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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011 Sections 19(1)(a)

Chamber Ref: FTS/HPC/LM/21/2188

Re: Property at 17 Silverholm Drive, Cleghorn, Lanark ML11 7SY ("the Property")

Parties:

Mr Derek Tollan, 17 Silverholm Drive, Cleghorn, Lanark ML11 7SY ("the Homeowner")

Newton Property Management Limited, 87 Port Dundas Road, Glasgow G4 0HF ("the Property Factor")

Tribunal Member:

Neil Kinnear (Legal Member) and Andrew Taylor (Ordinary Member)

DECISION

[1] The Tribunal determined that the Property Factor has failed to comply with sections 2.1 and 2.4 of the Code of Conduct for Property Factors as required by section 14(5) of the *Property Factors (Scotland) Act 2011*.

[2] The Tribunal proposed awarding compensation payable by the Property Factor to the Homeowner in the sum of £787.29 in respect of the Property Factor's failure to comply with sections 2.1 and 2.4 of the Code of Conduct for Property Factors.

[3] The Decision of the Tribunal was unanimous.

Introduction

[4] In this Decision the *Property Factors (Scotland) Act 2011* is referred to as "the 2011 Act"; the *Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (effective from 1 October 2012)* is referred to as "the Code"; and *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended are referred to as "the Rules".

[5] The Property Factor was a Registered Property Factor and had a duty under section 14(5) of the 2011 Act to comply with the Code.

Background

[6] By application dated 8th September 2021 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1)(a) of the 2011 Act and had failed to ensure compliance with Sections 2.1, 2.4, 2.5 and 3.4 of the Code as required by Section 14(5) of the 2011 Act in terms of section 17(1)(b) of the 2011 Act.

[7] On 16th September 2021 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a Hearing. A Case Management Discussion by conference call took place at 10.00 am on 16th November 2021. The Homeowner participated, and was represented by Mr Malcolm Campbell. The Property Factor's Mr MacDonald participated, and the Property Factor was not represented. The application was continued to a Hearing.

[8] Mr Campbell confirmed that he was the homeowner in the earlier decision of the Tribunal being FTS/HPC/PF/20/2471. He advised that the Tribunal had made a further decision in an application by him against the Property Factor in application FTS/HPC/PF/21/1412. He was also representing another homeowner in a further application made against the Property Factor in application FTS/HPC/PF/21/1283, which had been continued to a Hearing at 10.00 on 17th February 2022.

[9] Mr Campbell advised, and Mr MacDonald confirmed, that all the applications, though made by different homeowners, were otherwise virtually identical, making the same complaints for the same reasons and seeking broadly the same remedies.

[10] The key issue in all the applications was the homeowners' contention that the Property Factor had misled them by seeking to charge them for maintenance of the drainage and sewer system, when they had no legal liability for that maintenance. Whether they had any such liability turned on the factual question of whether the drainage and sewer system had been made up to a standard suitable for adoption by the local authority. If it had at the time the Property Factor sought to charge the Homeowners, as the Property Factor contends, then they would be liable. If it had not, then they would not be liable.

[11] Mr MacDonald advised the Tribunal that the Property Factor had made further investigations which indicated that the drainage and sewer system had been made up to a standard suitable for adoption by the local authority at the relevant time, but that those investigations were ongoing. The Property Factor's solicitors were investigating that matter further with Scottish Water, and were in the process of seeking to obtain Scottish Water's records on that point.

[12] Mr Campbell and Mr Orr advised the Tribunal that their information was that the drainage and sewer system at the relevant time was not, and clearly could not due to its design have been, anything other than a temporary arrangement, and that it had not been made up to a standard suitable for adoption.

[13] Both parties were in substantial agreement that Scottish Water held the answers on this crucial point, and that it would be most helpful to have evidence from the key member of Scottish Water's staff who dealt with this matter, Leigh Young.

[14] The Tribunal the Hearing to 17th February 2022, to be heard at the same time as application FTS/HPC/PF/21/1283. Hearing these applications together would avoid the parties having to present the same evidence and submissions in near identical cases twice to differently constituted Tribunals.

[15] The Tribunal also concluded that it was in the interests of justice for the Property Factor to be given an opportunity to conclude its investigations with Scottish Water, which it had advised the Tribunal it anticipated it would do by the end of December 2021. The result of those investigations might allow the Property Factor to lead evidence in support of its position at the continued Hearing.

[16] A further continued Hearing was held at 10.00 am on 17th February 2022 by conference call. The Homeowner participated, and was again represented by Mr Malcolm Campbell. The Property Factor's Mr Robertson and Mr MacDonald participated, and the Property Factor was not represented

[17] At the commencement of the further continued Hearing, the Property Factor e-mailed the Tribunal with further information which it had obtained from Scottish Water, in which Scottish Water confirmed that the drainage and sewer system had not been made up to a standard suitable for adoption by the local authority at the relevant time.

[18] The Property Factor commendably, and in the Tribunal's view properly and correctly, was candid in providing the results of its investigations regarding whether or not the drainage and sewer system had been made up to a standard suitable for adoption by the local authority at the relevant time. Standing the results of those investigations, the Property Factor's position was that it had received legal advice in relation to potential financial claims against third parties that it should not concede this application, but that equally it was not in a position to actively defend it.

[19] The Tribunal heard brief evidence from the Homeowner. He is the heritable proprietor of 17 Silverholm Drive, Jerviswood Park, Cleghorn, Lanark. The Property was one of the first 15 houses to be erected in a new housing development known as Jerviswood Park. The developer and owner of the development was originally R.F. Chattelle (Developments) Limited, which intended to build 31 houses. However, after completing the dwellinghouses, it went into administration and ceased to trade. The original developers' administrators advertised the development for sale in 2016. The development plot was advertised as a high-quality residential development opportunity with consent for 16 detached houses and one partially completed four bedroomed detached house.

[20] In December 2016, Taylor Homes (Scotland) Ltd purchased the undeveloped remainder of the original development plot. Taylor Homes (Scotland) Ltd then set about completing the development. The burdens on the title of Taylor Homes (Scotland) Ltd to the remainder of the original development plot and the burdens on the title of the Property are the same. Those burdens which are relevant to this

application are set out in a Deed of Conditions registered in the Land Register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd. In the Deed of Conditions "The Developers" are defined as R.F. Chattelle (Developments) Limited and their successors and assignees, "The Development" is defined as the Chatelle Subjects together with the residential dwellinghouses and others to be developed by the Developer, "Proprietor" is defined as the heritable Proprietor for the time being of any Dwellinghouse and Garage pertaining thereto in the Developmnent, and "the Development Open Areas" are defined as "the Development and the Services (as hereinafter defined) under exception of… all sewers drains pipes, cables, conduits or other services or transmitters serving the Development wherever situate whether within the Development or otherwise, but only in so far as any of these are adopted for maintenance purposes by a relevant authority.

[21] Clause (THIRD) of the Deed of Conditions provides, inter alia "The Developers shall form to a standard suitable for adoption purposes by the relevant authority… such sewers, drains and drainage facilities (both within the Development and/or serving the Development) as are intended by the Developers to be adopted by a relevant authority and once the said… sewers, drains and drainage facilities have been so formed they shall form part of the Development Open Areas for which each Proprietor of each Plot shall be responsible from their respective dates of entry to a Plot for an equal share jointly and severally of the cost of maintenance, repair, renewal, reinstatement and rebuilding as appropriate thereof unless and until the same are adopted for maintenance purposes by the relevant authority.

[22] The Property Factor is a firm of property factors which was appointed by the original developers in 2015. It acted as property factor for the entire development until it resigned on 21st October 2020.

[23] Parties were agreed that in the event that the Tribunal concluded that the Property Factor was in breach of its obligations, then the sum of £787.29 represented the sum which the Homeowner had paid which he should have not, and which is the sum which should be repaid to the Homeowner.

[24] Finally, the Homeowner asked the Tribunal to make an award of expenses in his favour upon the basis that he had been put to considerable unnecessary expense as a result of the Property Factor's belated response in light of the information it had received from Scottish Water.

Statement of Reasons

[24] Section 17 of the 2011 Act provides:

"17 Application to the First-tier Tribunal

(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").

(2) An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty.

(3) No such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(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."

[25] Section 17(1) creates two separate grounds of complaint, being failure to carry out the property factor's duties and failure to ensure compliance with the Code. The Homeowner proceeded in respect of both.

[26] The fundamental question, as in the previous cases before the Tribunal relating to the Development, relates to the interpretation of the Deed of Conditions. The Homeowner submits that the deed of conditions places an obligation on Taylor Homes (Scotland) Ltd as the heritable successor to R.F. Chattelle (Developments) Ltd to complete the development and to connect the temporary drainage and sewerage system to the local authority main system.

[27] The Property Factor appeared to have formed its interpretation of the Deed of Conditions at the time of its communications with the Homeowner without the benefit of legal advice. The Homeowner has subsequently taken legal advice, and produced the opinion from the Environmental Law Chamber dated 15th December 2020, upon which he based his submission.

[28] The Homeowner submitted that the deed of conditions places an obligation on Taylor Homes (Scotland) Ltd as the heritable successor to R.F. Chattelle

(Developments) Ltd to complete the development and to connect the temporary drainage and sewerage system to the local authority main system.

[29] Taylor Homes (Scotland) Ltd are a housing development company who purchased a development plot with planning consent for 14 houses, together with one completed house and one partially completed house, from the original developers of the larger development plot. Taylor Homes (Scotland) Ltd took title with an obligation to connect the entire sewerage and drainage systems serving the larger development, including the applicant's property, to the local authority main drainage system. Taylor Homes (Scotland) Ltd's title is burdened by the Deed of Conditions which defines "the Development Open Areas" of the development, including the Property.

[30] The drainage and sewer system only form part of "the Development Open Areas" when it is made up to a standard suitable for adoption by the local authority. Properties developed by Taylor Homes (Scotland) Ltd on the part of the development plot that they own are being connected to the same drainage and sewage system which serves the applicant's property. Taylor Homes (Scotland) Ltd are in discussion with Scottish Water and SEPA about connecting the entire temporary drainage and sewage system to the established local authority drainage and sewage system.

[31] The terms of the Deed of Conditions provide that because the drainage and sewage system serving the entire development plot has not been brought up to a state suitable for adoption by the local authority, the drainage and sewage system does not form part of "the Development Open Areas". The Property Factor now accepts after detailed investigation that this is the case. In consequence, the Homeowner is not therefore responsible for the cost of maintenance of the temporary drainage and sewerage system.

[32] Section 2.1 of the Code provides that you must not provide information which is misleading or false. Because the Property Factor misinterpreted the deed of conditions, the Property Factor provided inaccurate information to the applicant. The fact that the Property Factor proceeded in good faith, and was not deliberately dishonest, is highly mitigatory, but not a defence.

[33] There was not anything wrong with the mechanics of communication between the Homeowner and the Property Factor. The difficulty for the Property Factor is the content of what was communicated has led to misunderstanding and dispute. Even though the Property Factor, in the Tribunal's view, acted honestly, it wrongly interpreted the terms of the Deed of Conditions without the benefit of legal advice.

[34] On the facts, the Tribunal concluded that the Property Factor has inadvertently breached Section 2.1 of the Code. Section 2.1 of the Code states that you must not provide information which is misleading or false. Because the Property Factor misinterpreted the Deed of Conditions, the Property Factor provided inaccurate information to the Homeowner. In this case, the Tribunal accepts that the Property Factor was not deliberately dishonest. The difficulty for the Property Factor is the content of what was communicated led to misunderstanding and dispute. Although the Property Factor acted honestly, it misinterpreted the Deed of Conditions,

[35] Accordingly, the Tribunal found that the Property Factor inadvertently breached Section 2.1 of the Code.

[36] Section 2.4 of the Code states that the Property Factor must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where the Property Factor can show that it agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

[37] The Property Factor believed that the maintenance of the sewerage and drainage system serving the development fell within their core services because the its interpretation of the Deed of Conditions led it to believe that it was dealing with maintenance of a common part. If the Property Factor had been correct in that belief, then the works that were instructed would have been covered by the written statement of services. Unfortunately, the Property Factor's interpretation of the Deed of Conditions was incorrect, for the reasons explained above. As a result, the Property Factor inadvertently breached section 2.4 of the code of conduct, because it instructed repairs believing those to be emergency repairs authorised by the written statement of services, when, in fact, they were invoicing the Homeowner for the cost of servicing a drainage system for which his liability had not yet crystallised, because the drainage and sewage systems are still not of a standard suitable for adoption by the local authority.

[38] The Tribunal accepted that the Property Factor acted in good faith, and believed that what it was doing was correct and that it was acting in the interests of all of the proprietors of the development. However, as a result of its mistaken belief that that the maintenance of the sewerage and drainage system serving the development fell within their core services, the Property Factor inadvertently breached section 2.4 of the Code.

[39] Section 2.5 of the Code states that the Property Factor must respond to enquiries and complaints within prompt timescales. As previously noted, the Tribunal accepted that the Property Factor acted in good faith, and believed that what it was doing was correct and that it was acting in the interests of all of the proprietors of the development. The fact that it was incorrect in its approach, due to a misunderstanding of the legal consequences of the Deed of Conditions in the Tribunal's view, does not render its responses to the Homeowner as inappropriate. It did not provide the response which the Homeowner desired, and which as the Tribunal has determined, the Homeowner should have received, but that was as a result of its misunderstanding of the legal position with regard to the Deed of Conditions rather than through deliberate inaction in response to the Homeowner's complaint. Accordingly, the Tribunal found that the Property Factor was not in breach of Section 2.5 of the Code.

[40] Similarly, section 3.4 of the Code states that the Property Factor must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her, or their share of the funds. Again, the Tribunal accepted that the Property Factor acted in good faith, and believed that what it was doing was correct and that it was acting in the interests

of all of the proprietors of the development. The fact that it was incorrect in its approach, due to a misunderstanding of the legal consequences of the Deed of Conditions in the Tribunal's view, does not render its responses to the Homeowner as inappropriate. Because of its misunderstanding, it did not recognise that the Homeowner was making a payment in advance which might require to be refunded. Accordingly, the Tribunal found that the Property Factor was not in breach of Section 3.4 of the Code.

[41] With regard to whether the Property Factor had failed to carry out its property factor duties in terms of section 17(1)(a) of the 2011 Act, the Homeowner asserted that the Property Factor had exceeded its authority on behalf of the homeowners. As previously noted, the Tribunal accepted that the Property Factor acted in good faith, and believed that what it was doing was correct and that it was acting in the interests of all of the proprietors of the development. The fact that it was incorrect in its approach, due to a misunderstanding of the legal consequences of the Deed of Conditions, in the Tribunal's view does not render its responses to the Homeowner as inappropriate, nor did it deliberately and consciously exceed its authority on behalf of the homeowners. Accordingly, the Tribunal found that the Property Factor did not fail to carry out its property factor duties in terms of section 17(1)(a) of the 2011 Act.

[42] Parties were agreed that in the event that the Tribunal concluded that the Property Factor was in breach of its obligations, then the sum of £787.29 represented the sum which the Homeowner had paid which he should have not, and which is the sum which should be repaid to the Homeowner. In those circumstances, the Tribunal will issue a proposed Property Factor Enforcement Order for that amount.

[43] Finally, with regard to the Homeowner's application for expenses, Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides:
"(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.
(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made."

[44] The Tribunal noted that the Property Factor e-mailed the Tribunal with further information which it had obtained from Scottish Water at the commencement of the further continued Hearing of 17th February 2022. That information consisted of an e-mail chain between the Property Factor's solicitor and Scottish Water, where the final e-mail in that chain was dated 2nd December 2021. Accordingly, the Property Factor has been aware of Scottish Water's position since early December 2021, yet had not advised either the Tribunal or the Homeowner of the result of its enquiry with Scottish Water until the morning of the 17th February 2021.

[45] Had the Property Factor advised either the Tribunal or the Homeowner in advance of 17th February 2022 of the outcome of its enquiries, and of the position which it adopted in consequence thereof, then the Homeowner would have avoided having to prepare for the further continued Hearing upon the basis that the Property Factor still

relied upon its original assertion that the drainage and sewer system had been made up to a standard suitable for adoption by the local authority at the relevant time.

[46] The Tribunal considered that the Property Factor's failure to advise either the Tribunal or the Homeowner in advance of 17th February 2022 of the outcome of its enquiries was unreasonable behaviour in the conduct of the case which had put the Homeowner to unnecessary or unreasonable expense.

[47] The Tribunal awarded expenses against the Property Factor and in favour of the Homeowner to cover the expense to the Homeowner of preparing for the further continued Hearing on 17th February 2022, upon the basis that was unnecessary standing the evidence already lodged with the Tribunal prior to the 17th February 2022 which was spoken to at the further continued Hearing.

[48] The Homeowner should prepare an account of the expense to the Homeowner of preparing for the further continued Hearing of 17th February 2022, and submit that to the Tribunal, which will remit it to the Auditor of the Court of Session to tax and report.

Right of Appeal

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.

04 April 2022

Legal Member **Date**