Housing and Property Chamber
First-tier Tribunal for Scotland

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") Property Factors (Scotland) Act 2011 ("the Act") Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/21/0052

Property: 36 Dumyat Road, Wallace Gardens, Stirling, FK9 5HA **("the property")**

The Parties: -
Mr Raymond Robson, 36 Dumyat Road, Wallace Gardens, Stirling, FK9 5HA **("the homeowner")** represented by Mr James Rennie **("the homeowner's representative")**

Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow, G3 7PL **("the property factor")**

Tribunal Members: - Simone Sweeney (Legal Member) Elaine Munroe (Housing Member)

Decision of the Tribunal Chamber

The Tribunal unanimously determined that there has been no failure by the property factor to carry out the Property Factors' duties in terms of section 17 of the Act.

Background

1. By application dated 5th January 2021, the homeowner applied to the Tribunal for a determination on whether the factor had failed to comply with the property factor duties in terms of section 17 (1) (a) of the Act.
2. Section 7 (B) of the application form provided that the property factor had failed:-

> *"…to apply the terms set out in the deed of condition (sic) as it relates to 'garden ground.'"*

3. Attached to his application, the homeowner had provided colour photographs of the property, a copy letter from the property factor dated 20th December 2020 and copy emails between the parties between September and October 2020.
4. A notice of acceptance of the application had been issued on 18th January 2021 by a legal member of the Tribunal with delegated powers of the Chamber President and the application was passed to the Tribunal for determination at a hearing fixed to take place by telephone conference on 18th March 2021.
5. The homeowner returned to the Tribunal a completed form dated 10th February 2021 which was before the Tribunal and intimated to the property factor. Within the form the homeowner confirmed that he did not wish to take part in an oral hearing; did not intend to send written representations; and that he did not intend to lodge any additional productions for the application in advance of the hearing.
6. Written representations were lodged by the property factor dated 24th February 2021.
7. The homeowner notified the Tribunal's administration by email of 12th March 2021 that Mr Rennie would be his representative at the hearing of 18th March 2021. This email was not crossed to the property factor.
8. On 17th March 2021, the Tribunal was made aware that the homeowner would be represented at the hearing by Mr Rennie.

Hearing of 18th March 2021

Preliminary issue

9. In attendance at the hearing was Mr Rennie for the homeowner and Mr Gordon Buchanan, Director, for the property factor. The homeowner was absent.

10. Mr Rennie explained that he is the father in law of the homeowner. He is a businessman, not a legal representative. He appeared as a lay representative for the homeowner.

11. Mr Buchanan took issue with Mr Rennie representing the homeowner. No intimation of Mr Rennie's involvement had been given to the property factor in advance of the hearing. Mr Buchanan advised the Tribunal that he was, 'taken aback' by Mr Rennie's attendance.

12. The Tribunal invited Mr Buchanan to advise on what basis he opposed Mr Rennie representing the homeowner.

13. Mr Buchanan alleged that Mr Rennie had been directing the homeowner's complaint and sending emails to the property factor through the homeowner's email account. No evidence was forthcoming to support the allegation.

14. Mr Rennie denied the allegation and submitted that he had no access to the homeowner's email account.

15. Mr Buchanan referred to regulation 43 (1) (c) of the regulations which provides:-

> ***"43.***—*(1) In addition to the homeowner's reasons as required by section 17(2) of the 2011 Act, the application must state—*
>
> *(c)the name, address and profession of the representative of the homeowner, if any;"*

16. Mr Buchanan submitted that the property factor had not been provided with the name, address and profession of Mr Rennie in advance of the hearing.

17. Mr Buchanan referred to the homeowner's completed form of 10th February 2021. Mr Buchanan highlighted the fact that the homeowner had indicated that he did not intend to take part in the hearing. Mr Buchanan had assumed that only the property factor would be in attendance and that the homeowner had never provided the

property factor with authority to share information with Mr Rennie. Mr Buchanan submitted that he was questioning the authority of Mr Rennie to represent the homeowner.

18. Mr Buchanan conceded that there was nothing on the homeowner's form of 10th February 2021 to indicate that the homeowner did not wish the hearing to proceed; that no additional documentation or representations had been forthcoming; that the property factor had not been asked to share information with Mr Rennie; that the homeowner had contacted the Tribunal on 12th March 2021 to confirm that Mr Rennie would act on his behalf; that the property factor regularly attended hearings before the Tribunal in which a homeowner was represented by a family member. Mr Buchanan was unable to advise the Tribunal on what difference it would have made to the property factor's position had Mr Rennie's name, address and profession been shared in advance of the hearing. Mr Buchanan was unable to show any prejudice to the property factor from the hearing proceeding.

19. Satisfied that the property factor was able to participate fully in proceedings as required by the overriding objective of the regulations, the Tribunal determined that the hearing proceed.

Evidence of the homeowner

(i) Definition of the word, 'garden'

20. Mr Rennie set out that the complaint was in two parts. Firstly, that the property factor had failed to interpret the definition of the word 'garden.' This was significant in interpreting, accurately, the meaning of 'garden ground' as in appears in the deed of conditions.

21. Paragraph 5.7 of the deed of conditions provides the following:-

> *"garden ground to the front and sides of the building line of a house so far as open to a road, footpath or garage access shall be deemed to be a matter of common*

maintenance among the houses…and shall be maintained and dealt with as hereinafter with regard to the common ground."

22. It was submitted that the deed of conditions does not provide a definition of the word, 'garden.'

23. In the absence of same, the homeowner submitted that the Tribunal should apply the definition of, 'garden' from the Oxford English dictionary. This defines 'garden' as,

"a piece of ground adjoining a house in which grass, flowers and shrubs may be grown."

24. In his submission, Mr Rennie argued that the area around the property did not fall within the definition of 'garden' as it is provided in the Oxford English dictionary.

25. In support of his submission, Mr Rennie referred the Tribunal to three photographs attached to the application.

26. One photograph showed the front view of the property. The property is a modern end terraced house. In front of the property is a pavement and an area for parking. The photograph showed a path leading from the pavement to the front entrance door. From the photograph, the path looks to be approximately three metres in length. Running along the front of the house parallel with the pavement is an area of ground which appears to be filled with bark and chippings. This area was the same width as the path leading to the entrance door.

27. The second photograph showed, from a closer distance, an image of the ground running along the front of the house filled with bark and chippings.

28. The third photograph showed the left side of the property. A path of double concrete slabs ran along the side of the property. To the left of the path was a similar area of ground to that at the front of the property. It, too, was filled with chippings. A fence divided the ground around the property next door.

29. Mr Rennie submitted that the photographs showed that the area of ground at the front of the property filled with bark and chippings was not a garden. He submitted that the ground did not meet the definition of 'garden' as it is provided in the Oxford English dictionary. For the ground to meet that definition, it required to be a piece of ground in which grass, flowers and shrubs may be grown. Mr Rennie submitted that the ground at the front of the property had no flowers or shrubs. It could not be cultivated. The ground was stone. Therefore the ground could not be defined as a, 'garden'.

(ii) Interpretation of the deed of conditions

30. The second part of the homeowner's case was that, if it was accepted that the area of ground at the front of the property was not a garden, then it did not fall within paragraph 5.7 of the deed of conditions. It was not 'garden ground' within paragraph 5.7 which,

> '*shall be deemed to be a matter of common maintenance…and shall be maintained'* and regarded as *'common ground.'*

31. Mr Rennie explained that the homeowner had purchased the property in 2015. The property is within a development of approximately two hundred houses of varying sizes and styles and positioned on plots of different sizes. Within the development are areas of grass and recreation. These are maintained by the property factor. The homeowner does not dispute that these are areas which the property factor has a responsibility to maintain. The homeowner does not dispute that these areas are common. The homeowner is charged £132 per annum by the property factor to maintain, 'garden ground' in terms of paragraph 5.7 of the deed of conditions.

32. This brought Mr Rennie to the second part of the homeowner's complaint. He submitted that the property factor was incorrect to charge the homeowner for

maintenance of garden ground as there was no garden ground at the property. In his application form the homeowner submitted that the property factor,

> *"has merely assumed that every owner within the estate has 'garden ground' requiring regular maintenance and sharing the charge more equitably amongst the owners."*

33. Mr Rennie argued that the property factor has never provided maintenance to the ground at the front of the property since the property was purchased in 2015. The homeowner was paying for a service which he was not receiving, had never received and would not benefit from in the future. Mr Rennie described the fee of £132 per annum as an, 'inequitable charge'.

34. Mr Rennie emphasised that he was not taking issue with the terms of the deed of conditions or the property factor's written statement of services. Rather, he was taking issue with the way the property factor had interpreted paragraph 5.7 of the deed of conditions. The homeowner accepted that the property factor was responsible for maintaining common garden ground and charging those owners benefiting from that service.

35. However, as the area of ground at the property does not meet the definition of 'garden' as it is provided in the Oxford English dictionary, then it does not fall within the meaning of 'garden ground' at paragraph 5.7 of the deed of conditions and; therefore, it cannot be deemed to be, 'a matter of common maintenance among the houses' in terms of paragraph 5.7. Accordingly there should be no charge applied to the homeowner for common maintenance.

36. In response to questions from the Tribunal's ordinary member about enquiries made by the homeowner in advance of the purchase, Mr Rennie submitted that the homeowner would have been aware of charges for common areas but the homeowner would not have considered the terms of paragraph 5.7 of the deed of conditions. Mr Rennie submitted that the homeowner owned the property including

the area of ground to the front of the property. In his submission, that ground was not a common area; it is part of the homeowner's private property; does not fall within the definition of paragraph 5.7 of the deed of conditions; and therefore there should be no charge levied on the homeowner by the property factor.

37. In terms of how the property factor could resolve the complaint, the homeowner had provided in his application that this would be,

> *"cancellation of this charge and a rebate of all monies relating to his service that I have paid to date."*

Evidence of the property factor

38. In response Mr Buchanan denied any failure on the part of the property factor to carry out the property factor duties.

(i) Definition of garden

39. On behalf of the property factor, Mr Buchanan disputed the idea that the area of ground to the front of the property did not fall within the definition of a 'garden' provided by the homeowner. Mr Buchanan disputed that the area of ground could not fall within the definition of the Oxford English dictionary: 'a piece of ground adjoining a house in which grass, flowers and shrubs may be grown.' Mr Buchanan submitted that the area of ground was capable of being cultivated.

40. However, Mr Buchanan accepted the evidence of the homeowner that the ground at the front of the property was private and not 'common.' Indeed in a letter to the homeowner dated 22nd December 2020, the property factor had confirmed same. Insofar as relevant the letter provided,

> *"The garden ground present at any property in your development is not 'common ground,' it is clearly the private property of the relevant homeowner…"*

41. The fact that there was no garden ground which had or could be maintained at the property, was irrelevant to the obligation on the homeowner to pay a common charge for the maintenance of other areas. In the same letter of 22nd December 2020, the property factor had provided,

> *"Whilst your property may not have garden ground to be maintained, you are responsible for a share of the cost of maintenance which is carried out where this ground does exist, ie at other properties…"*

(ii) Interpretation of the deed of conditions

42. Mr Buchanan submitted that paragraph 5.7 of the deed of conditions provided authority for a front garden maintenance service to be carried out to relevant gardens and other areas in the development and treated as a common charge.

43. Further, that all homeowners are liable for a share of the common charge for front garden maintenance even if they, themselves, receive no front garden maintenance from the service at their particular property.

44. Mr Buchanan denied that there was any obligation on the property factor to apply the terms of paragraph 5.7 as it relates to garden ground. Rather, paragraph 5.7 places a burden on homeowners at the development, collectively. That burden is to maintain common ground. The homeowners, in fulfilling that burden, do so through the service provided by the property factor.

45. In written representations dated, 24th February 2021, the property factor had which, insofar as is relevant, provided:-

> *"It is a clear principle of law that the Title Deeds can only bind the proprietors in ownership, not the Property Factor. Our Duties as a Property Factor do not arise from the Applicant's Deed of Conditions. Our Duties arise from the terms of our agreement with our client. Our client is the collective group of homeowners of the Applicant's development. The terms of our agreement with our client do not reference*

the Title Deeds. HPMS do not have a Duty to "apply the terms set out in the Deeds of Conditions as it relates to 'Garden Ground'(paragraph 5.7)."

46. Mr Buchanan submitted that section 7B of the homeowner's application related to the property factor's duties; specifically the failure to apply the terms of the deed of conditions. On the basis that the deed of conditions bind the property factor to apply the decisions of the homeowners, Mr Buchanan submitted that, when apportioning costs, it is for the homeowners to decide how costs should be apportioned for the services they receive.

47. In response to the homeowner's argument that it was inequitable that he should contribute financially towards a service which he, himself, did not receive, Mr Buchanan submitted that this was not something on which the property factor could comment. Mr Buchanan explained that different people within the collective group of homeowners have different views on how the costs should be divided between owners. However the decision over the way in which costs should be divided rests with the owners and not with the property factor.

48. In support of his submission, Mr Buchanan prayed-in -aid a decision of the Tribunal from 2021. In the application of Mr Paul Brown v James Gibb (FTS/HPC/PF/20/2315) at page 40, Mr Buchanan submitted that the Tribunal had determined that the property factor in that case had no obligations in terms of the deed of conditions. Rather, that the property factor acts as an agent on behalf of the homeowners. The obligations arising from the deed of conditions rest solely on the homeowner. Mr Buchanan asked the Tribunal to accept this approach in the homeowner's application.

49. The Tribunal noted that the property factor had not lodged this authority in advance of the hearing and there was no evidence that a copy had been provided to the homeowner.

50. Within his letter of 22nd December 2020, Mr Buchanan had made the following suggestion to the homeowner:-

"To resolve your complaint you appear to request that the collective homeowners change how they apportion the cost of a service provided to your development by the ground maintenance contractor. We suggest you discuss this with your co-owners and if the collective homeowners wish to alter this they are welcome to provide us with their collective instruction."

51. Mr Buchanan submitted that despite this suggestion, there was no attempt by the homeowner to alter the apportionment of costs with the other owners.

52. Finally, Mr Buchanan accepted that the homeowner had never received maintenance of the area of ground at the front of his property. In the property factor's submission this was irrelevant as the charge to the homeowner was for the common service and to cover areas where work is carried out.

53. The property factor denied any suggestion that it had interpreted the deed of conditions, wrongly.

Findings in fact

54. The Tribunal makes the following findings in fact:-

55. That the homeowner purchased the property in 2015.

56. That the property factor manages the development in which the property is situated.

57. That there are areas within the development which are common and which are maintained by the property factor.

58. That the homeowner received advice from a solicitor prior to purchasing the property.

59. That the homeowner received advice about charges for common areas prior to purchasing the property.

60. That paragraph 5.7 of the deed of conditions provides that maintenance shall be undertaken to common ground.

61. That paragraph 5.7 refers to 'garden ground.'

62. That there is no definition of 'garden' within the deed of conditions.

63. That the area of ground at the front of the homeowner's property is private and not common to the development.

64. That the area of ground at the front of the homeowner's property has never received any maintenance from the property factor.

65. That the area of ground at the front of the homeowner's property has never received any maintenance because it is not common to the development.

66. That the homeowner is liable to meet his share of the costs of maintaining the common areas.

Reasons for decision

67. The parties are in agreement that the area of ground at the front of the homeowner's property is private, is not common ground and has not been maintained as part of the common maintenance at the development. Paragraph 5.7 of the deed of conditions requires only areas of ground which are common to the development to be maintained.

68. The homeowner's argument that the area of ground is not a 'garden' as defined by the Oxford English dictionary was made on the basis that the photographs revealed an area of bark and chippings and that the area could not be cultivated to allow grass, flowers or shrubs to be grown. There was no technical evidence to support this submission by the homeowner. In any event, it was accepted by the property factor that the area was private property and not common to the development. Therefore it does not fall to be an area which requires to be maintained in terms of paragraph 5.7 of the deed of conditions.

69. The Tribunal did not accept the argument of the homeowner that because he receives no maintenance to the area of ground outside his property, he ought not to contribute to the costs of areas which do receive maintenance. The homeowner accepted that there are areas within the development which are common and

maintained. The homeowner derives a benefit from such maintenance as it prevents any deterioration in the presentation of the development as a whole. The Tribunal accepts the property factor's position that paragraph 5.7 of the deed of conditions places an obligation on the homeowner to contribute to such garden maintenance despite there being no maintenance undertaken at the homeowner's property.

Appeals

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

[redacted]

……..

Simone Sweeney, Legal Chair, 11th May 2021, Glasgow