

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: HPC/PF/19/3395

Hillpark Brae Development, Edinburgh, EH4 7EF (" the Property")

The Parties:

Aylmer Millen, 5 Hillpark Brae, Edinburgh, EH4 7AP ("the Homeowner")

**Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD
(" the Property Factor")**

Tribunal Members:

**Josephine Bonnar (Legal Member)
Andrew Taylor (Ordinary Member)**

DECISION

The Tribunal determined that the Property Factor has failed to carry out its property factor duties in terms of section 17(1) of the Property Factor (Scotland) Act 2011 (" the Act") and has failed to comply with Section 2.5 of the Property Factor Code of Conduct as required by Section 14(5) of the Act.

The decision of the Tribunal is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 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 2016 are referred to as "the Rules"

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 21 October 2019 the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with Section 2.5, 3.3, 6.6, 7.1 and 7.2 of the Code. The Homeowner also sought a determination on whether the Property Factor had failed to carry out its property factor duties as required by Section 17(1) of the Act. The Homeowner stated that the Property Factor had:- (i) Failed to provide a substantive response to the request for sight of the terms and conditions of contract for the ongoing major storm drain maintenance and remedy contract works costing some £50000 to £60000; (ii) Failed to plan for and implement the re-tendering of the ground maintenance contract in good time for the renewal of the contract on 1 August 2019 and despite promises to the contrary; (iii) Failed to provide a substantive response to the request for sight of the tender list for the ground maintenance contract renewal and requested scope of works, specification and the terms and conditions of contract; (iv) Failure to provide substantive communication and inordinate delay in the advice of the storm drain maintenance out-turn costs and condition statement together with failure to provide any substantive communication on the arrangements and documentation surrounding the re-tendering of the ground maintenance contract ultimately and typically in breach of the Code of Conduct Complaints section; and (v) Persistently unreasonable behaviour and failure in delivering on promises made and in implementing maintenance arrangements and a woeful absence of substantive communication.
2. On 13 November 2019 a Convenor on behalf of the President accepted the application and referred it to a Tribunal for a hearing. By letters dated 20 November 2019 both parties were notified that the application had been referred to a Tribunal and that a hearing would take place on 13 January 2020 at 10am at Riverside House, Gorgie Road, Edinburgh.
3. Prior to the hearing the Homeowner lodged written representations and stated that he was happy for the matter to be considered by the Tribunal without a hearing. He subsequently advised the Tribunal that he wished to attend a hearing. The Tribunal notified parties that the hearing would proceed as scheduled. The Property Factor did not lodge written representations or contact the Tribunal in advance of the hearing.
4. The hearing took place before the Tribunal on 13 January 2020 at 10am. The Homeowner attended. Immediately before the start of the hearing the Tribunal was notified that the representative of the Property Factor who was due to attend, was unable to do so due to illness. No request for a postponement of the hearing was made.

The Hearing

5. As a preliminary matter the Tribunal advised the Homeowner the Property Factor representative was unable to attend. The Homeowner confirmed that he wanted the hearing to proceed. As no request had been received from the Property Factor to postpone the hearing, the Tribunal decided to proceed with

the hearing. As the Tribunal proceeded to discuss the application with the Homeowner it was noted that an email which the Homeowner sought to reply on dated 29 August 2019 did not appear to be with the papers lodged by the Homeowner. The Tribunal determined that it could not take the email into account as the Property Factor had not had fair notice of same. The Tribunal noted that the Homeowners complaints are listed in a letter dated 21 October 2019, addressed to the Tribunal, and attached to the application form.

6. **Complaint 1. Failure to provide a substantive response to the request for sight of the terms and conditions of contract for the ongoing major storm drain maintenance and remedy contract works costing some £50000 to £60000.** Mr Millen advised the Tribunal that there have been issues with the drainage system in place at the development for some years. The development was handed over in 2016 and the Homeowners have been trying to get drain maintenance put in place since then. Part of the problem is that there is some doubt as to the efficacy of the drainage system. Works were instructed in 2019 and were the culmination of previous exploratory works which established the extent of the deficiencies. Once concluded, the Homeowners expect the drainage to perform satisfactorily, and at the same time to be able to identify the issue of liability for the defects. Mr Millen confirmed that the contract works started in July 2019. They were expected to finish at the end of August 2019. He doesn't know if they are concluded. The last communication from the Property Factor was a letter dated 20 August 2019, lodged with the application, which states that the work is due to finish on 30 August 2020 and gives some information about the work itself. Mr Millen believes that they finished the work in November 2019 but that has never been confirmed.
7. Mr Millen advised the Tribunal that his first complaint relates to a request he made for sight of the contract with Lanes Drains who were instructed to carry out the drainage work. He referred the Tribunal to an email of 13 August 2019, in which he requests this. Karen Jenkins, Client Relationship and Support Manager responded to the email on 3 September 2019 saying "I will have an update out shortly regarding a number of items on the development, in lieu of arranging a further residents meeting. As you are aware instruction should be provided via a quorate meeting and it would be prudent to hold a meeting to review the report that Lanes have promised Nigel, regarding the drainage defects and their comments when these sections have been excavated". Although this addressed the drainage, it did not respond to the enquiry made which was for "sight please of the terms and conditions of contract on the current storm drain works which are due for completion I believe on 5 September 2019". Mr Millen responded on the same day, asking for his complaint of 29 August 2019 (not before the Tribunal) to be escalated. He advised the Tribunal that no response to this was received and on 4 October 2019 he sent a further detailed email outlining the alleged breaches of the Code and failure to carry out property factor duties, with no response received. A final email on 21 October 2019 advised the Property Factor that he was applying to the Tribunal. An email was then received on 31 October 2019, after his application was lodged, which did not adequately address his complaints. Mr Millen then referred the Tribunal to an email from Mr and Mrs

Hamilton, other Homeowners in the development, dated 31 July 2019 and sent to Nigel Fyffe, former director of the Property Factor. In the email they state "Thank for again being honest yesterday in admitting that Charles White Ltd does not have a contract in place with Lanes plc". He advised that he and Mr Hamilton met with Mr Fyffe in December 2019 and were told that there is no written contract in place. In response to questions from the Tribunal Mr Millen confirmed that the decision, in principle, to instruct Lanes to carry out the drainage works was taken at a meeting on 25 October 2018. A further meeting took place in December 2018 but was not attended by a quorum, so no decisions were made. On 16 May 2019 a further meeting was convened and the proposal to instruct Lanes Drains was agreed. Mr Millen referred the Tribunal to the minutes of that meeting which state that Lanes are to be instructed once the Property Factor has ingathered 75% of the funds from the Homeowners. Mr Millen confirmed that he had attended all three meetings, had seen a presentation on the proposal by Lanes and had paid his share for the work to be instructed. He has requested sight of the contract, has not been provided with this, and believes that no written contract exists.

8. Ms Millen advised that the Property Factor's failure to provide the contract, when requested to do so, is a breach of Sections 3.3 and 6.6 of the Code. He stated that, if they don't have a written contract, they should have said so. They have not responded to his request either to provide what was asked for, or to explain why they are unable to do so. He indicated that he is concerned that they may not have agreed written terms and conditions with Lanes, but that is not his complaint. He confirmed that no correspondence has been received, and no additional invoices for the remainder of the costs issued.
9. **Complaint 2. Failure to plan for and implement the re-tendering of the ground maintenance contract in good time for the renewal of the contract on 1 August 2019 and despite promises to the contrary.** Mr Millen advised the Tribunal that this issue has not moved on since he lodged the application and that the former contractor continues to carry out the ground maintenance. This issue was also raised in his email of 13 August 2019. In Karen Jenkins response she said, "The current gardener is continuing to maintain the grounds, although he is aware that the owners may opt for another contractor at the meeting which will be held to consider and select a contractor to maintain the grounds going forward. More details will be included in the update, which will include playpark works – three quotes have been received and Nigel was obtaining references for the company that provided the lowest cost, before updating and instructing these works". Mr Millen then referred the Tribunal to the email from Lorna Rae, director of the property Factor, on 31 October 2019 which states with regard to garden re-tendering - "Given the current drainage works being carried out on some communal areas, it does not seem appropriate at this time and would require a formal quorate meeting to appoint any change in the contractor. We will arrange this meeting once the drainage works are complete". Mr Millen advised the Tribunal that he is not satisfied with this response as he sees no reason why drainage work on the western boundary would conflict with the appointment of a new ground maintenance contractor. He also pointed out that at the meeting in May 2019 the Property Factor specifically said a re-

tender would be carried out before the end of the existing contract. Mr Millen advised the Tribunal that this failure was a breach of Section 2.5 of the Code and a failure to carry out property factor duties.

10. **Complaint 3. Failure to provide a substantive response to the request for sight of the tender list for the ground maintenance contract renewal and requested scope of works, specification and the terms and conditions of contract.** Mr Millen acknowledged that the email of 31 October 2019 from the Property Factor indicates that the re-tendering process is on hold. This suggests that no tender list is available, although this contradicts the statement in the email of 3 September 2019. He advised the Tribunal that this complaint relates to the failure of the Property Factor to provide a reasonable explanation for their inability to provide this information. He does not believe that the drainage work could prevent the Property Factor re-tendering for ground maintenance. This delay could have financial implications for the Homeowners, if the re-tendering had resulted in a cheaper contractor. He considers this failure to be a failure to carry out property factor duties.
11. **Complaint 4. Failure to provide substantive communication and inordinate delay in the advice of the storm drain maintenance out-turn costs and condition statement together with failure to provide any substantive communication on the arrangements and documentation surrounding the re-tendering of the ground maintenance contract ultimately and typically in breach of the Code of Conduct Complaints section.** The Tribunal noted that this complaint is actually two separate complaints. The first part – failure to provide substantive communication and delay in relation to storm drain out-turn costs and condition statement. Mr Millen referred the Tribunal to the letter of 20 August 2019 for the Property Factor which referred to a report being provided by mid-September 2019. No report has been provided. In response to questions from the Tribunal Mr Millen confirmed that he does not know for certain that the work is complete, although believes that it finished in November 2019. He also advised the Tribunal that when he met with Mr Fyffe, in December 2019, Mr Fyffe said that he had seen the report. Mr Millen does not know when this was received by the Property Factor. Mr Fyffe referred to a plan to meet with Karen Jenkins to finalise things in relation to the condition statement. When asked by the Tribunal whether a delay in this report being issued is perhaps understandable, given the complex nature of the matter, Mr Millen stated that the Homeowners should have been told that there would be a delay and given a reason, and this has not happened. He considered this failure to be a breach of 2.5 of the code and a failure to carry out property factor duties.
12. The second part of the 4th complaint is the failure to provide substantive communication on the arrangements and documentation surrounding the grounds maintenance re-tendering. When asked by the Tribunal whether this complaint is the same as complaint number 2, Mr Millen said that this complaint was about a general lack of communication and was a breach of section 2.5 and a failure to carry out property factor duties.

13. **Persistently unreasonable behaviour and failure in delivering on promises made and in implementing maintenance arrangements and a woeful absence of substantive communication.** The Tribunal noted that this complaint is very general in its nature and therefore does not appear to give the Property Factor fair notice of the nature of the complaint. Mr Millen referred the Tribunal to the minutes of the homeowners meeting on 16 May 2019. At this meeting the residents agreed to several proposals, including the ground maintenance re-tendering and the drainage works, and the Property Factor acknowledged the instruction to proceed. His complaint is that the property Factor has failed to implement what was agreed at that meeting. This failure continues to have consequences for the homeowners in the development. He considers this complaint to be a failure carry out property factor duties and a breach of 2.5 of the code. Also, a breach of section 7.1 of the code in that they have failed to follow their own complaints procedure. He stated that this type of behaviour is typical of the Property Factor. Their failure to respond to the Tribunal in connection with the application is also evidence of the malaise within the organisation.
14. In conclusion Mr Millen advised the Tribunal that that he was asking the Tribunal to make an order requiring the Property factor to apologise for their failures. They should also be ordered to undertake process improvements such as training on the Code. They should also be ordered to pay a "salutary compensation" for the persistent lack of communication.

Findings in Fact

15. The Homeowner is an owner of a property in the development at Hillpark Brae Development, Edinburgh.
16. The Property Factors factor the development.
17. The Property Factor instructed Lanes Drains to carry out storm drainage works at the development, having been instructed by the Homeowners at a quorate meeting to do so. The works started in July 2019.
18. The Property Factor did not carry out a re-tendering process for ground maintenance at the development prior to the expiry of the previous contract in August 2019.
19. The Property Factor has not provided the Homeowner with a report from Lanes Drains on the outcome of the drainage works.
20. The Property Factor did not provide a full response to a request from the Homeowner for a copy of the contract with Lanes Drains.

Reasons for Decision

21. **Complaint 1.** Section 3.3 of the Code states, *"You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection and copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance"*. The Tribunal does not consider the conduct complained of to breach this section. In his evidence, the Homeowner advised the Tribunal that the documents he requested do not exist. It follows that the Property Factor was unable to provide these, when requested by the Homeowner to do so. Section 6.6 of the Code states, *"If applicable, documentation relating to any tendering process (excluding commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested you may make a reasonable charge for providing these, subject to notifying the homeowner of the charge in advance"*. Although the Homeowner advised the Tribunal at the hearing that complaint one was a breach of this section, the Tribunal is not persuaded that this is the case, as the section relates to tendering processes and complaint 1 does not.
22. Although not specifically mentioned at the hearing in relation to this complaint, the Homeowner refers in the application to Section 2.5 of the Code. This states, *"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement"*. The Tribunal is satisfied that the Property Factor did not fully respond to the Homeowners enquiries of 13 August and 4 October 2019, when he asked for sight of the contract terms and conditions with Lanes Drains. The Tribunal note that a response was eventually obtained, verbally in December 2019, when the Homeowner met with a director of the Property Factor and was informed that there was no written contract. However, this was the result of a request for a meeting and not a direct response to the two emails. The Tribunal is satisfied that the Property Factor breached section 2.5 of the Code with regard to this complaint.
23. **Complaint 2.** The Tribunal is satisfied that the Property Factor failed to carry out a re-tendering process in relation to ground maintenance. They undertook to do this at a residents meeting in May 2019. Re-tendering for contracts is part of a property factor duties. The Property Factor has therefore failed to carry out its property factor duties with regard to this complaint
24. **Complaint 3.** The Tribunal notes that by email dated 3 September 2019 the Property Factor provided the Homeowner with a response to his enquiry regarding the ground maintenance. The email also provides him with an

explanation for the lack of information about re-tendering. The Tribunal is satisfied that this email provides a response which meets the requirements of section 2.5 of the Code and was issued within reasonable timescales. The Tribunal notes that the Homeowner did not agree with the response received, but that does not give rise to a complaint under this section of the Code. The Property factor did not breach clause 2.5 of the Code with regard to this complaint. Although not mentioned at the hearing, the Tribunal considered whether the conduct giving rise to complaint 3 breached section 6.6 of the code, which is mentioned in the application. However, no evidence was provided that the tendering documentation requested actually exists. It was established that the process was put on hold. The Tribunal concludes that section 6.6 is not applicable and no breach of this section is established.

25. Complaint - Part 1. The Homeowners complaint is that he has not been issued with the report from Lanes Drains following the drainage work or a substantive response to his enquiry on 3 October 2019 regarding same. The Tribunal notes that there is some uncertainty as to when the drainage work was finished, although it was probably November 2019. The Homeowner gave evidence to this effect and furthermore advised the Tribunal that in December 2019 a director of the Property Factor indicated that a report had been received and he required to discuss it with Karen Jenkins before any further action could be taken. The Tribunal concludes that the Homeowners complaint on 3 October 2019 and in the application dated 21 October 2019 is premature. Firstly, the Property Factor could not have issued a report they had not yet received. Secondly, the Homeowner was sent an email by the Property factor on 31 October 2019 which states " given the current drainage works being carried out on some communal areas" and refers to a meeting being arranged "once the drainage works are complete". This appears to establish that the work was not completed until November 2019, at the earliest. Furthermore, the Tribunal notes that, if the report was only received in December 2019, and had to be discussed internally before being issued to Homeowners, the failure to issue it before the hearing before the Tribunal on 13 January 2020 does not appear to be unreasonable. The Tribunal concludes that this complaint is premature and that no breach of the code or failure to carry out property factor duties has been established.

26. Complaint 4 – Part 2. The Tribunal concludes that this complaint is essentially the same as complaint 3. The complaint relates to a lack of a response regarding the ground maintenance re-tendering. For the reasons stated in paragraph 24 above no breach of sections 2.5 and 6.6 have been established. The complaint also refers to the complaints section of the Code. This is section 7. In the application the Homeowner refers to 7.1 and 7.2 of the Code. These state *"7.1 You must have a clear written complaints resolution procedure which sets out a series of steps with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how will handle complaints against contractors". "7.2 When your in-house complaints procedure has been exhausted without resolving the complaint the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may*

apply to the homeowner housing panel". Neither of these sections appear to be relevant to complaint 4. No breach of sections 7.1 and 7.2 is established in relation to this complaint.

27. **Complaint 5.** The Tribunal finds this complaint to be lacking in specification. The Homeowner expanded upon the complaint at the hearing, saying that it relates to a failure to deliver on the instructions given by Homeowners at the meeting on 16 May 2019. However, the Tribunal notes that none of the letters or emails notifying the Property Factor of the complaints mention this. Furthermore, there is no specific reference to this alleged failure in the application. The complaint itself is not sufficiently specific and the Property Factor has not been given fair notice in relation to same in terms of Section 17(3)(a) of the Act which requires the Homeowner to notify the property factor in writing "*as to why the homeowner considers that the property factor has failed to carry out the property factor duties or, as the case may be, to comply with the section 14 duty*" before an application to the Tribunal is made. The Tribunal concludes that it cannot make a determination in relation to this complaint.

Decision

28. The Tribunal determines that, (i) the Property Factor has breached section 2.5 of the Code in relation to complaint 1, (ii) The Property Factor failed to carry out its property factor duties in relation to complaint 2, (iii) The Property Factor did not breach the Code or fail to carry out its property factor duties in relation to complaints 3 and 4 and (iv) The Homeowner failed to notify the Property Factor of complaint 5 and the Tribunal therefore could not determine same in terms of section 17(3) of the Act.

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) 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.

