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

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

Chamber Ref: FTS/HPC/LM/21/1767

The Parties:-

Stephen McLarty, 11H North Frederick Path, Hanover Court, Glasgow, G1 2BG ("the Homeowner")

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Glasgow, G72 1UZ ("the Property Factor")

The Tribunal:-

Melanie Barbour (Legal Member)
Elaine Munroe (Ordinary Member)

DECISION

The Factor failed to comply with section 6.3 of the Code of Conduct for Property Factor. The decision is unanimous.

INTRODUCTION

1. In this decision the Property Factor (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factor (Scotland) Act 2011 Code of Conduct for Property Factor is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

2. The Factor is a Registered Property Factor and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that registration.

BACKGROUND

3. By application dated 21 July 2021 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 4, 6 and 7 of the Code.

4. A case management discussion (CMD) took place by telephone on 14 December 2021. Both parties attended the CMD.

5. After discussion as to what breaches of the code were alleged, it was agreed that the Tribunal would consider breaches under Sections 2, 4 and 6 of the Code. The alleged breaches were set out in detail in the letter from the homeowner entitled "*Issues with Management of Speirs Gumley account and The Communal Areas at Hanover Court*". There were 4 separate complaints in that letter. It was also agreed that for the purposes of this application the code of conduct effective from 1 October 2012 is the code applicable to the complaints made by the Homeowner.

6. The Property Factor had submitted written representations to the Homeowner's complaints in an email of 12 November 2021. The Homeowner confirmed that he had had sight of those written representations and he was satisfied with the explanation that the Property Factor had provided in relation to complaint number 3. The Homeowner advised that he was not satisfied with the explanations in relation to the other three matters 1, 2 and 4. He wished to proceed to a hearing on those matters. The Homeowner clarified that he was seeking a resolution which included compensation.

7. The tribunal noted that complaints 1, 2, and 4 remained outstanding. The matters were disputed by both parties. The tribunal determined that it should refer the case to a hearing. The tribunal issued a direction to manage further procedure.

HEARING

8. A Hearing was held by teleconference on 21 February 2022. The Homeowner attended. The Factor was represented by Ms Dearie, Ms Brownloe, and Mr Stuart Smith. Both parties had submitted some further documentation. Neither party objected to the further documentation lodged.

SUMMARY OF SUBMISSIONS

9. Damage to the Floorcovering at Block 11 (circa 2011): Section 6.9 of the Code

10. The Homeowner advised that contractors had been sent out to his block in 2011 and had proceeded to cut out large sections of flooring in the hallway. He had no idea why the contractor had done this. There was no correspondence from the Property Factor about this matter before the work took place, however he believed that the Factor had instructed the contractor to come to the development and carry out this work.

11. The Property Factor had later written out to the owners suggesting that the flooring needed to be replaced; they did not get owner support for that replacement work however, and the floorcovering lay in that damaged condition for the next 9/10 years. He submitted that the Property Factor should not have had the contractors attend at the property in 2011, to remove sections of the flooring and then submit invoices to the owners to pay for this damage. He was concerned that the poor condition of the flooring had lasted for such a long time. He considered that the Property Factor should have rectified this. The matter had gone on for 10/11 years, during that period they had not rectified the matter.

12. Turning to the fact that the flooring damage had occurred in 2011 before the code came into force he considered that his complaint was relevant in relation to actions the Property Factor had taken or not taken to rectify the matter after October 2012. He thought that the code should apply to matters involving the Property Factors after 1 October 2012.

13. The Homeowner was asked what he had done to speak to the Property Factor about the matter from October 2012. He advised that he had no written or other documentary evidence to show what he did to raise the matter, however he advised that the Property Factor's offices are close to the development, and he would often go and pay his factors bill at their offices; when he did this he would raise the issue verbally with the Factors. He advised that he raise the matter a couple of times a year. He would ask them why sections had been cut out of the flooring, and why

were they now suggesting that the flooring had to replaced. He advised that the flooring had been in good shape before this incident. He advised that the works had made the flooring dangerous.

14. He was asked why he had not pursued the matter further before now i.e., raising court proceedings or bringing the matter to the tribunal at any time since 2012. He advised that it was one of those situations, where he had been busy, and further he had not been aware of the tribunal for some time. He advised that he had asked about who had been the individual who had instructed this repair at the time, but never got any reply to that request. He advised that he would be disappointed if nothing can be done about this complaint.

15. The Property Factor referred to pages 48 and 49 of their submission, this information related to a response to the Homeowner in September 2019 about the damage to the flooring. The Homeowner was advised that the only emergency repair carried out to flat C was for emergency plumbing in January 2011. Further that the flooring was concrete and would not have been lifted to complete those repairs.

16. The Homeowner challenged this explanation and advised that he had received an invoice for the works which had cut out sections of the flooring. He advised that the Factor had invoiced him for this work, and it was Ian McDonald Flooring who had done the work.

17. During the hearing the Property Factor checked the records again and noted that in fact there had been a trip hazard reported to them, and an invoice was raised for common charges to cut away a section of the flooring due to the trip hazard at the landing and some of the stair treads appeared to be loose. She advised that after those works had been done they had proposed replacement flooring to the owners, the owners had not agreed to it and the flooring was not therefore replaced.

18. The Homeowner did not accept this description of the works that were done. He advised that there were extensive amounts of flooring cut way on the landing and the stairs. He referred to the photos submitted with his application. The photo shows an area on the top floor which has areas of flooring cut away. He disputed that the top floor would be in any way damaged and had not required to be repaired or replaced.

19. The Property Factor advised that there had not been a complaint ongoing for 9 and a half years about this matter. The Property Factor did not consider that section 6.9 of the code applied in the circumstances.

20. The Property Factor advised that she did not have access to all the details of the contactors' invoice, however she noted that the cost of the call-out was to make safe and it had totalled £80. She considered that this was a fairly small sum and would not cover a large amount of work and she did think that it would have covered a large section of flooring being removed.

21. The Property Factor submitted that this issue was out with the jurisdiction of the tribunal as it occurred before the code was in force. Further she advised that if all that the Homeowner had done to raise the matter was speak about it when he had come into the office to pay his factor's fee, it would be difficult to look back and find any record of any communication with him. She advised that they had proposed the replacement flooring to homeowners but there was not agreement for it to be replaced. To ascertain exactly what the contractor had been instructed to do they would need to review their records to see if they had spoken to the contractor.

22. The Homeowner's position was that the flooring was not in a poor condition and sections should not have been cut from it. He confirmed that the development is around 40 years old, and it was the original flooring that had been damaged. He advised that he had assumed that the person who he had spoken to when raising the matter would have a note of his visit and his complaint. He confirmed that he had not submitted a complaint in writing.

23. <u>Complaint 2: The Groundwork Contract (Sections 2.4 and 6.3 of the Code)</u>

24. The Homeowner advised that the grounds maintenance works had cost around £15,000. It was extensive works. Shortly, after the work was completed he had received a further invoice for the removal of a further four trees. He could not understand why this had not been part of the original contract. He considered that the contract had been instructed on the basis of one homeowner suggesting the work be done. He did not consider that there had been majority support for the works. He could not understand why this work had been done.

25. The Property Factor advised that their position was set out in pages 21—40 of their submission. The Property Factor advised that they had had majority approval to do the work. The owners had made the decision. Correspondence had been sent out to all owners about the proposed work.

26. They advised that there had been anti-social problems in the garden areas, the removal of the shrubs was to address this issue. They had removed the shrubs and carried out the grounds work to address anti-social behaviour; during the works they had removed 15,000 needles in the garden area due to the area being used by people misusing drugs. There were no gates at the development, and this had been an ongoing problem. The plan had been to keep the trees on the site; however, as the works were being carried out it became apparent that some further works were required. They were advised that the trees were either unsafe or too close to one of the blocks in the development. They had to remove four trees. They had advice from the tree surgeon suggesting that they had to remove them.

27. The Homeowner asked if there was evidence to prove the condition of the trees and to show that the trees were too close to windows. He asked if any owners had asked for the removal of those trees for that work to be done. He suggested that these works were done without consultation. He thought that this was a situation that was part of a pattern of similar actions by the factor; and recently other works had been done without consultation. In this regard he advised that he had recently received a further invoice for the removal of shrubs due to the visibility of a path.

28. The Homeowner was unhappy that the owners had not been informed that the trees needed to be removed and they were just billed for this work; he submitted that it had not been approved and the owners had not been asked about it.

29. The Property Factor advised that two of the trees were at the side of block 3 and removed at the request of the block 3 owners, and the other two trees were in the car park and there was a safety issue, there was concern that they could fall over, they were situated on a slight slope, while it was hoped that they could remain when the shrubs were removed the tree surgeon assessed the trees noted that they were not healthy and recommended that they be removed.

30. The Property Factor confirmed that while some owners from block 3 were spoken with, because of the nominal cost involved and the safety issue of the trees in the car

park the Property Factor did not write to all owners as they considered that they had delegated authority to proceed to instruct this work. The cost to remove the trees for each owner was invoiced as two charges one for £7.20; and the second for £5.60. She advised that they could provide further clarity about these works if required, namely which trees were removed and copies of the invoices.

31. The Property Factor advised that they have thresholds for doing building repairs, but this was a different situation as it was grounds maintenance. They did not have a threshold for these works. She advised that they had managed a large scheduled contract for these works and as they were managing the contract, additional issues had arisen, and they needed to act on those matters for the owners. She considered that these works were part of essential maintenance, and the cost of them was nominal; there was no specific threshold before consent was sought it was a decision taken on each situation; and she considered that it was reasonable to take the decision in this situation.

32. The Homeowner wanted to know who the tree surgeon was employed by. The Property Factor advised that it was the ground maintenance contractors and that they are on the Property Factors approved list. The Property Factor advised that they had delegated powers in the deed of conditions that allowed them to instruct such matters as the removal of the trees.

33. The Property Factor advised that in terms of the original ground maintenance works, the Property Factor had written to the owners advising that they had a proposal to do these works. A majority of owners had contacted the Property Factor agreeing to the works and a majority had paid for the works (she referred to page 39 of her submission). Any owner who had not paid separately had the sum added to their quarterly account and all owners, except one, had paid these costs.

34. The Homeowner was unhappy with the procedure which had been adopted by the Factors. He submitted that owners should have been asked if they agreed to the works before seeking payment and doing the works. He considered that what had been sent out was a proposal by one owner. There were no discussions about the plan for the works. The plan had not been agreed. He submitted that just because someone has paid for the works did not indicate that they agreed to the works being done. The actual plan should have been put to the owners, there was no agreement

from the owners for the works to be done and there should have been a majority in agreement with the plan, before any invoices were sent out and the quotes sought.

35. The Homeowner was referred to the letter of page 21 which asked owners for their opinion and a majority expressed interest in doing that work.

36. The Homeowner referred to his photographic evidence submitted showing landscaping works, he submitted that the cost of the plants was substantial, he submitted that the photos show that a large amount of the plants have now disappeared, he considered that this was due to poor workmanship and that £4,500 of plants had blown away in the wind since the work was done. He advised that most of the plants have now gone; and the grassy area was in a very poor state with a huge "baldy" patch, he said he had never seen the grassed area in such poor condition.

37. He referred to the other pictures which showed a building site adjacent to the development, he advised that the builders has commandeered some of the land at the development to support scaffolding and to store materials and tools; he asked the Factors if the owners were to get compensation for this. The Homeowner was advised by the Tribunal that this matter was not one before the Tribunal, however the Factors were asked by the members to note this concern raised and to revert to the Homeowner once they had investigated the position.

38. <u>Complaint 4: Legal Fees (Section 4.8 of the Code)</u>

39. The Homeowner advised that he had missed a couple of payments of factors fees. He had then been charged legal costs. He was unhappy as he advised that a more informal approach could have been tried first, including a call to him which would have saved money. He was disappointed that he had been charged legal fees, he felt that this was at the root of where his account had gone haywire. He had refused to pay these legal fees, as far as he was concerned they had not been due. He had paid his account in full, and was then charged legal fees, he was not sure how the account had got into such a situation.

40. Stuart Smith, from the Factor's Credit Control Team advised that the £787.75 fee had been outstanding for some time. There had been two late payment fees added to the

Homeowner's account. Recovery of the £787.75 was then pursued by court action. He agreed that the balance had been subsequently paid, but this still left the balance of court dues. These dues were detailed in the sheriff court decree. The charges for those fees were then added to the Homeowner's common charges account. He advised that the matter had been muddied by an overcharging of expenses of £145.09 for solicitor's dues and diligence fees which had been erroneously added, however, this was picked up in a review of the complaint by the Homeowner. A statement of account had been produced and this money had been credited to fix that error. Anything else was subject to the decree and had been due.

41. The Homeowner advised that he did not know why the court action had been brought against him, he felt that they could have phoned him to advise him that the debt was outstanding.

42. Mr. Smith advised that after invoices are rendered and if not paid, there is a reminder note issued (21 days after invoice) and then a further notice (14 days later) which is a notice of intended action (this later letter incurs a £15 late payment fee); and then the matter may be referred onto a third party debt collection agency, and they will also contact the owner before court action is commenced. Therefore, there are at least 3 letters before court action is commenced.

43. He advised that there was no record of contact from The Homeowner between the period of the invoices and final notices going out and court action commencing. The Homeowner advised that there had been periods when he had rented the property out and he had possibly not received that correspondence, one phone call would have sorted that out. Mr. Smith advised that debt recovery contact can be by post or email. Owners can also provide alternative contact details. He advised that correspondence to the Homeowner in this case was being sent out by email and not posted.

44. Mr Smith noted that there was currently a court action which had been paused at court pending the tribunal decision.

FINDINGS

45. The Tribunal make the following findings in fact:-

a. The Homeowner is the owner of 11H North Frederick Path, Hanover Court, Glasgow, G1 2BG ("the Property")

b. The Factor performed the role of the property factor for the Property.

c. The Factor had instructed some works removing section of flooring in Block 11 in around 2011.

d. The communal flooring had been replaced in Block 11 in around 2020.

e. The Homeowner contacted the Factor from at least July 2019 to seek clarification as to why the work to the flooring had been carried out in 2011.

f. In 17 and 18 September 2019 the Property Factor advised that no emergency repairs had been carried out to his block in 2011 which would have cut pieces out of the communal flooring.

g. On 14 October 2021 the Property Factor confirmed by email that there had been flooring repairs carried to block 11 in 2011.

h. That garden maintenance works had been carried out the development in around 2020. That there had been majority approval for these works. That the majority of the owners had paid the Property Factors for these works to be completed.

i. That some additional works arose when carrying of the garden maintenance, namely the removal of 4 trees. That the removal of 4 trees incurred some further costs amounting to around £12 for each owner.

j. That the Property Factor relied on the title deeds as authority for instructing these further works.

k. That there is a written statement of services for the development.

l. The Factor issued invoices to the Homeowner in relation to charges incurred in 2018 for an account tolling £787 .

REASONS FOR DECISION

46. Damage to the Floorcovering at Block 11 (circa 2011): Section 6 of the Code, particularly, 6.9

47. We did not consider that there had been a breach of section 6.9. The work was done before the code came into force and we are not therefore entitled to consider matters prior 1 October 2012. The Homeowner was unable to provide very much specification as to what he had done from 2012 to raise the matter with the Property Factor, we note that there is nothing in writing to show that the matter had been raised at all with the Factor. We consider that the Homeowner had had at least 7 years to raise this matter and it was not clear why he had failed to take earlier action if he had been concerned about the works and wanted something done to have the Factor account for what had happened. It appeared to us that this complaint may have been part of a general discontent that had arisen with the Property Factor. Given that there is no proof that the matter was raised before 2019 we do not find a breach of 6.9.

48. That said, we note that the correspondence referred to by the Propert Factor in their papers (pages 48/49 emails sent on 17 and 18 September 2019) indicated initially that the only works done at block 11 were emergency plumbing repairs and would not have led to any works to the flooring. That was not however the case. During the hearing the Homeowner was able to refer to an invoice he had had for the flooring works, and at that point the Property Factor checked their records and she had in fact a copy of this invoice showing that flooring works had taken place in 2011. We also note that the Homeowner had received an explanation about the works to the flooring in an email of 14 October 2021. It is not clear why the written submission by the Factor differed from the explanation of given to the Homeowner on 14 October 2021.

49. We consider therefore that there has been a breach under 6.3 of the code that on request you must be able to show how and why you appointed contractors. The Homeowner sought clarification about the flooring repairs from at least 17 September 2019, he did not appear to get an accurate response to this question until around 14 October 2021. While we find that there is a breach under 6.3, do not consider that it

was a significant breach given the works were carried out before the code came into force and there is no evidence that the information requested by the Homeowner until 8 years after the works were carried out.

50. Complaint 2: The Groundwork Contract (Sections 2.4 and 6.3 of the Code)

51. We did not find that there was a breach of 2.4 of the code; however, considered that there had been a breach of 6.3 of the code.

52. We note that part of the Homeowner's submission related to the instruction of the original ground works contract, the actual complaint strictly related to the removal of four trees which was additional works. We consider that during the course of a fairly substantial contract of works, it does not unreasonable to expect that additional works may be required to be carried out.

53. For the grounds maintenance contract, it became apparent that four additional trees required to be removed. It is not entirely clear why the two trees next to block 3 were not considered initially however we are prepared to accept that on occasions further works might become apparent during a contract of works taking place. It might also be more cost effective to have those works done at the same time as a larger contract is being carried out. We consider that the trees at the car park being removed for safety reasons, could easily have only come to light and been determined to be necessary as the main works were being progressed.

54. In addition, we accept the position of the Factor that they considered that they had delegated authority in terms of the deed of conditions which provided them at condition (FOURTH) (Fifth) the right to *delegate to the said factor the whole rights and powers exercisable by a majority vote … and the right to collect fees for common maintenance*. We also note the cost of these additional works was relatively nominal and we consider it was reasonable for the factor to take the action that they did and proceed to have the supplementary works carried out without seeking further consent from the owners. We consider that these works were supplementary to the existing contract.

55. Turning to section 2.4 of the code we consider that it is clear that the factors did have a procedure for consulting with owners; this was clear from the papers submitted for

the original groundworks. In relation to the four additional trees, we consider that the written statement of service provides that the factor is there to administer common maintenance and the removal of the four trees appeared to us to fall within this definition. We did not therefore consider that there had been a breach of section 2.4.

56. We also consider that the Factor's explanation as to why the supplementary works were done and the basis for the Factors to proceed to do them met the terms of 6.3 of the code. However, we find that there was a breach of section 6.3 of the code because we note that the explanation for the further works does not appear to have been provided to the Homeowner before the hearing on 21 February 2022, we refer to the email from the Property Factors of 14 October 2021 which refers to the tree removal but does not explain why no approval was sought.

57. Section 6.3 requires that "on request the factor must be able to show. While the breach may be nominal it appears to the tribunal that these nominal breaches may be in due course lead to a situation where an owner may feel unhappy with the actions of a Factor, and it is the cumulative effect of small breaches which are perhaps important in this application.

58. <u>Complaint 4: Legal Fees (Section 4.8 of the Code)</u>

59. We did not consider that there was a breach of section 4.8 of the code of conduct. The Homeowner accepted that he had missed a couple of payments of factors fees. He said that he had then been charged legal costs and he was unhappy as he advised that a more informal approach could have been tried first.

60. From the evidence given by Stuart Smith from the Factors Credit Control Team, which was not contradicted by the Homeowner, it appears to be the case that at least three letters will have been issued before any proceedings are raised. Mr Smith advised that there had been not contact from the Homeowner and that invoice and reminder letters had been emailed to him. We note that the written statement services provides advice under the heading *common charge and service charge debts* that where payment is not made to the common charges account legal action routinely will be taken. Given that the late payment was not in dispute, and as it appeared that the Homeowner would have received three reminders about the charges, we did not consider that there had been a breach of section 4.8 of the

code. It appeared to us that legal action was not taken before reasonable steps had been taken to resolve the matter.

REMEDY

61. We consider that the Property Factor requires to provide the Homeowner with copies of the following invoices and available records regarding:-

    a) the works carried out to the flooring in block 11 in 2011 by Ian McDonald Flooring

    b) the removal of the four trees constituting the supplementary grounds works carried out in 2020

62. We consider that the Property Factor requires to pay compensation to the Homeowner of £300 for the inconvenience caused to the Homeowner in not providing a proper and timeous response to complaints 1 and 2 of the Homeowners complaint.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

63. The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

A homeowner or Property Factor 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.

Melanie Barbour Legal Member and Chair

February 2022 Date