

Housing and Property Chamber

First-tier Tribunal for Scotland



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/20/2371

**Shawfair Phase 1, Bellway Development, Danderhall, EH22 1FQ
("the Property")**

The Parties:-

**Mr Jamie Ross, 38 Redcroft Road, Shawfair, EH22 1FQ
("the Homeowner")**

**Scottish Woodlands Ltd, 2 Roddinglaw Court, Roddinglaw Business Park,
Roddinglaw Road, Roddinglaw, Edinburgh EH12 9DB
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
Elaine Munroe (Ordinary Member)**

DECISION

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.1, 2.5 and 3.3 of the Code

The decision is unanimous.

Introduction

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 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"

Background

1. By application dated 9 November 2020 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2.1, 2.5 and 3.3 of the Code and had also failed to carry out its property factor's duties. The Homeowner submitted written representations in support of his complaint.

2. By Notice of Acceptance dated 25 November 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. By letter dated 16 December 2020 the Factor submitted written representations to the Tribunal.

Hearing

4. A hearing was held by teleconference on 25 January 2021. The Homeowner attended personally. The Factor was represented by its Head of Division, Mr Duncan Gilchrist.

Summary of submissions

Section 2.1 of the Code

5. The Tribunal referred the Homeowner to his written submissions and asked if he had anything to add. The Homeowner explained that the handover map disclosed 48 properties within the red border line and which included two show homes owned by the Developers, Bellway Homes. He accepted that the show homes were excluded from payment of a share of the ground maintenance costs but he had been charged for a 1/45 share rather than a 1/46 share. The Homeowner went on to say that he had moved to the property in September 2018 and had commenced paying for the ground maintenance from 1 June 2019. In response to a query from the Tribunal the Homeowner was unable to say whether all 46 houses were occupied from 22 May 2019.
6. For the Factor Mr Gilchrist advised the Tribunal that the Factor was informed by the developer who had moved in to the houses when each phase was released. At the time in question the Factor was provided with details of 45 properties not 46. He explained that tranches of properties were handed over at mutually agreed times and that this was a norm within the industry. He said that having varying dates of adding additional properties did not benefit land management. He went on to say that since the first phase had been handed over in May 2019 no further tranches had been released although he was due to have a meeting with the developers in February when it was anticipated a further tranche would be handed over.
7. The Homeowner queried if that meant that an occupier of one of the houses within the red boundary line was not paying for maintenance. Mr Gilchrist confirmed that all residents would have paid a float at the time of purchase of their property but was unable to say if someone was occupying a property and not yet paying although he could find out. He said it was possible in the same way as the Homeowner had moved into his property in September 2018 but had not started paying until June 2019.
8. The Homeowner then made reference to his second point with regards to Section 2.1 of the Code as according to the statement of account he was

charged the same for every month throughout the year when there was less work done during the winter months. Mr Gilchrist explained that there was a minimum of visits once a month in the summer months but frequently there were more visits at these times. However, in winter the visits were monthly. For his part the Homeowner explained that there was very little litter picking or pruning done in the winter months and the main reason for his request to the Factor had been to see what work was actually being done as residents did not know what their money was paying for.

9. For the Factor Mr Gilchrist explained that if there had not been a technical issue it would have produced the inspection reports as requested. He explained that the reports had not been uploaded to customer care and as the employee responsible had now left the company all records had been deleted. Mr Gilchrist indicated that going forward the Factor would be happy to provide the reports on request. He explained that the Factor was moving to a new operational system that would allow owners to see reports online at no charge. He said the new system was scheduled to become operational in April 2021 but there could be a delay. Until then the reports could be made available for a small charge.
10. In response to a query from the Tribunal Mr Gilchrist advised that there was no record of any of the inspections not recorded on the system. He explained that each inspection would have taken the employee 20 – 25 minutes and the subsequent report would have been inputted manually into the system. Unfortunately, these had “slipped through the net”. Mr Gilchrist went on to say the Factor now had a more robust system in place. He also said that no issues had been reported at the site and therefore the missing reports had not been noticed. He said that whilst the employees line manager would have had discussions about the site there had been very few customer care enquiries. The Ordinary member of the Tribunal expressed surprise that there had been no discussion of the monthly reports between the line manager and the employee. Mr Gilchrist said that the Factor now had confidence in the new system that was soon to be operational.
11. The legal member of the Tribunal queried whether in reality the Factor had any way of knowing that the employee in question had actually carried out the inspections and whether there had been issues at other sites. Mr Gilchrist confirmed there had been similar issues at other sites and acknowledged that it was not possible to be certain that the inspections had been carried out. He explained the employee had left the company voluntarily and had not been subjected to any disciplinary proceedings.
12. The Homeowner suggested that there was a general consensus amongst owners that there were numerous complaints about the standard of maintenance and if the site inspections were taking place, they were not obvious as no-one was seen walking around in a uniform. Mr Gilchrist confirmed that managers did not wear uniforms although if it was wet would wear a jacket with “Scottish Woodlands” on it. He said he had carried out at least two inspections and was going out again that afternoon. The Homeowner suggested that the employee should wear a high visibility jacket

when carrying out the inspections. Mr Gilchrist said that would not be normal but he would look into it. He also confirmed that there was a facility to upload photographs along with the report.

Section 2.5 of the Code

13. The Tribunal referred the Homeowner to his written submissions with regard to this section of the Code and to the Factor's written response. The Homeowner said that he accepted that the Covid-19 pandemic would have accounted for some delay to a reasonable extent but that a response to his complaint was administrative and could have been dealt with by someone working from home and 78 working days was not reasonable.
14. For the Factor Mr Gilchrist explained that two of the three customer care staff had been furloughed and had not returned until July or August. That meant that only one member of staff was available to respond to enquiries and that had led to delays but in the circumstances such delays were understandable. Mr Gilchrist went on to say that despite the current lockdown no staff had been furloughed.

Section 3.3 of the Code

15. The Tribunal again referred the Homeowner to his written submissions and the Homeowner explained that in his view his complaint was centred on the number of houses that should be contributing to the ground maintenance. For his part Mr Gilchrist indicated that the Factor's written submissions covered the Factor's position.
16. The Homeowner then went on to say that despite apparently not being charged for maintenance in March and April 2020 the total cost for the year was more or less the same as he had paid in advance for the year. He said his bill seemed to go up by about £25.00 every year.
17. For the Factor Mr Gilchrist said that there was no increase in the management charge this year but there may be a small increase in line with RPI charged by the contractor. He went on to explain how the costs for maintaining the development were established long before the properties were built. He said the company would be approached by a developer to produce an anticipated charge in order to calculate a float charge and that this can sometimes be up to five years in advance of handover. He said the cost was based on the totality of the maintenance of the site when completed although on handover of each phase the cost should be about the same as they avoided handing over large areas of landscaping when there had been few house sales. Mr Gilchrist went on to say there was no objective way of calculating the cost it was always based on experience however the developer would have obtained quotes from other providers and it could therefore be assumed that the Factor had been competitive.
18. Mr Gilchrist went on to say that the Factor issued an invoice for the year in advance that detailed charge for the year and separated the management fee

and insurance premium. He said the Factor also produced a separate annual statement for the previous year which broke down the costs into separate heads. Mr Gilchrist went on to say that if in February a second tranche is released then there would be an increase mid term and these would be detailed. If there was a surplus of income at the end of the year that would be credited back to the owners.

19. Mr Gilchrist said that the annual site inspection report cost £35.00 and worked out at 78p per owner. He said he had been unaware that the Homeowner had requested sight of this and said he would provide this to him. Mr Gilchrist said he had also been unaware that the Homeowner had requested sight of the three inspection reports that had been available and again said he would provide these to the Homeowner.

Property Factor's Duties

20. The Tribunal queried with the Homeowner if his complaint with respect to the alleged failure to carry out its property factor's duties had already been covered by the parties' submissions with regards to the breaches of the Code and the Homeowner confirmed that they had. Mr Gilchrist concurred.

The Tribunal make the following findings in fact:

21. The Homeowner is the owner of 38 Redcroft Road, Shawfair, EH22 1FQ ("the Property")
22. The Property is a house within the Bellway Development at Shawfair, Danderhall (hereinafter "the Development").
23. The Factor performed the role of the property factor to maintain the common landscaped areas of the Development.
24. Of the 48 homes contained within the 1st handover from the developer Bellway Homes as at 22 May 2019 the Factor was instructed by the developer to charge 45 owners for land maintenance.
25. Owners taking occupation of the property after that date would not have been charged for ground maintenance until the Factor was informed to do so by the developer.
26. The Factor has no record of inspection reports at the development for the months of June 2019, September 2019 to February 2020 and April and May 2020 a total of nine months.
27. Despite having no such inspection reports the Homeowner has been charged for these inspections in that the cost is incorporated into the Factor's management fee.

28. The Factor's Customer Care Complaints Procedure provides that it will acknowledge any complaint within 5 working days and deal reasonably with the complaint or issue within 20 working days.
29. The Homeowner complained to the Factor in a letter dated 13 June 2020 and received an acknowledgement by email dated 26 June 2020.
30. The Homeowner did not receive a substantive response from the Factor until 5 August 2020.
31. Two of the three customer care staff employed by the Factor were furloughed due to the Covid-19 pandemic until August 2020.
32. The ground maintenance cost charged to Homeowners each year is based on a fixed management fee levied by the Factor together with the actual cost charged by contractors for carrying out the work including any charges for additional work, insurance and VAT.
33. The estimated cost is calculated annually in advance and reconciled at the end of that year with any surplus or shortfall being credited or debited to the following years invoice.

Reasons for Decision

Section 2.1 of the Code

34. The Tribunal accepted that the Homeowner might well assume that 46 properties should contribute to the cost of ground maintenance if they were included in the tranche of properties contained on the plan provided to owners in May 2019 by the Factor. However, the Tribunal was satisfied that an owner only became liable to pay the maintenance charge after he took occupation and after the Factor was notified of to commence charging. The Tribunal was advised by Mr Gilchrist that new owners were not charged immediately on taking occupation but only when further tranches were handed over. There could therefore be substantial periods where an owner did not have to pay for ground maintenance. Given that this was the situation the Tribunal was satisfied that the Homeowner's share of the cost of maintenance had been correctly calculated at 1/45.
35. The Tribunal was concerned that only three monthly site inspection reports out of twelve had been uploaded to the Factor's customer care department. It seemed to the Tribunal that irrespective of whether this had been a technical error or a failure on the part of an employee to perform his duties the issue ought not to have gone unnoticed over such a prolonged period of time. The Tribunal did not accept Mr Gilchrist's evidence that the Factor's employee would definitely have carried out the site inspections. There was simply no substantive evidence to support such an assertion. It was not known if the employee had attempted to upload the inspection reports or not. Therefore, the Tribunal was satisfied that the Factor did provide the Homeowner with false or misleading information by stating in its email of 27 August 2020 that

its inability to supply the inspection reports was due to a technical error. The Tribunal was therefore satisfied that the Factor was in breach of this section of the Code. In doing so the Tribunal also noted that the Factor appeared to have realised its shortcomings in this area in that it now had a more robust system in place.

Section 2.5 of the Code

36. Mr Gilchrist acknowledged that the Factor had not met its response time for dealing with the Homeowner's complaint. The Homeowner accepted that the Covid-19 pandemic would have impacted on the Factor's ability to meet its 20-working day target but felt that 38 working days was unacceptable. The Tribunal was obliged to consider the wording of the Factor's Customer Care Complaints Procedure. It is quite specific. It states that "*Scottish Woodlands will acknowledge receipt of the complaint/issue within 5 working days.*" And goes on to say "*Scottish Woodlands will deal reasonably with the complaint/issue and carry out an investigation into the circumstances within 20 working days and inform the or update the resident on the findings.*" The Factor did not make any provision for unexpected delays or circumstances and therefore whilst the Tribunal accepted that it would have been very difficult for the Factor to comply with its complaint procedure with two of its three customer care employees being furloughed that in itself did not avoid a breach of this section of the Code. The Tribunal noted however that the Factor had apologised for the delay and the Tribunal did not consider that any further action was required.

Section 3.3 of the Code

37. The management fee of £38.32 plus VAT charged by the Factor for the year from 1 June 2019 to 31 May 2020 included the cost of monthly and annual site inspections. However, the Factor was unable to prove that all of these inspections had actually been carried out and therefore was unable to respond to the Homeowner's reasonable request to supply supporting documentation. The Tribunal was therefore satisfied that the Factor was in breach of this section of the Code.

Property Factor's Duties

38. The Homeowner's complaint in this regard was essentially a re-statement of the alleged breaches of the Code narrated above. The Tribunal therefore determined that as these issues had already been determined no further consideration by the Tribunal was necessary.

Proposed Property Factor Enforcement Order

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.

Graham Harding

Legal Member and Chair

29 January 2021

Date