Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision issued under s19 of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/20/2471

The Property: 15 Silverholm Drive, Jerviswood Park, Cleghorn, Lanark, ML11 7SY ("The Property")

The Parties:-

Malcom Campbell, residing at 15 Silverholm Drive, Jerviswood Park, Cleghorn, Lanark, ML11 7SY
("the applicant")

Newton Property Management Ltd, a company incorporated under the Companies Acts and having a place of business at 87 Port Dundas Road, Glasgow, G4 0HF
("The property factor")

The Tribunal, having made such enquiries as it saw fit for the purposes of determining whether the property factor has failed to comply with the code of conduct as required by Section 14 of the 2011 Act, and determined that the property factor has breached the code of conduct for property factors and has failed to carry out its duties in terms of s.17 of the Property Factors (Scotland) Act 2011.

Committee Members

Paul Doyle — Legal Member
David Godfrey — Ordinary Member

Background

1 By application dated 26 November 2020, the applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination of his complaint that the property factor has breached the code of conduct imposed by Section 14 of the 2011 Act & that the property factor has failed to comply with the property factor's duties.

2 The application stated that the applicant considered that the respondent failed to comply with Sections 2.1, 2.2, 2.4, 6.2 and 7.1 of the code of conduct for property factors, and breached the property factor's duties.

3 By interlocutor dated 18 January 2021, the application was referred to this tribunal. The First-tier Tribunal for Scotland (Housing and Property Chamber) served notice of referral on both parties, directing the parties to make any further written representations.

4 The applicant lodged further written representations on 27 November and 22 December both 2020 and on 12 January 2021. The respondent lodged written representations on 1 March 2021.

5. A hearing was held by telephone conference on 23 March 2021. The applicant was present, but unrepresented. The respondent was neither present nor represented. The respondent declared in their representations dated 1 March 2021 that they rely solely on their written representations and do not want to participate in an oral hearing.

Findings in Fact

6 The tribunal finds the following facts to be established:

(a) The applicant is the heritable proprietor of 15 Silverholm Drive, Jerviswood Park, Cleghorn, Lanark. He purchased the property on 1 May 2015. His house was one of the first 15 houses to be erected in a new development known as Jerviswood Park ("The development plot"). The developers, and owners of, Jerviswood Park were F. Chattelle (Developments) Limited ("the original developers"). The original developers intended to build 31 houses in Jerviswood Park ("the development").

(b) After completing 16 dwellinghouses in Jerviswood Park, the original developers went into administration and ceased to trade. The original developers were removed from the Register of Companies in 2017.

(c) The original developers' administrators advertised the development for sale in 2016. The development plot was advertised as a high-quality residential development opportunity with consent for 16 detached houses and one partially completed four bedroomed detached house. The advertising materials contained the following

> the existing foul drainage system discharges via an on-site treatment works into the adjacent watercourse. Any purchaser would be required to remove the existing treatment plant and make a connection into the public sewerage system.

(d) In December 2016, Taylor Homes (Scotland) Ltd, a company incorporated under the Companies Acts and having its registered office at Unit 3, Woodhall Road, Cambusnethan, Wishaw, purchased the undeveloped remainder of the

original development plot. Taylor Homes (Scotland) Ltd then set about completing the development of a total of 31 homes on the development plot.

(e) Taylor Homes (Scotland) Ltd, have sold some of the properties they completed on the development plot and are now advertising other newly built properties for sale there.

(f) The burdens on the title of Taylor Homes (Scotland) Ltd to the remainder of the original development plot and the burdens on the title of the applicant's property are the same. The burdens which are relevant to this application are set out in a deed of conditions registered in the Land Register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd.

(g) In the deed of conditions registered in the Land Register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd. "The Developers" are defined as R.F. Chattelle (Developments) Limited and their successors and assignees.

(h) The deed of conditions registered in the land register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd. defines "the development open areas" as

> the development and the services under exception of… All sewers drains pipes, cables, conduits or other services … Serving the development wherever situate whether within the development or otherwise, but only insofar as any of these are adopted for maintenance purposes by a relevant authority.

(i) Clause third of the deed of conditions registered in the land register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd. provides, *inter alia*

> The developers shall form to a standard suitable for adoption purposes by the relevant authority… such sewers, drains and drainage facilities (both within the development and/or serving the development) as are intended by the developers to be adopted by the relevant authority and once the said… Sewers drains and drainage facilities have been so formed they shall form part of the development open areas for which each proprietor of each plot shall be responsible from their respective dates of entry to a plot for an equal share jointly and severally of the cost of maintenance, repair, renewal, reinstatement and rebuilding as appropriate thereof unless and until the same are adopted for maintenance purposes by the relevant authority.

(j) The respondents are a firm of property factors who were appointed by the original developers in 2015. They acted as property factors for the entire development plot until they resigned on 21 October 2020.

(k) On 27 February 2020, Taylor Homes (Scotland) Ltd instructed a contractor to clear a blockage in the sewerage system and empty a septic tank on the

development plot at a cost of £769.20. The respondents believe that Taylor Homes (Scotland) Ltd are responsible for a 17/31 share of the invoice for that work. The Respondents apportioned the balance of £351.52 amongst the applicant and his neighbours. Neither the applicant nor his neighbours were consulted before the work was instructed. The applicant did not know about the work or the charge for the work until it was included in an invoice from the respondent in August 2020.

(l) Since purchasing his property, the applicant has been charged by the respondent between £400 and £500 for a share of the cost of maintenance of the drainage system serving his house. The drainage and sewer system has not yet been brought up to a standard suitable for adoption by the Local Authority. Both Scottish Water and SEPA have been consulted about the drainage and sewer system. SEPA have issued a licence to Taylor Homes (Scotland) Ltd for the entire drainage and sewer system serving the development plot. Before the drainage and sewer system can be adopted, a pumping station has to be installed on the development plot. In the meantime, a septic tank has been installed as a temporary measure to ensure all of the houses within the development plot have drainage and sewer systems.

(m) The Houses developed by Taylor Homes (Scotland) Limited connect to the same drainage and sewer system that serves the applicant's property. Taylor Homes (Scotland) Ltd have submitted a proposal to Scottish Water to install a pumping station on the development plot to serve all of the properties on the development plot.

(n) No work has yet been undertaken to bring the temporary drainage and sewer system serving the development plot to a standard suitable for adoption by the local authority. No application for adoption of the sewer and drainage system serving the development plot has yet been submitted.

(o) At a meeting of the developments' Residents Association (made up of the applicant and his neighbours) on 13 February 2020, the Residents Association refused to authorise any works in relation to the drains and sewers, other than the installation of a pumping system adoptable by Scottish water. The Residents Association resolution said

> should anything other than the aforementioned pumping station be installed, we will not accept liability for any costs. These include, but are not limited to, costs in relation to the purchase of equipment, design, installation and future maintenance.

(p) On 1 March 2020 the Residents Association (made up of the applicant and his neighbours) agreed to pay a 1/31 share per household of the cost of works required to empty the septic tank and clear a blockage in the sewerage system. Those works are separate to the work instructed by Taylor Homes (Scotland) Ltd on 27 February 2020.

(q) On 3 March 2020 work was carried out to clear a blockage in the sewerage system and to empty the septic tank. The applicant paid his share of the cost of those works.

(r) The developments' Residents Association's resolutions of 13 February & 1 March, both 2020, formed instructions to the respondent. Those instructions were confirmed to the respondent on 18 April 2019.

(s) At a meeting between Scottish water and the Residents Association in October 2019, Scottish Water agreed to meet the costs which might be apportioned to each of the 15 original proprietors of the development for any works required to bring the sewerage and drainage system serving their houses up to the standard required for adoption by the local authority.

(t) Even After Scottish Water clarified their position with the Residents Association, the respondents continued in their belief that each of the individual original 15 proprietors (who had purchased their homes from the original developer) were responsible for all costs associated with the sewerage and drainage system.

(u) In September 2020 the respondent's issued invoice number 49111 to the applicant. The respondent asked for payment of 1/17 share of the costs incurred by Taylor Homes (Scotland) Ltd on 27 February 2020.

(v) Between March and October 2020, the applicant and the respondent were in correspondence about the correct apportionment of costs for works to the open development areas in the development. That correspondence ended when the respondent's resigned agency in October 2020.

Reasons for decision

7. The fundamental question in this case relates to the interpretation of the deed of conditions registered in the land register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd. The applicant says that the deed of conditions places an obligation on Taylor Homes (Scotland) Ltd as the heritable successor to RF Chattelle (Developments) Ltd to complete the development and to connect the temporary drainage and sewerage system to the local authority main system.

8. The respondent insists that Taylor Homes (Scotland) Ltd are nothing more than a neighbouring proprietor. They may be a development company, but their interest is in relation to building plots adjacent to the applicant's property, so that they are merely the applicant's neighbour, with no responsibility for the drainage and sewage system serving the applicant's property.

9. Neither the applicant nor the respondent are lawyers. The respondents appear to have formed their interpretation of deed of conditions registered in

the Land Register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd without the benefit of legal advice. The applicant took legal advice, and now produces the opinion from the Environmental Law Chamber dated 15 December 2020, upon which he bases his argument.

10. On the facts as we find them to be, Taylor Homes (Scotland) Ltd are a housing development company who purchased a development plot with planning consent for 14 houses, together with one completed house and one partially completed house, from the original developers of the larger development plot. Taylor Homes (Scotland) Ltd took title with an obligation to connect the entire sewerage and drainage systems serving the larger development ploy, including the applicant's property, to the local authority main drainage system.

11. Taylor Homes (Scotland) Ltd's title is burdened by the deed of conditions registered in the land register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd. That deed of conditions defines "*the development open areas*" of the larger development plot, including the applicant's property. The drainage and sewer system will only form part of "*the development open areas*" when it is made up to a standard suitable for adoption by the local authority.

12. Properties developed by Taylor Homes (Scotland) Ltd on the part of the development plot that they own are being connected to the same drainage and sewage system which serves the applicant's property. Taylor Homes (Scotland) Ltd are in discussion with Scottish Water and SEPA about connecting the entire temporary drainage and sewage system to the established local authority drainage and sewage system.

13. The terms of the deed of conditions registered in the land register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd tell us that the respondent's interpretation of the burdens affecting the development plot is wrong.

14. Because the drainage and sewage system serving the entire development plot has not been brought up to a state suitable for adoption by the local authority, the drainage and sewage system does not form part of "*the development open areas*". The applicant is not therefore responsible for the cost of maintenance of the temporary drainage and sewerage system.

The Property Factors Code of Conduct

15. (a) Section 2.2.1 of the code of conduct says

SECTION 2: COMMUNICATION AND CONSULTATION

> Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
>
> 2.1 You must not provide information which is misleading or false.

(b) Because the property factor misinterpreted the deed of conditions, the property factor provided inaccurate information to the applicant. The provision of false and misleading information is a deliberate or negligent? act of dishonesty. In this case the respondent was not deliberately dishonest, but what mitigates against the respondent is the preamble in section 2 to the Property Factors Code of Conduct.

(c) The intention of section 2 of the Code of Conduct is to provide for good communication to avoid misunderstanding and dispute. There was not anything wrong with the mechanics of communication between the applicant and the respondent. The difficulty for the respondent is the content of what was communicated has led to misunderstanding and dispute. Even though the respondent acted honestly, the respondent took too great a burden upon itself by trying to interpret the deed of conditions registered in the land register of Scotland on 17 February 2009 by R.F. Chattelle (Developments) Ltd, without the benefit of legal advice.

(d) On the facts as we find them to be the respondent has inadvertently breached Section 2.2.1 of the code of conduct.

16. (a) Section 2.2.2 of the code of conduct says

> You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).

(b) The key words in section 2.2.2 are “abusive”, “intimidating” and “threatens”. There was a vibrant exchange of correspondence between the applicant and respondent, but the respondent maintained a civil tone in that exchange of correspondence. The respondent adhered to a position that the applicant did not like, but not once did the respondent abuse the applicant, nor did the respondent use language which could be interpreted as intimidating, nor did the respondent threaten the applicant.

(c) We consider the entirety of the correspondence disclosed to us between the applicant and the respondent and, applying the ordinary meaning to the words contained in section 2.2.2 of the Code of Conduct, find that the respondent did not communicate in a way which can be interpreted as

abusive or intimidating and there was nothing in the correspondence between the respondent and the applicant which an impartial observer would regard as threatening.

(d) The respondent has not breached section 2.2.2 of the code of conduct.

17.(a) Section 2.2.4 of the code of conduct says

> 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).

(b) The respondent believed that the maintenance of the sewerage and drainage system serving the development plot fell within their core services because the respondent's interpretation of the deed of conditions led them to believe that they were dealing with maintenance of a common part. If the respondents were correct, then the works that were instructed would be covered by the written statement of services.

(c) The problem for the respondent is that their interpretation of the deed of conditions was, on the facts as we find them to be, incorrect.

(d) The respondent inadvertently breached section 2.4 of the code of conduct, because they carried out repairs believing them to be emergency repairs authorised by the written statement of services, when, in fact, they were invoicing the applicant for the cost of servicing a drainage system for which his liability had not yet crystallised, because the drainage and sewage systems are still not of a standard suitable for adoption by the local authority.

(e) Despite believing that they were doing what is right and believing that they were acting in the interests of all of the proprietors of the larger development plot, the respondent inadvertently breached section 2.4 of the code of conduct.

18. (a) Section 6.2. of the code of conduct says

> If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

(b) The dispute between the parties relates in part to the definition of "emergency repairs". On the facts as we find them to be, the respondent incorrectly designed the charges for works carried out to the temporary drainage and sewage system as emergency repairs. That is not a breach of section 6.2 of the code of conduct.

(c) The documentary evidence tells us that the respondent does have in place procedures for dealing with emergencies and for arranging access for contractors.

(d) The respondent has not breached section 6.2 of the code of conduct.

19.(a) Section 7.1 of the code of conduct says

> 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 you will handle complaints against contractors.

(b) The respondent produces, inter alia, their written statement of services. That written statement of services provides a clear written complaints resolution procedure which complies with section 7.1 of the Code of Conduct.

(c) The applicant is aggrieved that his original complaint was answered by a senior manager rather than a director of the respondent's company, but on the facts as we find them to be the applicant's complaint was considered by a senior manager and then reviewed by an executive director.

(d) The weight of reliable evidence tells us that the respondent adhered to the written complaints procedure. Section 7.1 of the code of conduct has not been breached.

The Property Factors Duties

20. Section17 of the Property Factors (Scotland) Act 2011 says

> (1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—
>
> > (a) to carry out the property factor's duties,
> >
> > (b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").

(2) An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty.

(3) No such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "property factor's duties" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner.

21. We have found that the respondent has misinterpreted the deed of conditions affecting the development plot, and as a result has mistakenly raised charges for the drainage and sewage system which is not a common part of the land owned by the homeowner. By analogy, we have to find that the respondent has not adhered to their duties in relation to the management of the common parts of land owned by the homeowner.

22. We therefore find that the respondent has failed to carry out the property factors duties.

23. We emphasise that on the facts as we find them to be the respondent's failure is not a result of deliberate acts. The respondent inadvertent breaches of the Code of Conduct, and the failure in the Property Factors Duties, are caused by an incorrect interpretation of the deed of conditions.

24. The unchallenged evidence placed before us is that the applicant has been faced with expenses of between £400 and £500 for the maintenance of the drainage and sewage systems. Taking an holistic view of the evidence in this case, we reach the conclusion that it is only fair that the respondent should be reimbursed for that expense.

Decision

25. The tribunal therefore intend to make the following property factor enforcement order (PFEO)

> *"Within 28 days of the date of service on the respondent of this property factor enforcement order the respondent must pay the applicant £450.00 representing the cost of maintenance incorrectly charged to the applicant between 2015 and 2020."*

26. Section 19 of the 2011 Act contains the following:

> (2) In any case where the committee proposes to make a property factor enforcement order, they must before doing so—
>
> (a) give notice of the proposal to the property factor, and
>
> (b) allow the parties an opportunity to make representations to them.
>
> (3) If the committee are satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order.
>
> (4) Subject to section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.

27. The intimation of the tribunal's decision and this proposed PFEO to the parties should be taken as notice for the purposes of s. 19(2)(a) of the 2011 Act, and parties are hereby given notice that they should ensure that any written representations which they wish to make under s.19 (2)(b) of the 2011 Act reach the First-Tier Tribunal for Scotland (Housing and Property Chamber) office not later than 14 days after the date that the Decision and this proposed PFEO is intimated to them. If no representations are received within that 14 day period, then the tribunal is likely to proceed to make a property factor enforcement order without seeking further representations form the parties.

Right of Appeal

28. In terms of Section 46 of the Tribunal (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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Signed 23 March 2021

Legal Member