

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/LM/20/2058

The Property: 1, Honeyman Crescent, Armadale Road, Lanark, ML 11 7BD (“The Property”)

The Parties:-

Mrs Susan Girvan, residing at 1 Honeyman Crescent, Armadale Road, Lanark, ML11 7BD (“the applicant”)

Hacking and Paterson Management Services, a private unlimited company having their registered office at 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL. (“The property factor”)

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has failed to comply with the code of conduct as required by Section 14 of the Property Factors (Scotland) Act 2011 (“The 2011 Act,.) determined that the property factor has neither breached the code of conduct for property factors nor have they failed to carry out its duties in terms of s.17 of the 2011 Act.

The decision is unanimous.

Committee Members

Paul Doyle	Legal Member
Angus Anderson	Ordinary Member

Background

1 By application dated 21 September 2020, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of her complaint that the property factor has breached the code of conduct imposed by Section 14 of the 2011 Act & that the property factor has failed to comply with the property factor’s duties.

2 The application stated that the applicant considered that the property factor failed to comply with Sections 2, 6 and 7 of the code of conduct for property factors and breached the property factor's duties.

3 By interlocutor dated 19 February 2021, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 Notice of referral and details of the time date and place of today's hearing were sent to both parties on 8 March 2021. The applicant lodged further written representations on 18 November and 17 December both 2020 and again on 13 January, 10 February, 22 March and 30 March all 2021. The respondent lodged detailed written representations on 15 April 2021.

5. A hearing was held by telephone conference on 21 April 2021. The applicant was present and was represented by her husband, Colin Girvan. The respondent was represented by Colin Devon, one of their directors.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The applicant is the joint heritable proprietor of 1 Honeyman Crescent, Armadale Road Lanark. She and her husband purchased the property in November 2007. At least since the applicant purchased the property, the property factor has been the applicant's property factor. In recent years, the applicant has become more and more dissatisfied with the services of the property factor.

(b) The applicant's property is one of 56 properties in a larger development ("the development") completed in 1996. The applicant's property and the other properties within the development are burdened with the conditions set out in a deed of conditions by McLean Homes Scotland Limited registered in the Land Register of Scotland on 7 December 1994. That deed of conditions provides for the appointment of a factor to manage the common areas of land in the development. The property factor was originally appointed for a period of two years by the developer. The deed of conditions provides that after the first two years the property factor should be appointed by the majority of proprietors of the development.

(c) It is likely that since the date of completion of the development the property factor has managed the common areas of the development. The deed of conditions by McLean Homes Scotland Limited registered in the Land

Register of Scotland on 7 December 1994 provides that a property factor can be removed by a decision of the majority of proprietors.

(d) The only payment that the applicant has made to the property factor for common services at the development since 6 February 2017 is one payment of £50 made on 24 July 2020. Over the last four years, arrears have accrued on the appellant's account. At today's date the arrears for common charges total £1,123.98.

(e) In 2017 the applicant made a formal complaint to the property factor about the quality of the groundwork carried out to the common areas in the development. The applicant was not satisfied with the response received and asked for a stage two formal complaint resolution form in accordance with the property factor's written statement of services. The property factor sent the stage two formal complaint resolution form to the applicant on 24 May 2018.

(f) On 28 September 2018 the property factor sent a further stage two formal complaint resolution form to the applicant in response to the applicant's request. The applicant completed that second stage two formal complaint resolution form and dated it 18 October 2018, but the completed form was not received by the property factor until 21 June 2019.

(g) On 26 June 2019 the property factor acknowledged receipt of the stage two formal complaint resolution form received on 21 June 2019, and said that a full response would be issued by 11 July 2019.

(h) The property factor's full response to the stage two formal complaint resolution form received on 21 June 2019 was issued on 10 July 2019. The applicant was not happy with the property factor's full response to her stage two complaint, and escalated her complaint to the property factor (a "stage three complaint") on 8 September 2019. The next day, the property factor wrote to the applicant, saying that a final response would be issued within 14 days. That final response to the applicant's stage three complaint was issued on 26 September 2019.

(i) After receiving the property factor's final response dated 26 September 2019 the applicant lodged her application with the First-tier Tribunal for Scotland (Housing and Property Chamber) on 21 September 2020.

(j) In November 2012, the property factor provided the applicant with a written statement of services which complied with the Property Factor (Scotland) Act 2011. As part of the complaints procedures in which the applicant and property factor engaged, a further copy of the written statement of services were sent to the applicant on 10 July 2019.

(k) Section 5.5 5.6 of the property factor's written statement of services, says

5.5 HPMS will endeavour to respond to enquiries received in writing (including electronically) within 7 working days of receipt. If more time is required to respond the homeowner will be notified within that period.

5.6 HPMS will endeavour to return telephone calls by the end of the next working day. Calls may be monitored for education and training purposes.

(l) It is not known whether there has been a formal reappointment of the property factors since 1996. As a matter of fact, between 2007 and 2021 their services have been accepted by the applicant and the proprietors of the development. No one has, not prior to the date of this application, taken any steps to remove the property factor. The applicant has accepted the services of the property factor. The majority of homeowners within the development have promptly and regularly paid the sums charged by the property factor for the service they provide.

(m) The burdens in the title to the applicant's property provide for termination of appointment of a property factor. Section 7.1 of the property factor's written statement of services, says

... HPMS or the homeowners may terminate the property factoring arrangement upon three months prior written notice or earlier by agreement.

(n) It is the property factor's practice to send quarterly accounts to each of their clients. The applicant has access to the property factor's website and an electronic portal where details of the property factors charges and the state of her account with the property factor are clearly provided.

(o) The property factor's written statement of services provides for financial penalties for late payment of common charges. The applicant has not maintained prompt and regular payments of common charges since 2017, citing poor service and dissatisfaction with the grounds maintenance contractor and factor and the property factor has applied charges in accordance with the written statement of services. As part of the complaints procedure the property factor offered certain deductions to the applicant which the applicant declined.

(p) Between 2017 and June 2020 the property factor sought payment of the increasing arrears of common charges from the applicant. It was not until 19 June 2020 that the property factor told the applicant that they would instruct solicitors to recover unpaid charges.

(q) Section 5.4 of the property factor's written statement of services sets out the procedures for reporting repairs and maintenance. The property factor regularly updates the homeowners Internet portal with development news.

(r) In 2020 the property factor corresponded with the applicant and all of the other homeowners in the development in relation to works necessary to trees

in the development. The property factor took account of tree preservation orders and submitted for tenders for work. The decision on whether or not to instruct the work was put to the homeowner's vote. The majority of homeowners voted for the works to be carried out. Once the works were carried out, the total cost of the works was divided amongst homeowners in the development.

(s) Throughout their tenure the property factor has maintained a planned programme of maintenance of the common ground within the development. Production number 7 for the property factor is the common ground maintenance schedule for the development.

(t) In 2018 one of the property factor's employees investigated concern about the quality of the ground maintenance with their contractor after receiving a complaint from the applicant. The applicant participated in a meeting between the property factor and the ground maintenance contractor. After that meeting, an area where litter had gathered received renewed attention from the common ground contractor.

Reasons for decision

7. At the start of the hearing, Mr Girvan confirmed that the relevant documents for the applicant were the application form completed by the applicant, the applicant's written submission dated 30 March 2021, together with the five typewritten pages headed "*what is our complaint ?*". For the respondent Mr Devon told us that the relevant documents were the property factor's letter of 10 July 2019 and the property factor's written submission dated 14 April 2021

8. Both Mr Girvan and Mr Devon told us that the applicant's document "*what is our complaint?*" is a copy of the applicant's stage two complaint submitted to the property factor in July 2019. The property factor's letter of 10 July 2019 is the response to that stage two complaint.

9. The document. "*What is our complaint?*" says that the property factor has breached Sections 1.1a.B; 1.1a D m & n; 1.1aF; 2.5, 3.3; 4.3; 4.8; & 4.9; 6.1; 6.3; 6.4; & 6.9 of the code of conduct for property factors and breached the property factor's duties. The application is in more modest terms, and says that the property factor has breached Sections 2, 6 & 7 of the code of conduct for property factors and breached the property factor's duties.

10. Mr Girvan and Mr Devon agreed that this tribunal's jurisdiction is restricted to considering whether or not the property factor has breached Sections 2.5; 6.1; 6.3; 6.4; & 6.9 of the code of conduct for property factors and breached the property factor's duties, to correspond with the details appearing in both the application and "what is our complaint" notification of failures to the factor .

11. Section 2.2.5 of the code of conduct says

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 (Section 1 refers).

12. Parties agree that there has been extensive communication between the applicant and the property factor since at least 2017. The applicant produces e-mails which demonstrate that the property factor responded to the applicant within the timescales specified within the property factor's written statement of services. Although asked to provide specification of the complaint, the applicant could not say which telephone calls or which items of correspondence were not responded to timeously.

13. In the response to the applicant's Stage two complaint dated 10 July 2019 the property factor concedes that "there may have been some minor delays in some communication". The property factor says that, if that is the case, they offer an apology, but what the property factor says is framed in the conditional mood. There is no admission that there has been a delay which would breach the terms of the written statement of services.

14. That is no reliable evidence which would allow this tribunal can make a finding that the property factor has failed to adhere to timescales to respond.

15. In oral submissions, Mr Girvan dwelt on the property factors continued pursuit of outstanding invoices for common charges after the applicant submitted her application. What neither party knew is that, although the application was submitted in September 2020, it was not referred to this tribunal until 19 February 2021 and was not intimated to the property factor until 8 March 2021. Throughout that period, the property factor had no obligation to make enquiry of the First-tier Tribunal.

16. There is no reliable evidence to support the application's assertion that the respondent has breached section 2.5 of the code of conduct for property factors.

17. Section 6 of the code of conduct for property factors relates to the execution of repairs and maintenance. Section 6.1 requires the property factor to have a procedure for notification of repairs and to keep homeowners informed about the progress of repairs.

18. Section 5.4 of the property factor's written statement of services says

HPMS expect homeowners to notify them promptly of common property requiring maintenance, repair or attention. This should be done either in writing (including electronically) by telephone or in person at their office, specifying the details of the property and the matter requiring attention.

19. The unchallenged evidence we have indicates that the property factor regularly updates the homeowners' portal with the news of repairs and maintenance on the development. The unchallenged evidence indicates that in November 2018 the property factor offered to meet all homeowners in the development in December 2018 to discuss groundworks and maintenance. The extracts of correspondence between the parties to this application made available to the tribunal indicate that there has been a lively exchange of correspondence between the parties, in which the property factor has advised the applicant about progress of works, timescales for completion, and likely costs.

20. The property factor has not breached section 6.1 of the code of conduct for property factors.

21. Section 6.3 of the code of conduct for property factors says

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.

22. The applicant focuses on dissatisfaction with landscaping works carried out by the property factor's subcontractor, GSB Landscapes. The request for information about the contract and the tendering process was made by the applicant in the document, entitled "*what is our complaint ?*" The property factor responded in the letter of 10 July 2019, in which the property factor explained that a tendering exercise in December 2017 resulted in a renewed contract for groundworks on 1 April 2018. Item 7 of the property factor's inventory of productions is a specification of works for the common ground maintenance.

23. There is very little detail within the documentation submitted and evidence heard that illustrates the adequacy or otherwise of the process of tender, selection and appointment of the contractor. Accordingly, we are unable to find that the factor has breached section 6.3 of the code of conduct for property factors.

24. Section 6.4 of the code of conduct for property factors says

If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

25. We adopt the reasoning at paragraph 20 above. The property factor produces the common ground maintenance schedule. The extracts of the correspondence between the applicant and the property factor produced to this tribunal, and the applicant's own evidence, tell us that the applicant was given a copy of the common ground maintenance schedule and used the copy of that maintenance schedule to challenge GSB landscapers about the quality of their work.

26. The property factor has not breached section 6.4 of the code of conduct for property factors.

27. Section 6.9 of the code of conduct for property factors says

You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

28. In their letter dated 10 July 2019 the property factor undertakes to meet the ground maintenance contractor to raise the applicant's concerns about the quality of the ground maintenance works. The weight of reliable evidence tells us that the property factor terminated the previous landscapers ground maintenance contract in 2018, and appointed the current contractors. The weight of reliable evidence indicates that the property factor has investigated the complaints of the applicant. On the applicant's own evidence, the applicant, the contractor and the property factor participated in a site meeting in 2018 to resolve challenges to the quality of work carried out by the landscaper then.

29. The applicant remains dissatisfied with the quality of ground maintenance works on the development, but there is a difference between the quality of the contractor's work and the obligations placed on the property factor. The weight of reliable evidence indicates that the property factor has taken sufficient active steps to monitor the work or the subcontractor.

30. There is no reliable evidence that the property factor has breached the terms of section 6.9 of the code of conduct for property factors.

31. In her application form, the applicant says that the property factor has breached section 7 of the code of conduct for property factors. On behalf the

applicant Mr Girvan's conceded that the applicant has not previously notified the property factor in writing of a complaint about section 7 of the code of conduct for property factors. We do not have jurisdiction to consider that aspect of this application because of the operation of section 17(3) of the Property Factors (Scotland) Act 2011.

32. On the facts as we find them to be, the property factor has not breached the code of conduct for property factors.

The Property Factors Duties

33. Section 17(5) of the Property Factors (Scotland) Act 2011 defines the property factor's duties as follows

(5) In this Act, "property factor's duties" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner.

34. The applicant's complaint is that the property factor has not proved that they were reappointed as property factors in 1998, after the two-year appointment by the developer came to an end in terms of the deed of conditions by McLean homes Scotland Ltd.

35. The applicant was not a homeowner on this development until 2007. Mr Devon for the property factor candidly concedes that nobody knows whether or not, in 1998, a meeting of the then homeowners was convened to reappoint the property factor.

36. If the applicant wants to challenge the property factor's contract, it is for the applicant to produce evidence to show that the contract is void, voidable or entirely without foundation. Understandably, the applicant cannot produce that evidence, because none of the parties to this application know what happened in 1998.

37. What is beyond dispute is that since 2007 the property factor has consistently acted as property factor of this development, their appointment has not been challenged, and their services have been accepted and paid for

by the homeowners. Indeed, the factor cites "Custom and Practice" as their authority to act and this is what appears within the Terms of Service.

38. In any event the applicant's suspicions do not engage the property factors duties because of the definition of "*the property factors duties*" contained in the Property Factors (Scotland) Act 2011. That definition restricts this tribunal to consider duties in relation to the management of the common parts of land owned by the homeowner, rather than a challenge to the validity of a contract which has been accepted for at least 14 years.

39. The applicant does not establish that the property factor has failed to carry out the property factors duties

40. We therefore find that the property factor has not failed to carry out the property factors duties.

Conclusion

41. The property factor has neither failed in their duties nor breached the code of conduct. A Property Factor Enforcement Order ("PFEO") is not necessary.

Decision

42. The property factor has neither breached the Code of Conduct nor failed in the property factors duties.

Right of Appeal

43. In terms of Section 46 of the Tribunal (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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will

be treated as having effect from the day on which the appeal is abandoned or so determined.



Signed

28 April 2021

Legal Member