manager revealed considerable evidence of personalisation on the patio areas of Garden B, and ornamental chips placed around the foot of the building.
3. In April 2022, the homeowner proposed the installation of four benches in Garden B, a communal garden in which there was no seating. This was rejected on the ground of costs, and the homeowner's notices as to how they might be funded were repeatedly torn from the notice board or defaced. The House Manager suggested having an open meeting with residents. At the meeting, those with ground floor flats abutting Garden B objected to the noise and loss of privacy they would experience. The meeting ended in chaos and, afterwards, the House Manager suggested that the homeowner might consider having a ballot of residents' views.
4. The view of the homeowner was that the consequence of the property factors contravening the WSS and breaching the Code have resulted in a small group of residents and their friends believing that they have rights to a communal garden to the detriment of those in the wider community. Her complaint was that the property factors' approach had been inconsistent. On the one hand, they had taken no steps to prevent or to seek approval of the wider group to the personalisation by residents of ground flats abutting Garden B, but they had suggested an open meeting, then a ballot, in respect of the homeowner's proposal to install the benches.
5. The homeowner provided the Tribunal with a copy of the property factors' Written Statement of Services ("WSS"). Clause 2.8.3 of the WSS provides that "alterations to the common areas of the development or block require consultation approval from homeowners" and that this includes "placing of private

property in shared spaces". The homeowner contended that the property factors had not been honest, open, transparent and fair in their dealings with homeowners, as required by OSP2 and had not applied their policies consistently and reasonably, as required by OSP5.

6. On 12 August 2024, the Tribunal advised the Parties of the date and time of a Case Management Discussion and the property factors were invited to make written representations by 2 September 2024.
7. On 2 September 2024, the property factors made written representations to the Tribunal. They stated that, 13 years ago, the owner of flat 8 facing out to Garden B requested and obtained permission from the Property Manager to place pebbles. In 2021, it was proposed to enhance the development by placing white chips at the front of the building, along with removal of the bushes at the back garden and their replacement with chips. This would reduce maintenance costs. The cost of labour and materials was £1,150. Two owners whose properties abut Garden B contributed £130 towards the chips as, when they saw the chips at the front, they requested that the back be the same.
8. In relation to the request by the homeowner for four benches in Garden B, Mrs Julie Walton, on her first handover visit to Homeross House, met with the homeowner and had since written to her on several occasions and assured her that a bench would be purchased and placed in Garden B. If it proved popular and did not meet the demand for use, other benches could be purchased. The new bench was to be a replacement for one which had been removed due to being unsafe. It would be at the top of the garden, looking down the whole garden. If four benches were to be proposed, it would have to be communicated to owners and agreed by a majority, as the benches cost £900 each, with ongoing maintenance due to possible revision of the ground specification due to the benches being moved around and causing wear and tear of the grass. The property factor suggested that carrying out a ballot in relation to the additional benches would resolve the matter.
9. On 24 September 2024, the homeowner challenged the assumptions in the property factors' representations. She said that she has been resident at Homeross House since 2021 and in that time there had never been white chips in any part of the front gardens of the development until latterly in 2024, when they were introduced to a small raised flower bed at the entrance. She also said that two other residents had been pursuing the objective of increasing recreational opportunities, particularly for disabled residents, since early 2024. They too have been offered a ballot of residents. The Tribunal did not consider this matter further as it did not form part of the application and, if the two residents were dissatisfied with the performance of the property factors, it would be open to them to make their own applications to the Tribunal.

Case Management Discussion

10. A Case Management Discussion was held by means of a telephone conference call on the morning of 10 December 2024. The homeowner was present. The property factors were represented by Mr Brandon O'Connell and Mrs Julie Walton.
11. The homeowner repeated that her complaint was that the ground floor owners abutting Garden B had been allowed to place personal items there, but no-one else was allowed to do so. A number of ground floor flat owners had paid for this work to be done and three owners had told her that they had paid for pebbles to be put down adjacent to the building and for the laying of paving.
12. Mrs Walton told the Tribunal that she has managed Homeross House for two years. The owners had agreed to place pebbles at the front of the building. The owners at the back asked for pebbles to be laid there as well, to provide uniformity, and contributed to the cost. The paving is communal, and anyone can use it or take a chair and sit on it. Personal plant pots around Homeross House are all removable. Mrs Walton had arranged for one bench to be placed in Garden B at the request of the homeowner. If it proves popular, they could look at adding more benches, but they would have to be fixed on the grassed area, creating more ground maintenance and, if they were to be put in, it would require a ballot, because of the cost and maintenance expense. The new seat did not appear to be very popular.
13. There are two benches outside the laundry room and five at the front entrance. The property factors stressed that they are not opposed to more benches if the majority of owners want them.
14. The property factors said that the pebbles at the front had been laid in 2020, so had been there before the homeowner moved in in 2021. During the Case Management Discussion, they emailed to the Tribunal, for reference, photographs showing white pebbles in the front garden, in a raised bed at the entrance area and gravel chips between the front wall of the building and the car parking spaces.
15. The view of the homeowner was that the owners at the rear of the building saw themselves as having special privileges and had come to regard the garden as their own and are extremely reluctant to allow others to use it on a daily basis.
16. Both Parties confirmed that they were content for the Tribunal to determine the application without a full evidential Hearing. The Parties then left the conference call and the Tribunal Members considered all the evidence before them.

Findings of Fact

- i. The homeowner is the proprietor of the Property, which forms part of a development of 139 retirement flats known as Homeross House, Edinburgh.
- ii. The property factors, in the course of their business, manage the common parts of the block of which the Property forms part. The property factors, therefore, fall within the definition of “property factor” set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).
- iii. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- iv. The property factors were registered on The Scottish Property Factor Register on 1 December 2012. Their present registration is dated 17 May 2016.
- v. The homeowner has notified the property factors in writing as to why she considers that the property factors have breached the Codes of Conduct under the Act.
- vi. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber on 11 April 2024, under Section 17(1) of the Act.

Reasons for Decision

17. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing.
18. The Tribunal considered carefully all the evidence before it, namely the written representations of both Parties and the oral evidence given at the Case Management Discussion. Not every document forming part of the written representations is referred to in the following statement of Reasons for Decision, but the Tribunal took all of them into account in arriving at its Decision.
19. **OSP2** of the Code states that property factors must be honest, open, transparent and fair in their dealings with homeowners. The Tribunal found no evidence that the property factors had failed to comply. The Tribunal noted that it appeared that the only thing the property factors had allowed the owners of the ground flats abutting Garden B to do was to lay pebbles. This had been done at modest cost and paid for by a number of the owners themselves, rather than as a communal charge. The Tribunal noted that the homeowner had provided a copy of the Accounts to 31 August 2021, which showed the expenditure on the chips as having been incurred during that period. The property factors had stated that the paved areas remained communal and could be used for seating by other residents. They had made it clear that, once the additional bench was in, they would look at further ones, but it appeared that it is not often used. The cost of

benches which would have to be fixed on the grass was not inconsiderable and, whilst the Tribunal did not have before it the Development Schedule which would be appended to the WSS, the indications were that the cost would be greater than their delegated level of authority. In any event, these would be improvements, not repairs, and the Tribunal would expect such work to require prior consent of a majority of the owners who would be required to pay for it. Accordingly, the Tribunal **did not uphold** the complaint that the property factors had failed to comply with OSP2.

20. **OSP5** states that property factors must provide their policies consistently and reasonably. The Tribunal **did not uphold** the complaint that the property factors had failed to comply with OSP5, largely for the same reasons as are set out in the immediately preceding paragraph. They had agreed with the suggestion by owners to the rear of the development that pebbles should be laid there for uniformity. That was a reasonable decision to make, particularly as those owners were contributing to the cost. That was very different from the homeowner's proposal to install four new benches, at a significant cost which would be borne by all the owners in the development.

21. **Section 2.8.3** of the WSS does include the placing of private property in shared spaces as a matter requiring consultation and approval, but the Tribunal accepted that the issue related to plant pots, which are removeable. The Tribunal noted that it seems clear that relationships amongst some of the owners at Homeross House are not good and are, at times, antagonistic, but however regrettable that might be for owners who are looking to enjoy a quiet retirement, it is not an issue that the property factors can resolve. The Tribunal **did not uphold** the homeowner's complaint that the property factors had failed to comply with Section 2.8.3 of the WSS.

22. The Tribunal's Decision was unanimous.

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.

Legal Member

27 January 2025
Date