

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Ref: FTS/HPC/PF/20/1389

24 Lady Campbell's Court, Dunfermline, KY12 0LJ ("the House")

The Parties:-

Mr David Mitchell, 24 Lady Campbell's Court, Dunfermline, KY12 0LJ ("the Homeowner")

Charles White Ltd., Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the Factor")

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr Mike Links (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") determined that the Factor has failed to comply with the Section 14 duty in terms of the Property Factors (Scotland) Act 2011 in respect of compliance with paragraphs 5.2 and 7.2 of the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and it has failed to carry out its property factor duties in terms of section 17 of the Act.

The decision is unanimous.

Background

1. By application received in the period between 15th June and 29th September 2020, the Homeowner applied to the Tribunal for a determination on whether

the Factor had failed to comply with sections 1, 2, 5 and 7 of the Code, and whether the Factor had failed in carrying out its property factor duties.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents, which included the Factors written statement of services ("WSS"), email correspondence between the parties, planning documentation, extract section of title deed, minutes of meetings, background and timeline. The complaint concerns alleged inadequacies in the WSS, insurance matters, the Factor's complaints procedure, title burdens and a lack of engagement with the Proprietors Association Management Committee "PAMC").
3. The Homeowner intimated his concerns to the Factor on 20th July and 3rd September 2020.
4. By decision dated 19th October 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a tribunal for a hearing.
5. Hearing notification letters were sent out to parties on 22nd October 2020 notifying parties of a hearing scheduled for 4th December 2020.
6. On 5th November 2020, the Homeowner lodged further documents, comprising correspondence between the parties and correspondence with Miller Homes.
7. By letter dated 10th November 2020, the Factor lodged written representations and productions, comprising correspondence between the parties, garden maintenance specification and insurance documentation.

The Hearing

8. A hearing was held on 4th December 2020 by telephone conference. The Homeowner was in attendance, supported by Mr Charles McLaughlan. The Factor was represented by Ms Sarah Wilson, Director.

Preliminary Issues

9. The Tribunal asked for clarification from the Homeowner regarding the particular paragraphs of the Code that he alleged had been breached. The Homeowner had previously provided notification that paragraphs 1.1aAa and 2.4 had been breached. He identified paragraph 7.2 and said it was difficult to identify particular paragraphs in relation to section 5. The Tribunal proposed to reserve judgement on whether or not a complaint could be considered under section 5 without the identification of particular paragraphs until after evidence had been heard.

Paragraph 1.1aAa of the Code

10. This paragraph of the Code states: *[The Written Statement should set out] a statement of the basis of any authority you have to act on behalf of all the homeowners in the group.*
11. The Homeowner said the main issue was a concern that the Factor was acting as a principal rather than an agent. The Factor had accepted risks during handover in 2017 that could impose financial burdens on the homeowners. The Homeowner referred to a letter from Miller Homes lodged by him dated 9th September 2013 with enclosed landscape drawing. The drawing showed an area of landscaping to the rear of a terrace of eleven properties including the Homeowner's property, which form Phase 2 of the development. The proposed landscaping has never been carried out, so the required conditions have not been met. The area is a wooded overgrown area. The concern was the manner in which the Factor exercised its authority and whether it had authority in relation to the imposition of financial burdens on the homeowners.
12. Ms Wilson referred to the Factor's written representations, where it is stated that the Factor believes the WSS is clear and concise in this regard.

Paragraph 2.4 of the Code

13. This paragraph of the Code states: *You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).*
14. The Homeowner said the WSS did not provide for any such procedure, therefore, it would seem that the Factor did not have to seek the written approval of the homeowner before providing additional services. The WSS does not mention having to seek approval. Responding to questions from the Tribunal as to whether any work had been carried out that would have required approval, the Homeowner referred to the handover and other issues, however, he confirmed that no money had been paid out by homeowners for additional services.
15. Ms Wilson referred to paragraphs 1.4, 1.5, 3 and 7.2 of the WSS, and submitted that it is clear that there is a distinction between core services and additional services and that this complies with the Code.

Section 5 of the Code

16. Section 5 of the Code refers to insurance.

17. The Homeowner said the concern was with public liability insurance. Homeowners each pay £5 per year for this insurance. Requests for information made on numerous occasions to the Factor as to what exactly they are paying for have not been answered. The Homeowner referred to key notes from a meeting held on 12th February 2020. Item 6 provides '*CWL required to advise outstanding information in respect to insurance matters.*' The Homeowner said that the note was circulated the following day to the Factor, but no response was received.
18. The Homeowner said that the insurance documents lodged by the Factor with the Tribunal showed that a commonly-owned wall that should be included was not, and there was a gap in the insurance cover from March 2018 to April 2019.
19. Ms Wilson said public liability insurance had always been in place and documents were available on the client portal, or in hard copy by post if requested. She said she had informed the meeting of this on 12th February 2020. There has been no request by the Homeowner for hard copy to be sent out. The questions were answered at the time. Responding to questions from the Tribunal as to why she had not responded to the clear call for further information contained within the note of the meeting, Ms Wilson said this had perhaps been a miscommunication on her part. She did not think the matter required further explanation.
20. Ms Wilson said there was no gap in insurance, and the wall was included. She would check this and revert to the Homeowner.

Paragraph 7.2 of the Code

21. This paragraph states: *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 First-tier Tribunal for Scotland (Housing and Property Chamber).*
22. The Homeowner said this had not been complied with. He had informed the Factor by email dated 6th January 2020 that he was making a formal complaint. This was followed by the meeting on 12th February 2020. There has been no further communication from the Factor. He believed he had exhausted the Factor's complaints procedure. The WSS refers to the First-tier Tribunal.
23. Ms Wilson said that the complaint had not gone through the Factor's complaints procedure. The procedure was available on the website and in the WSS and it had not been followed by either party. She said there were faults on both sides. The Homeowner had not asked to escalate the complaint and the Factor had failed to follow this up after the email of 6th January 2020.

Failure to carry out property factor duties

Burdens

24. The Homeowner referred the Tribunal to the 2013 landscape drawing. The work required to the area behind the properties has not been carried out. There is a maintenance burden within the Title Deeds that imposes maintenance and financial commitments on the homeowners. It was his position that the Factor should not have accepted handover of phase 2 from the developer, Miller Homes, until this work was done. The Homeowner would like the Factor to acknowledge this failure.
25. Discussion has now taken place with the council and they have assured homeowners that they will not enforce the conditions. A revised drawing has now been issued, removing the works that were not completed. Responding to questions from the Tribunal, the Homeowner said he moved into the Property in 2015 and became aware of the situation in relation to the burdens in 2018. He thought the area behind his house was included within his title deed, although he understood the strip of land that was not landscaped to be common property. It was the Homeowner's position that the Factor ought to know what was going on with the development. The Homeowner said that a survey carried out to ascertain homeowners' satisfaction with the Factor showed that twenty out of twenty-five homeowners were dissatisfied.
26. Ms Wilson referred the Tribunal to a letter within her productions, which, although dated 12th November 2020, should have been dated 21st July 2017, the actual date on which it was sent out to all homeowners to inform them of the handover of phase 2. Phase 1 handover was completed in 2015. The Factor is currently in the process of getting quotes for putting a tree maintenance plan in place. This should be complete next year, which is within the five year period mentioned in the Deed of Conditions. As far as Ms Wilson was aware, the development was complete, in accordance with the plans, at the time of handover. The information received from Miller Homes led the Factor to believe that was the case. Ms Wilson was unaware of any change in the area plan or the work to be carried out. The Factor has not seen a revised plan. The Factor has to manage the development in accordance with the Deed of Conditions, which has not been changed, and the burdens remain therein. Any change to the Deed of Conditions would have to be carried out through the Lands Tribunal. There are concerns that, in the absence of management of the area, the trees could cause damage. Ms Wilson said that the matter seemed to have been taken out of the Factor's hands and they were not involved in discussions with the council or Miller Homes.

Engagement with PAMC

27. The Homeowner referred to the minute of the meeting of 12th February 2020 and the outstanding issues from that meeting, that had not been addressed. These included the fact that the PAMC had not accepted the WSS, because it was generic and it appeared not to be correct, particularly as it includes reference to 'blocks', and there are no blocks within phase 2 of the

development. Further information was expected in relation to the tree-belt area and the chimney base footprint. Further information was required in relation to insurance. None of the issues were addressed by the Factor and the relationship appeared to have broken down. The Homeowner confirmed that he was still paying for core services, which are being carried out.

28. Ms Wilson said it was not the intention of the Factor not to engage with the PAMC. The Factor has been engaging with individual homeowners that do not recognise the PAMC, which is not set up in accordance with the Deed of Conditions. There are difficulties with recognising the PAMC as acting for all the homeowners. There has been a breakdown of communication but that is not what the Factor wants. The WSS was written for phase 2 in accordance with the Code. There may be sections that are not relevant but they are included in case they are required. The reference to 'blocks' is actually blocks of terraced properties rather than flats. The Factor would be happy to change that if directed to do so by the Tribunal. In response to questions from the Tribunal as to why the matters highlighted as requiring a response from the Factor in the note of the meeting of 12th February 2020 had not been attended to, Ms Wilson said there was clearly a breakdown, for which she apologised. It was not intentional.

Findings in Fact

- 29.
- i. The Homeowner is the owner and occupier of the House, which is a terraced dwelling-house within phase 2 of the development of which the House forms part.
 - ii. The Factor registered as a Property Factor on 7th December 2012 under registration number PF000153.
 - iii. The Factor has provided factoring services to the Homeowner since July 2017.
 - iv. It was intended that a strip of land that runs along the back of the terrace would be planted with trees and shrubs prior to handover of phase 2 from the builder, Miller Homes, to the Factor.
 - v. The strip of land was not planted with trees and shrubs prior to handover. It is a wooded overgrown area.
 - vi. The Deed of Conditions pertaining to the development includes burdens upon the homeowners in relation to maintenance of the strip of land.
 - vii. The Factor intends to obtain quotes for management of the wooded area.
 - viii. The Homeowner is a member of the PAMC.

- ix. The PAMC has been in discussion with Fife Council in relation to the lack of compliance with approved planning conditions.
- x. Fife Council have confirmed no enforcement action will be taken against Miller Homes or the homeowners in relation to the lack of landscaping of the overgrown strip of land.
- xi. Following a meeting on 12th February 2020, the PAMC compiled a note which was provided to the Factor, stating that further information on certain areas was required. The Factor did not provide the information requested.
- xii. There has been a breakdown of communication between the Factor and the PAMC.
- xiii. The Factor has failed to comply with the Code by failing to provide clear information to homeowners in relation to public liability insurance.
- xiv. The Factor has failed to comply with the Code by unreasonably delaying to resolve the Homeowner's formal complaint.
- xv. The Factor has failed in the carrying out of its property factor duties by failing to engage with the PAMC and the Homeowner.

Determination and Reasons for Decision

30. The Tribunal took account of all the documentation provided and the written and oral submissions.

Paragraph 1.1aAa of the Code

31. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The WSS sets out the basis of the authority the Factor has to act on behalf of the homeowners. The Tribunal made no findings in relation to the content of the WSS.

Paragraph 2.4 of the Code

32. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The Tribunal accepted the submissions made on behalf of the Factor that the required procedure is in place.

Section 5 of the Code

33. The Tribunal found that the Factor had failed to comply with paragraph 5.2 of the Code by failing to provide clear information in relation to public liability insurance following several requests by the Homeowner and a reference to further information being requested by the PAMC. The Tribunal noted that, although the Factor had provided insurance information within its productions,

the information did not confirm continuous cover. It was, therefore, not clear whether continuous cover was in place.

Paragraph 7.2 of the Code

34. The Tribunal found that the Factor had failed to comply with this paragraph of the Code by failing to progress the Homeowner's formal complaint.

Failure to carry out property factor's duties

Burdens

35. The Tribunal did not find that the Factor had failed to carry out its property factor duties by passing unnecessary burdens to the homeowners. There was insufficient evidence before the Tribunal to make a finding on the balance of probabilities that the Factor agreed to handover knowing that required works had not been carried out. It was not clear that both parties were in possession of the same information or plans in regard to what was required before handover.

Lack of engagement

36. The Tribunal found that the Factor had failed to carry out its property factor duties by failing to engage with the PAMC and the Homeowner, with particular regard to the matters discussed at the meeting of the PAMC on 12th February 2020 and the Factor's failure to follow-up as required, and the failure to communicate with the PAMC and the Homeowner thereafter.

Proposed Property Factor Enforcement Order (PFEO)

37. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

38. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failure to comply with the Code.

39. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

40. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

41. 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 to appeal within 30 days of the date the decision was sent to them.

10th December 2020