

Housing and Property Chamber

First-tier Tribunal for Scotland



Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

Reference number: FTS/HPC/LM/21/0290

Re: Property at 41 Lawrie Reilly Place, Edinburgh, EH7 5EU (“the Property”)

The Parties:

Ms Shelagh Young, 41 Lawrie Reilly Place, Edinburgh, EH7 5EU (“the Applicant”)

RMG Scotland Ltd, Unit 6, 95 Morrison Street, Glasgow, G5 8BE (“the Respondent”)

Tribunal Members:

Martin J. McAllister, Solicitor, (Legal Member)

**Mike Links, Chartered Surveyor, (Ordinary Member)
(the “tribunal”)**

Background

1. This is an application by Ms Shelagh Young in respect of the Property in relation to the Respondent’s actings as a property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). The application alleges that the Respondent has failed to comply with Paragraphs 1.1.Cf, 1.1.b C d, 2.1, 2.5, 3.3, 6.3, 6.4, 6.8 and 7.4 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors. The application is dated 7th February 2021 and the matter was remitted to the tribunal for determination on 15th March 2021. A Hearing was fixed for 5th May 2021 and this was postponed to 29th June 2021. A case management discussion was held on 29th June 2021 rather than a Hearing.

Case Management Discussion

2. A case management discussion was held by audio conference on 29th June 2021 at which future progress of consideration of the application was discussed. In particular, parties were encouraged to better organise the considerable number of documents which had been lodged.

The Hearing

3. A Hearing was held over two days: 22nd September 2021 and 10th November 2021. The Hearing was conducted by video conference.

The Hearing on 22nd September 2021

4. The Applicant was present and the Respondent was represented by Mr Andrew Rose, Ms Lisa Pieper and Mr Shaun Moffat. All present gave evidence.

Preliminary Matters

5. The tribunal congratulated the parties for the indexation and pagination of the productions and the fact that this would make referral to documents so much easier. It was also noted that the Applicant had “refined” the application and, as a consequence reduced the number of documents which she had lodged.
6. During the course of the Hearing the Applicant conceded that, as a result of the reduction in the number of documents which she had lodged, she would not be pursuing that part of her application relating to a breach of Paragraph 6.3 of the Code. She also intimated that she would not be pursuing that part of her application relating to possible breach of Section 1 of the Code.
7. It was decided that matters would be progressed by dealing with each alleged breach of the Code in turn.

The Code of Conduct

Paragraph 2.1 of the Code: You must not provide information which is misleading or false.

8. The Applicant said that the main issue she had under this paragraph of the Code was the lack of clarity in accounting and what charges on factoring statements are for. She said that, in an attempt to get clarity on some issues, she had received a number of emails which she considered to be misleading. Ms Young said that, when she started the process of communicating with the Respondent on matters which caused concern, she had been working with other residents but latterly she had been communicating on her own behalf and the application was solely about her concerns.

9. Ms Young cited, as an example, the Respondent's change to the billing system. She said that the consultation document on the matter which was issued by the Respondent in connection with this gave insufficient time for people to respond. Ms Young said that the Respondent must have known in December 2020 that it could not comply with the aspirational billing system it was proposing to put in place and she pointed out that, at the case management discussion in June 2021, the Respondent said that the new computerised billing system would not be functioning until Christmas 2021.
10. Ms Young said that the invoicing system had not changed since December 2020 to provide homeowners with quality invoices which they could understand. She said that the invoices spanned a number of time periods and included items which could not readily be understood. She said that the Respondent accepted at the case management discussion that its IT system was not up to the task of producing accurate invoices and that there had to be considerable manual input.
11. Ms Young said that there had been issues with utility bills. She said that there had been no clarity and that, for example, one of the charges on the invoice related to electricity for a show home of the developers of the housing estate for which she obviously had no liability.
12. Ms Young referred to the Titan wall which is a retaining wall at the boundary of the development and the maintenance of which is the responsibility of all homeowners in the development. She said that the wall was originally not included in the maintenance programme of the property factor. She said that there had been an understanding that the wall would be maintained but that the property factor had not ensured that this was done.
13. Ms Young said that recommendations for maintenance of the wall are contained in PHI Group's document which is Applicant Production 7A. She said that this is a document prepared by the engineers responsible for design of the wall. She said that it clearly states that the wall should be inspected on an annual basis and that any growth on the wall would be an issue. She said that the document also states that drains in the wall require to be inspected to ensure that they remain clear. Ms Young said that she was told by an employee of the Property Factor that the wall was a solid block of concrete but that this is untrue and that it was therefore a misleading statement.
14. Ms Young referred to Applicant Production 16 which is an email to homeowners from Mr Moffat dated 7th April 2020 which refers to the wall being maintained by Pender Landscaping. She said that Lisa Pieper had told her that the wall is being maintained but she knows that this has not been included in the contract with Pender Landscaping.
15. Ms Young said that, although the wall appears to be a solid structure, it is brick and the engineer's report states that growth should not be allowed to penetrate it and she said that, if the brick facing of the wall is not kept clear, it is not possible to see if the joints between the bricks are clear of vegetation. She referred to a meeting with Shaun Moffat on site where, she said, he got angry

and said that the wall is being maintained but, as far as Ms Young is concerned, it is not. She said that misleading statements have been provided in connection with the wall and that she cannot get a straight answer with regard to who is responsible for maintenance of the wall.

16. Ms Young said that Robert Armstrong of the Respondents had met with her in late 2018/ early 2019 and that it had been promised that regular inspections of the development would be carried out. She said that originally there had been monthly inspections. Ms Young referred to Applicant Production 8 which is a report sent to homeowners by the Property Factor on 12th March 2019 where it is stated that "RMG Scotland undertake monthly site visits/inspections at Urban Eden." Ms Young said that reports had been promised following inspections but that none had materialised. She said that some reports provided by the Respondents contained promises which were not thereafter acted upon and were therefore misleading.
17. Ms Young said that emails of the Respondent were misleading because often they did not answer what had been asked. She referred to Applicant Production 6C which is an email from her to the Property Factor which, she said, highlights that she was not given the correct information with regard to graffiti removal and the cost to her.
18. Ms Young said that one of the invoices referred to a charge for removal of graffiti but that she had been unable to get information on the detail of what it was for. She was then told that it referred to Block 58 in the development and queried this because she did not live in that block. She said that this was then told that it was for payment of an insurance excess.
19. She said that, at the date of the charge on the invoice, Block 58 had not been completed. Ms Young said that she could not understand why paying a share of an insurance excess could have been her responsibility when she was not party to the insurance policy in question. She explained that she only paid a share of the insurance premium for public liability insurance. Ms Young said that the charge in question was for something incurred in 2017. Ms Young said that, in that email, she had asked about being charged for fencing when she thought that this should have been the responsibility of the developer who had not yet completed works.
20. Ms Young said that she wanted to be told what the charge was for and that her question on the matter wasn't answered.
21. Ms Young said that, in an email to her of 27th October 2021, the Property Factor acknowledged that there were problems with billing. Ms Young said that, at the case management discussion, the Respondents had said that there had been no other complaints about billing and she said that this was misleading.
22. Ms Young said that recent invoices still refer to the budget being available on the RMG Living website. She said that the budget is not available. Ms Young referred to Page 3 of the Development schedule at Applicant Production 17

which refers to the budget being available on the website. Ms Young said that she has repeatedly asked for the budget and that it has not been provided.

23. Mr Rose said that, in his view, for a finding of false and misleading behaviour to be made against the Property Factor there had to be intention. He said that it had been stated by Ms Young that the written statement of services was misleading but he said that it had had been updated and kept under review to reflect changes found to be necessary as the management of the development progressed.
24. Ms Pieper said that the Property Factor had taken over management of the development on a phased basis and that this had been challenging. She said that it had only been recently that the Property Factor had assumed the management of all two hundred and six units in the development. She said that the phased nature of taking on management of the units had necessitated numerous apportionments which had to change on a regular basis.
25. Ms Pieper said that there had been changes to the accounting procedures. She said that in 2016/2017 accounts had been sent to homeowners which did not detail all the charges. She said that, in the past, the method of accounting was that charges were forecast and budgets were sent to homeowners. She said that, at the end of each year, the budget amounts were credited and charged to the account. She said that the system had not been satisfactory.
26. Ms Pieper said that “lots of owners” would telephone to query the accounts which they had been sent. She said that from 2020/2021, the Property Factor suggested that charges would be made quarterly in arrears. Ms Pieper said that she had sympathy with Ms Young in that the invoices had been difficult to understand. Ms Pieper said that there had to be manual input to the accounts because the current IT system was not able to deal with the work required to produce the invoices.
27. Ms Pieper said that the accounts for 2019/2020 had not been finalised until August 2021.
28. Ms Pieper said that the Respondents were making an investment of £300,000 to implement a new IT system which would produce accounts in a better manner. She said that the particular software, called CPL, which had been purchased, is used by other property factors in Scotland and that it is to go live on 1st February 2022.
29. Ms Pieper said that, at no time, did the Property Factor set out to mislead homeowners.
30. Mr Moffat referred to Applicant Production 7A which was the document provided by PHI Group. He said that part 4 of the document related to maintenance procedures. He said that such maintenance referred to in the

document can be carried out annually by visual inspection. He said that any anomalies with regard to the condition of the wall can be observed by visual inspection.

31. Mr Moffatt said that the Titan wall is a retaining wall and he explained that it is situated on the boundary of the development and that, on the other side of the wall was a decommissioned railway cutting which is the responsibility of Network Rail. He said that the wall is situated entirely on ground belonging to the homeowners in the development. He explained access difficulties to the "railway" side of the wall. He said that there is a narrow gap between the wall and fencing belonging to Network Rail.
32. Mr Moffat said that, because of the access issues, Ms Pieper had hived off the wall from the general grounds maintenance contract with Pender, the landscaping contractors. He said that the work for contractors involved getting access to the wall and spraying with weed killer.
33. Mr Moffat said that part of the wall is faced with brick but that the facing is cosmetic and does not form part of the integral structure of the wall. He said that these fascia blocks are not grouted but are hung. He said that buddleia was growing from part of the wall.
34. Mr Moffat said that he had contacted PHI, the engineers, and had been satisfied that an annual inspection was appropriate together with ensuring that there is no growth on the wall and clearing buddleia and other growth between the railway fence and the wall. He said that investigations are being undertaken to try and arrive at a better solution for access such as spraying weedkiller from the top of the wall. He said that nothing can be done to prevent growth and what is required, from time to time, is its removal.
35. Ms Pieper said that she had separated the Titan wall contract from other ground maintenance and had asked contractors to spray the wall and immediate area three times a year. Ms Pieper said that there had been a site meeting with the developer in August 2021 at which aspects of the wall maintenance and safety aspects for access were discussed. She said that she is trying to get quotations for eye bolts to be installed in the wall to allow access for spraying from the top of the wall.
36. Ms Young said that, as far as she was concerned, the Property Factor had been unaware that maintenance of the wall should have been included in a grounds' maintenance contract. Ms Young said that Elaine Bauld, an employee of the Respondents, had told her in 2018 that she was unaware that the wall should be maintained as part of the grounds' maintenance contract.
37. Ms Young accepted that, in relation to the work which is required to be done to the Titan wall, there has been improvement. Ms Young said that her anxiety is that the maintenance to the wall has not been regular.

38. Ms Pieper said that Pender Landscaping is the contractor with responsibility for works to the Titan Wall and that this is a separate contract form that for grounds maintenance.
39. Mr Rose referred to Applicant Production 8 which is a report of the Property Factor which was provided to homeowners on 12th March 2019. He said that some things stated in the report have not been achieved by the Property Factor. He said that, when the report was produced, the Property Factor had every intention to do what is stated. He said that, in relation to matters raised by the Applicant where she had been given a response by a member of staff which proved to be inaccurate, a reply given by someone under pressure should not be considered false or misleading.
40. Ms Young said that when she met with Ms Pieper and Mr Moffat, she had been told that it was intended to have monthly inspections of the development but that quarterly visits were now being undertaken. She said that she had been told that reports would be provided to homeowners after each inspection.
41. Mr Rose said that any inspections are carried out in accordance with the written statement of services.
42. Mr Rose said that there had been removal of graffiti carried out in 2017 and that it had been found in various areas of the development. He said that it appeared that an employee of the Respondent had managed to raise an insurance claim and that the excess had been charged to homeowners. He said that the claim had been under the policy in respect of a Block in the development but that the graffiti had been spread throughout the development and its removal in other areas of the development was the responsibility of all the homeowners. Mr Rose said that the payment from the insurers had been sufficient to remove all the graffiti and not just that which was found on the insured part of the development.
43. Mr Rose indicated that there had been some difficulties in tracking what had happened with the insurance claim because the relevant member of staff was no longer employed.
44. Ms Young said that she considered it significant that the graffiti had been removed in 2017 but that homeowners had not been invoiced until the charging period 2020/2021.
45. Ms Young conceded that the actual sum charged to her for the policy excess/ graffiti removal was £1.49 but that the sum was not important. She said that the issue demonstrates the problems in trying to establish what charges were for.
46. Mr Rose said that the Respondents accept that the budget for the development was not posted to the website notwithstanding the terms of the Development Schedule at Applicant Production 17.

47. Mr Rose said that it is accepted that the accounting processes and the information provide to homeowners could have been better but he did not accept that Ms Young had been provided with false or misleading information.
48. Mr Rose said that, although the new IT system was going live on 1st February 2022, it would be 30th June 2022 before all information relating to the development would be fully through CPL.
49. Mr Moffat said that the new IT system would have all accounting information accessible by homeowners.

Paragraph 2.5 of the Code: 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.

50. Ms Young said that the fundamental issue in connection with this section of the Code is that queries she has raised about invoices were not answered promptly and that sometimes they were not answered at all.
51. Ms Young said that she had asked for details about contractors' invoices and that it took her over a year to get them.
52. Ms Young said that there had been an issue with electricity bills for the development. She said some charges for electricity were historic and were for meters for supply of electricity which were not her responsibility. She said that she had asked for information on these but that this had not been provided. Ms Young said that she had also asked questions about street lighting in the development. She said she has had no clear answer with regard to which meters applied to which supplies. Ms Young referred to Applicant Production 13 which was an email from her to the Property Factor in relation to the stage 4 complaint response. She said that the email shows her inability to get clear answers in relation to the electricity charges and that she had asked for copies of relevant invoices.
53. Ms Pieper said that she has responded to queries made by Ms Young and that she communicates with her on a regular basis. Ms Young said that her questions to Ms Pieper were often along the lines that she had asked questions which had not been replied to and "could she please have a response?" Ms Young said that she frequently received responses to her requests which were only partial.
54. Ms Young said that sometimes there had been difficulties because members of staff, to whom she had written, had left and that there did not seem to be an "audit trail" which would allow someone else to take responsibility for responding.

55. Mr Moffat said that street lighting throughout the development is paid for by the local authority even where roads have not been adopted. He said that there are electricity sub meters for such items as play areas and satellite apparatus.
56. Ms Young said that it was not clear what she was being charged for in respect of electricity charges and that, despite seeking clarification, no satisfactory explanation had been provided.
57. Mr Rose gave what he describes as a “general view” on this section of the Code. He said that a number of requests for information came from Ms Young and that some seemed excessive and, on occasion too much information was being sought. He said that a property factor has to make a judgement on what is reasonable to supply when asked for information.
58. As an example of the frequency of communication, Mr Rose said that, in a period of eight months, Ms Young had sent eighteen emails. He said that staff found it demanding and that it was difficult for them to keep up with the various requests. He said that Ms Young wants detailed responses to every query raised by her.
59. Ms Young took objection to some of what was said by Mr Rose and said that some of the communications sent to the Property Factor were on behalf of the residents’ association and some were about trying to get the property Factor to meet with homeowners.
60. Ms Young said that the frequency and content of her emails to the Property Factor was a consequence of the fact that she did not get responses to requests she had made about invoices and sometimes received partial responses and that, as a consequence, she had to communicate further. She said that, for example, she had been complaining about late billing for years.

Paragraph 3.3 of the Code: You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

61. Ms Young said that she requested information about contractors’ invoices for the years 2016/2017 and 2017/2018 and that it was a year before this was provided to her.
62. Ms Young said that she had asked to see the year end accounts for the development. She said that the provision of these had been referred to in the Welcome Pack which had been given to her when she became a homeowner. She said that she was eventually sent year end summary accounts but that they did not match the invoices which she had received. She said that she found it

impossible to marry up the invoices to the year end summary accounts. She said that an error had been found in her accounting and that she received an apology and was told that a refund would be made. Ms Young said that it was impossible from statements to find out if she had actually received a refund.

63. Ms Young said that sometimes entries appeared in the invoices without any obvious explanation and when enquiries were made, no further detail was forthcoming. She gave the entry in the invoice "graffiti removal" as an example. She said that one invoice contained a reference to "gas supply" when she could have no liability for such an item.
64. Ms Young said that, as a homeowner, she did not see a budget of anticipated expenditure which can then be compared with actual expenditure. She said that, instead, she receives invoices containing inconsistencies. She said that, when she was provided with invoices from contractors, they were not bundled in particular financial years and that it was therefore difficult to make sense of them.
65. Ms Pieper said that, at the start of each year, homeowners get a copy of a budget and a forecast of expenditure and then a reconciliation at the end of each year.
66. Ms Pieper said that, from 2021 when the system was changed, what homeowners now get are invoices in arrears which show actual charges. She said that these have not yet been sent out because she is trying to resolve issues within them. She said that the new IT system will make matters clearer for homeowners.
67. Ms Young said that she has no certainty from year to year with regard to what the charges are going to be.
68. Mr Rose referred to Respondent Productions 130 to 139 which was a letter to homeowners dated 13th December 2018 confirming that the invoicing had been incorrect and enclosing an amended invoice. He conceded that the provision of information was not ideal and that the Respondents are trying to resolve issues so that more detailed information is provided.
69. Mr Rose referred to Respondent Production 71 which represented a credit note given to the Homeowner.
70. Mr Rose referred to Respondent Production 67 which was a letter sent to homeowners on 13th September 2019 intimating that accounts for the period ending 31st August 2017 had been posted to the customer portal. He said that these documents demonstrated that the Property Factor had provided detailed financial information to the homeowners and in response to queries being raised.

71. Ms Young said that the accounts referred to by Mr Rose were not provided until 2019 some two years after the year end and that her anxiety going forward is that accounts will not be able to be reconciled. She said that no one advised her that she would not be receiving accounts annually. She said that the budget, in itself, did not make sense and contains a number of mistakes and that entries on invoices sometimes did not make sense.
72. Mr Moffat said that he agreed that some of the description of items on the invoices are unclear. He said that contractors are being asked to be more succinct so that it is clearer when items are transposed to the system.
73. Ms Young referred to Respondent Production 142 which is the budget for the period 1st September 2019 to 31st August 2020 where there is reference to grounds and other maintenance charges of just over £12,500. She said that this was not accurate because the real costs are much higher.
74. Ms Pieper said that, in common with all budgets, the budget cannot be completely accurate because it is not known exactly what expenses will require to be met from year to year. She said that a particular challenge for the Property Factor was that, until it became responsible for managing the whole estate, it did not know what grounds were to be maintained because of the phased nature of the development.
75. Ms Young said that, just because it might have been difficult to accurately state what was requiring to be managed going forward, that was no reason not to attempt to do it.

Paragraph 6.3 of the Code: 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.

76. Ms Young said that the homeowners had never been offered information on the process of engaging contractors or received information on specification of contracts or the quality of work. She said that she did not believe that there was a process of competitive tendering. She said that she has asked why particular contractors were appointed and she has also asked for more information on the appointment of insurance providers for public liability insurance. She said that full information has not been forthcoming. After some discussion, Ms Young said that, in her "slimmed down submission," she had not included documentation to support her arguments under breach of Section 6.3 of the Code and that she therefore wanted to withdraw the matter from consideration by the Tribunal.

Paragraph 6.4 of the Code: 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.

77. Ms Young said that there was no published programme of work and no detailed information on what the core services provided by the Property Factor were. She said that one example was provision for cleaning of the blocks of flat in the development although she conceded that this was not a matter which directly impacted on her.
78. Ms Young said that she believed that the playground was inspected twice a year but she had no idea of what standards are applied in connection with such inspections.
79. Ms Pieper said that there is no programme of works but that now the Property Factor has responsibility for managing all the grounds, it can look to put one in place.
80. Ms Pieper said that the area in the development known as the Colony steps are now power washed and that gradually other items are being addressed and added to what is required to manage the development. She gave another example which is the question of repairs required to the bin store. She said that there would be meetings with homeowners to discuss what required to be done going forward.
81. Mr Rose said that this was not a mature development and that work would be done to see what is required for long term management.
82. Ms Young said that she had an anxiety about the Titan wall since this was part of the common parts defined in the title deeds. She said that she did not consider that the fact that the development was partly finished was reason for the Property Factor not to have a programme of works in place. She said that parts of the development are more than five years old. She said that the lack of a programme of works would affect all proprietors and might affect values of the properties in the development.

Paragraph 6.8 of the Code: You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

83. Ms Young's representations state that she realised that there was a connection between RMG and Osterna, a contractor who had provided services to the homeowners when she was supplied with a copy invoice and she noted a common VAT number.
84. Mr Rose conceded that there had been breach of this paragraph of the Code. He said that Osterna Ltd had been used for health and safety assessments and he described it as "part of the RMG family." He said that this should have been disclosed to homeowners.

The Hearing on 10th November 2021

85. The Applicant was present and the Respondent was represented by Mr Andrew Rose, Mr Shaun Moffat and Ms Melissa Syme.

Preliminary Matters

86. A question was raised about the alleged failure of the Property Factor to comply with Section 1 of the Code being part of the application. Ms Young said that the difficulty was that the written statement of services appeared to be continually changing. After some discussion, Ms Young accepted that her concerns were about whether or not the Property Factor complied with the written statement of services rather than the content of the document. She agreed to withdraw that part from her application and breach of Section 1 of the Code was no longer live for consideration by the tribunal.

87. Since the previous Hearing, Ms Young had submitted a copy of a budget provided to her by the Property Factor. She said that this was the budget for the period September 2018 to August 2019. She said that budgets with such detail are no longer provided by the Property Factor and that she needed such detail so that, as an owner, she could understand what her costs might be. She said that she did not consider it unreasonable for such detail to be provided.

88. The tribunal were advised that the Property Factor's project team had advised that it was hoped that the new IT system would be installed by February 2022. Mr Moffat said that it was currently undergoing robust testing. He said that the legacy data would be transferred to the new platform and that, ultimately, there would be quarterly bills issued to homeowners but they would be able to access the system and see real time information on spending on the development.

Paragraph 7.4 of the Code: You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the First-tier Tribunal.

89. Ms Young said that what she experienced was that frequently, when she raised an issue with the Property Factor, it was not satisfactorily dealt with and, when she chased the matter up, the person she was then dealing with appeared not to have information from her original submission which might be some time before.

90. Mr Rose and Mr Moffat disputed this and said that information was retained by the Property Factor in conformity with its obligations in terms of the Code. Mr Rose referred the tribunal to Respondent Productions 236-238 and 264- part 5 and 268 to 274. Mr Rose said that these represent exchanges between the Property Factor and the Homeowner and demonstrate that the Property Factor was aware of matters previously raised by the Homeowner.

91. Ms Young said that one example she could recall was when she complained in February 2019 that the playground equipment was not operational and this matter was not responded to in a timeous manner. She said that this was an issue which extended beyond 2019 and that her original emails which had been sent in 2019 had appeared to “go missing.” She said that this particular matter went through four stages of the complaints process and that the original emails which she had sent should have been referred to by the Property Factor.
92. Mr Moffat said that, at the time the complaint was made about the playground, the Property Factor was not responsible for its maintenance and that it was still in the control of the Developer who was responsible to ensure that it was functioning properly. He said that he reported the matter to the Developer and arranged for part of it to be shut off. He said that the information about Ms Young complaining about the playground would be in the server of the Property Factor and retained but not necessarily logged as a complaint against the Property Factor because it was not responsible for maintenance of the playground at that time.
93. Ms Young said that, whilst that may have been the case, it demonstrated the lack of clarity on what the Property Factor thought actually constituted a complaint.

Property Factors Duties

94. Ms Young said that it was some time after she bought her property that she had access to her Deeds. She accepted that any delay was not due to the Property Factor. She referred the tribunal to Section D8 of the Burdens Section and Section D.36 of the Title Sheet.
Ms Young said that the Deeds clearly specify that audited accounts should be produced. Mr Rose conceded that the Property Factor did not comply with this section and had not provided audited accounts.
95. Ms Young said that, in relation to the Osterna invoice, the Property Factor had not complied with the Property Factor’s duties.

Submissions

96. Paragraph 2.1 of the Code
Ms Young said that she had produced evidence that, at various times, the Property Factor had undertaken to produce information when it must have known that its system could not provide it. She said that she had been promised for five years that things would improve and that specific things would happen. She said that, typically, the Property Factor would promise to deliver on provision of information and then fail to provide it.
97. Ms Young said that a written statement of services had been produced in 2016 which had been purported to be from RMG (Scotland) Ltd but that company was not a legal entity until 2018. She said that this was an attempt to mislead.

98. Ms Young said that she had been misled in connection with a commitment that had been given to her with regard to provision of factoring bills being provided quarterly in arrears. She said that it became clear that the Property Factor could not do this.
99. Mr Rose said that, in connection with the written statement of services issued in 2016, it had been badged up as RMG (Scotland) and he accepted that it was the parent company, RMG, which was actually providing the factoring service.
100. Mr Rose said that he thought it important to consider the definition of “misleading” which he says is causing someone to believe something which is not true and he suggested that this required the author to know that it was not true. He described some of the publications issued and information provided by the Property Factor to be “sloppy.”
101. As an example of what he described as sloppy language, Mr Rose referred to Respondent Production 104. He said that there is reference to a “report” being carried out. He said that a “report” cannot be carried out but that an “inspection” can. He said that is an example of sloppy wording. He said that some of the wording has created expectations which the Property Factor cannot meet. Mr Rose said that it is important to consider the relative import of matters and he posed the question of what is more important- inspection reports not being produced or inspections not being carried out?
102. Mr Rose said that Ms Young had indicated that she wanted to see evidence of when a particular inspection was done. He said that he did not consider that, for the management fee homeowners were paying, they were entitled to detailed management information reports. Ms Young responded to say that she only asked for things because their provision was referred to in the written statement of services and that any expectations she had were based on the written statement of services.
103. Paragraph 2.5 of the Code
Ms Young said that she believed that she had demonstrated that the Property Factor had not responded promptly to complaints which she had made. She cited as one example that she had been asking for the 2021 budget and has still not been provided with it. She said that response times for complaints are frequently missed by the Property Factor. She cited as an example a stage 4 complaints response which had taken one hundred days.
104. Mr Rose said that there was evidence before the tribunal with regard to timescales for response by the Property Factor. He accepted that two stage four complaints responses had not been given timeously. He said that the Property Factor had accepted that, in some instances, it had not responded timeously to requests for specific information and also in provision of documentation it was required to supply to homeowners. He referred to Respondent Production 221 which was an email from the Property Factor to the Applicant in which it was accepted that certain matters had not been done timeously and that homeowners were to be credited with a partial refund of

management fees. He said that the Property Factor had always been “upfront” in acknowledging its shortcomings in this regard.

105. Paragraph 3.3 of the Code

Ms Young said that she considered that she was only provided with partial information. She said that, during her ownership, only two end of year accounts had been produced. She said that the information which is provided only shows her share of costs where previously the accounts showed the whole development. She said that, as a consequence of not seeing information for the whole development, it was difficult for her to assess value for money. She said that, according to the obligations contained within her Title Sheet, a budget should be produced ahead of the relevant charging period. She said that the Property Factor stopped producing budgets.

106. Ms Young said that the Property Factor has accepted that there are inaccuracies contained within invoices. Ms Young said that, when she has asked for copies of contractors’ invoices, it has sometimes taken months for them to be produced. Ms Young referred to Applicant Production 17 which was an invoice dated 19th August 2021. She said that this invoice did not provide her with necessary information.

107. Ms Young said that a revised invoice which had been issued earlier in the year was dated back to 2018 but only billed her up to 2020. She said that she has received no invoice in respect of 2021 and therefore no detailed information on the charges made. She said that she has had a statement but not a corrected invoice.

108. Ms Young said that she has had no sight of the overall costs for the development and that she was therefore “completely in the dark.” She said that she acknowledged that the Property Factor hopes that the new IT system will be functioning by March 2022 but that, after five years, she has no confidence that costs will be accurately reflected and proper detail provided.

109. Paragraph 6.4 of the Code

Ms Young said that homeowners were promised inspections of the development but that this had now been downgraded to “visits.” She said that she is not satisfied that these are happening on a regular basis and that actions are being taken on what is observed at such visits.

110. Ms Young said that, for a long period, no works were carried out to the Titan wall. She said that it had been difficult to ascertain what should be done and what is actually being done. She said that maintenance to the Titan wall has been “sporadic” and that, over the years, when she has raised queries about the wall, they have been dealt with by property managers in different ways. She said that she had not been able to get a definitive answer as to what was to happen with maintenance of the Titan wall. She said there should be a programme of works for what she described as “the big things” such as the Titan wall and painting. She said that homeowners were promised regular

inspection of the grounds in the development and that, as a result of the Property Factor's failings, a refund of its 2019 management fee was made.

111. Ms Young said that if the written statement of services states that there will be visits then they should happen and such visits should result in something like a report and a programme of work. She said that she saw no evidence of this. She said that the original written statement of services referred to twelve annual inspections and a written report but that this has now been stated to be "visits" with no provision for reports to be produced.
112. Mr Rose said that, in his view, a distinction has to be made between a programme of services and a programme of works. He said that there is a regular cycle of works such as weeding and grass cutting. He said that such matters comprised a service contract. He said that he would not anticipate a programme of works being in place for a development as new as this one. He said that this would need to be put in place in the future and that steps are being taken to look at what might be included in such a programme.
113. Mr Rose said that the reference in the Code to a programme of works is different from a service contract.
114. Mr Moffat said that, in relation to the Titan wall, the tribunal had the document from PHI. He said that the wall is visually inspected once a year. He said that the tribunal had evidence on the issue with the area of ground between the wall and the Network Rail fence. He said that a separate contract was in place for clearing that area because it was identified that it was wrong to include it in the general contract for grounds maintenance. He said that the clearance of growth in this area which would be undertaken three times a year would facilitate work to clear the wall of any growth.

Property Factor's Duties

115. Ms Young said that one matter threaded throughout her case is the fact that she did not have full information on the costs for the whole development and she said that, if matters arose which would require homeowners to take a decision with regard to development issues or the Property Factors, she would not be able to properly participate in such a decision because she would not have full information. She said that it goes against the principles of democracy that she didn't get information on costs which she was not liable to pay. She said that she considers that she has a right to have sight of such information.
116. Mr Moffat said that, in his view, a distinction has to be made between costs for the development and costs only to be borne by some units in the development. He cited, as examples, fire safety equipment in blocks of flats.
117. Mr Rose said that he would like the tribunal to look at the Title Sheet and the difficulties presented to a property factor to comply with its terms.
118. Mr Rose asked the tribunal, in arriving at its determination, to take into account the phased nature of the development. He said that the team in RMG,

when it started management in 2016, was inexperienced but that RMG (Scotland) Ltd now has in place experienced and quality staff and that its back-office function is more effective. He said that the Property Factor has committed considerable financial resources to put in place a new billing system. He said that the Property Factor has behaved responsibly in accepting its shortcomings to the extent of refunding part of its management fee to homeowners. He said that the Property Factor is committed to providing a quality service to homeowners.

Discussion

119. The tribunal noted that a number of matters raised in the application had been conceded by the Property Factor and that, during the course of the Hearings, the Applicant conceded certain matters. This assisted the tribunal in arriving at its determination. There were no issues of credibility although clearly the Applicant and Respondent had differing views on the evidence before the tribunal. All those giving evidence provided it in a clear and balanced manner. The tribunal had to assess the evidence, both written and oral.

120. It was conceded by the Property Factor that the accounting system for the development was not fit for purpose. It recognised this and is making a significant investment in information technology to improve its delivery to homeowners. It also conceded that, at times, it had been slow to respond to the Homeowner when she asked for information. The tribunal did not find that requests made by the Homeowner of the Property Factor were excessive and it accepted that, on some occasions, she had to make a number of approaches because incomplete or partial answers had been provided to her. The Property Factor also conceded that the homeowners in the Development should have been made aware of the connection of ownership which it had with Osterna Ltd.

Paragraph 2.1 of the Code.

121. Ms Young's position was clear. She asked the tribunal to accept that, on various occasions, she was provided with information which was wrong or inaccurate. The tribunal accepted the evidence provided by the Applicant in this regard. What it had to determine is whether or not the Homeowner had been provided with information which was false or misleading. There was no doubt that the Property Factor made promises to do something or provide something which it subsequently failed to deliver. It was also the case that, in its written statement of services of 2016, it described itself as RMG Scotland which did not exist as an entity until 2018.

122. Mr Rose had set out the Property Factor's position and that was, put simply, that any actings or failings in this regard were below the threshold of false and misleading. He said that he considered that the definition of "misleading" is relevant and that is to cause someone to believe something which is not true.

123. The tribunal determined that the failures of the Property Factor fell short of being false and misleading. There were no doubt instances where the

Property Factor undertook to do certain things which, on reflection, it should perhaps not have done. It should have known that it would have difficulty complying with what it had agreed to do but there was no evidence of deliberate courses of action to mislead the Homeowner or to provide false information. With regard to the 2016 written statement of services, the reference to RMG Scotland was incorrect but the tribunal accepted that, in Mr Rose's words, it was sloppy rather than false and misleading.

Paragraph 2.5 of the Code

124. The Property Factor had conceded that it had not complied with the prompt timescales referenced in the Code and in compliance with its written statement of services. The tribunal determined that the Property Factor had not complied with this paragraph of the Code.

Paragraph 3.3 of the Code

125. It was clear that the Property Factor had provide the Homeowner with financial information but the tribunal found that this did not amount to a "detailed financial breakdown of charges." By its own admission, the Property Factor had been unable to provide the Homeowner with a detailed account showing what charges it had made. In recognition of its inability to comply with this paragraph of the Code, the Property Factor is putting a new IT system in place to deal with the accounting for the Development.

126. The Tribunal determined that the Property Factor had not complied with this paragraph of the Code and accepted the evidence of the Homeowner. She had provided a number of examples where financial information had not been provided to her.

Paragraph 6.4 of the Code

127. The Applicant's position is that there should be a programme of works for the Development and that of the Property Factor is that one is not yet necessary because the Development is relatively new. No evidence was produced to support that the core service agreed with homeowners included a planned programme of cyclical maintenance. The Tribunal preferred the evidence of Mr Rose in this regard- that there was no requirement for a planned programme of works and that it would be something to consider implementing going forward.

128. The tribunal accepted the distinction made by Mr Rose between a programme of services and a programme of works.

129. The Applicant's position was that she did not know what inspections were being carried out and what standards were being applied when they were. The tribunal put some weight to the statement of Mr Rose with regard to management fees. His position was that homeowners do not require to receive detailed information after each inspection or visit. There was no substantive

evidence that there was a lack of inspection which was causing issues with the Development.

130. The tribunal recognised that there is a contract between each group of homeowners and a property factor and it was a matter for homeowners what was to be included in such a contract. In this Development, it was open to homeowners to decide what level of inspection and reporting they wanted and to negotiate this with the Property Factor. Such additional work would, of course, probably result in a higher level of management fee.

131. The tribunal understood the concerns expressed by the Applicant in relation to the Titan wall and considered that the Property Factor could have been better in providing information to the Homeowner with regard to what is required to ensure that the wall is properly maintained. The tribunal accepted the evidence of Mr Moffat that an appropriate regime of inspection and maintenance is in place.

132. The tribunal determined that, in connection with the evidence before it, the Property Factor had complied with this paragraph of the Code.

Paragraph 6.8 of the Code.

133. The Property Factor conceded that it had not advised Homeowners of its connection with Osterna Ltd. The tribunal determined that the Property Factor had not complied with this paragraph of the Code.

Paragraph 7.4 of the Code.

134. The tribunal had no evidence that the Property Factor had not retained all correspondence relating to the Homeowner's complaints. It accepted that the Homeowner would have been frustrated when she considered that a member of staff who she was dealing with did not seem to have knowledge of a previous complaint which she had made but that did not amount to proof that the Property Factor had not retained items of correspondence. It also accepted the point made by Mr Moffat that, with regard to some matters raised by the Homeowner, the Property Factor was not actually managing all the Development and therefore certain matters, although retained on the server of the Property Factor, would not necessarily be logged as a complaint.

135. The tribunal determined that, on the basis of the evidence before it, the Property Factor had complied with this paragraph of the Code.

Property Factor's Duties

136. Both parties asked the Tribunal to have regard to the terms of the Title sheet relating to the Property. The Applicant said that the Burdens Section of the Title Sheet requires audited accounts to be prepared by the Property Factor and that these are not done. Mr Rose said that he would like the Tribunal to

consider the terms of the Title Sheet and the difficulties presented to property factors to comply with its terms.

137. When housing developments are contemplated, there comes a point when decisions have to be taken with regard to burdens to be set out in relation to each unit in a development. Solicitors are instructed to prepare the necessary documentation which nowadays is typically enshrined in a Deed of Conditions. It is common for units in developments to be subject to a number of burden deeds in addition to the one put in place by the developers. It is possible that some burdens, with the benefit of experience prove to be cumbersome or unwieldy but nevertheless still remain part of the title.
138. Ms Young referred the tribunal to page D.36 in her Title Sheet. This is part of a Deed of Condition by Eastgate Developments Limited and registered on 14th November 2006. Section 4.3 states that, as soon as practicable after 31st December in each year, a Service Charge Statement will be produced to proprietors. It states that “on requestthe managing agent will supply the proprietors.....with audited accounts.”
139. The development was built by Places for People Homes Limited and it registered a Deed of Conditions on 16th May 2016. On the same date it registered another Deed of Conditions which relates primarily to the flats in the Development. Section 6.1 states that all proprietors will have an obligation to maintain the Common Parts. Sections 7 to 11 sets out the powers of proprietors in relation to calling a meeting of proprietors, conduct of such a meeting, decision making and voting. Section 11 sets out specific matters on which decisions can be made. Section 12 bind proprietors to pay costs properly incurred. Section 13 binds proprietors to pay an annual contingency charge “as contributions in advance towards the costs of establishing and maintaining financial reserves to meet the future costs (as from time to time established by the Factor acting reasonably) of the repair, maintenance, reconstruction, renewal and replacement in respect of the Development Common Parts where such costs are not of a constant and recurring nature.”
140. The tribunal considered whether or not there was, as suggested by the Applicant, a requirement to produce audited accounts. The Property Factor is obliged to produce audited accounts when required to by the proprietors. The definition of “Proprietors” is contained at page D30: “party or parties who are then proprietors of the whole or any part of that site.” The wording is somewhat sloppy (drafted by solicitors and not the Property Factor) but it appeared to the tribunal that the meaning of this is that it is for the proprietors as a group to require the production of audited accounts. They can decide to do so at a meeting properly called. It did not appear to the Tribunal reasonable that one proprietor of two hundred and six could require the Property Factor to produce such accounts with the consequent cost having to be borne by all the proprietors.
141. The Property Factor’s evidence was that it was considering what might be the constituent parts of a programme of works and the title does allow it to set a contingency charge.

142. The Title requires the property Factor to produce a Service Charge Statement as soon as practicable after 31st December each year. The Property Factor has failed to do so and, in this regard has failed to carry out the property factor's duties.

143. In relation to the Osterna Ltd contract, the tribunal considered that it was proper to deal with this as breach of the Code.

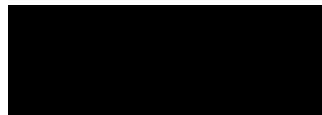
144. In her submissions, Ms Young said that, threaded through her application, there was a failure by the Property Factor to produce information and that, in this regard, it failed to comply with the property factor duties. The tribunal considered that such a matter was more properly addressed in considering whether or not the Property Factor had complied with the Code.

Summary and Disposal

145. The tribunal found that the Property factor has failed to comply with the property factor duties and has breached paragraphs 2.5, 3.3 and 6.8 of the Code.

146. The tribunal had sympathy with both parties. The Homeowner, in her relentless pursuit of information and clarity had been frustrated. The Property Factor had difficulties because of the phased nature of the development but some difficulties it brought upon itself. It should have reacted sooner when it realised that its financial reporting systems were not robust and it should have been more interventionist in dealing with some of the matters raised by the Homeowner. Those giving evidence for the Property Factor appeared, to the tribunal, to recognise its past mistakes and it is to be hoped that the new reporting system will allow better service to be provided to the Homeowner and other proprietors in the development.

147. The Homeowner has been put to inconvenience and the tribunal determined that it would be appropriate for an award of compensation to be made in her favour. A proposed property factor enforcement order will be made which will require compensation of £600 to be paid to the Homeowner by the Property Factor.



Martin J. McAllister, Legal Member
of the First-tier Tribunal for Scotland
2 December 2021