Housing and Property Chamber
First-tier Tribunal for Scotland

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") Property Factors (Scotland) Act 2011 ("the Act") Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/20/1742

Property: Braemar Gardens A9, 1 Robertson Street, Greenock, PA16 8JE **("the property")**

The Parties: -

Mr Lorna Lutz, Braemar Gardens A9, 1 Robertson Street, Greenock, PA16 8JE **("the homeowner")**

McTavish & Company, Accountants and Property Agents, 18 Nicolson Street, Greenock, PA15 1JU **("the property factor")**

Tribunal Members: - Simone Sweeney (Legal Member) Andrew McFarlane (Surveyor Member)

Decision of the Tribunal Chamber

The Tribunal unanimously determined that the property factor has failed to comply with the section 6.5 of the Code of Conduct for Property Factors ("the Code") in terms of section 14 of the Act and has failed to meet the Property Factors' duties in terms of section 17 of the Act .

Background

1. By application dated 15th August 2020, the homeowner applied to the Tribunal for a determination on whether the factor had failed to comply with section 6.5 of the Code imposed by section 14 of the Act and to carry out the property factor duties in terms of section 17 (1) (a) of the Act.

2. Section 6.5 of the code provides,

"You must ensure that all contractors appointed by you have public liability insurance."

3. On her application, the homeowner alleged that the property factor,

> *"…has failed in his duties as a factor by hiring Mr Douglas Inglis-gardening services knowing that Mr Inglis has no public liability insurance as stated at section 6.5 of the code."*

4. The homeowner formally intimated her complaint to the property factor by letter of 30th June 2020. The property factor acknowledged the complaint in a letter dated, 9th July 2020 confirming that no further works would be undertaken by Mr Inglis. However by email of 27th July 2020, the property factor's Mr McTavish retracted this statement.
5. Copies of these communications together with copies of various other communications about this and other issues between the parties between June and August 2020 were produced by the homeowner as part of an appendix to her application.
6. By decision dated 5th October 2019, a Convenor referred the application to the Tribunal for a hearing. A telephone hearing was assigned to take place on Friday 27th November 2020 at 10am.
7. The telephone hearing proceeded on Friday 27th November 2020 at 10am. In attendance was the homeowner and, on behalf of the property factor, Mr Gordon McTavish.

Hearing of 27th November 2020

Evidence of the homeowner

8. Ms Lutz confirmed that her complaint against the property factor was focused on section 6.5 of the code and the property factor's duties in terms of section 17 of the Act.
9. The homeowner provided some background to the history of her complaint. She had read an email from the property factor to the representatives of the local residents' group on 5th June 2020. The group acts as a liaison between owners at the block of flats within which her property is based and the property factor. The homeowner is not part of the group but became aware of the content of the email because it had been attached to the front door of the building by a resident of the group.
10. A copy of the relevant email was provided within the homeowner's papers accompanying her application. Attached to the email was a document with the title, *'invoice.'* The invoice was addressed to, *"McTavish and co."* The document was presented on the headed notepaper of, *'Douglas Inglis Gardening Services'* with a business address at 211A Finnart Street, Greenock, dated and described as being in respect of, *"gardening services."* The document detailed the works as,

    > *"Work maintenance for 1 Robertson St. Cut back shrubs and weed large garden. Cut back shrubs and remove rubbish from side and front facing gardens. Spray weeds…around all areas, remove and dispose of all cuttings and rubbish. Return and strim dead weeds etc and remove to dump. Total £130."*

    The document stated that all cheques should be made payable to, *"Douglas Inglis"* and ended, *"Thank you for your business."* Finally the document bore the date, 4th June, *"1990."* Mr McTavish clarified that *"1990"* was a typographical error. The correct date was 4th June 2020.

11. Aware that Douglas Inglis was an owner at a neighbouring property, the homeowner contacted the property factor by email of 5th June 2020. The homeowner

requested that the property factor make a copy of Mr Inglis' business insurance available to owners.

12. The property factor responded by email of 7th June 2020, a copy of which was available to the Tribunal within the homeowner's papers. The email (from Mr McTavish) confirmed that garden maintenance work was to proceed. The email provided, in so far as is relevant,

> *"I confirmed that it would make eminent sense to have this carried out by a competent contractor, and as we do use Mr Inglis on many of our properties within our property portfolio, I saw a real benefit to the owners at Braemar Gardens in having this work undertaken by him, as he would clearly execute this work both at a considerable reduced rate, and in all probability carry out more work that had been quoted for….Having looked at the estimate, I am happy that from our bank of gardening contractors, we could not match the price as quoted by Mr Inglis…Should you, or indeed any other owner in the future, wish to undertake this work on an ongoing basis, at a nil cost to the owners, I would be absolutely delighted to pass this on for the other owners' consumption. "*

13. Dissatisfied with this response, the homeowner sent another email to Mr McTavish repeating her request for a copy of Mr Inglis' business insurance and clarifying that she was objecting to Mr Inglis proceeding with works at the common garden areas in the absence of such insurance.
14. By email of 12th June 2020, Mr McTavish replied to the homeowner. He confirmed that Mr Inglis was without public liability insurance. The email, in so far as is relevant read,

> *"I can confirm that Mr Inglis does not carry insurance. To clarify however, I would not release a gardener into a property if, in my estimation via risk assessment, it merited full insurance cover eg if tree lopping/felling was to be carried out, and this was in close proximity to overhead power or telephone lines, or if any work being executed could potentially cause damage to cars/other vehicles or indeed was a risk to public health, in respect of the gardening work undertaken, I was satisfied that Mr*

Inglis was a suitable qualified and competent individual. I can also confirm that he does hold spraying certification, which would enable him to carry out the weed-killing aspect of his work. The actual work carried out, in my view, posed no risk whatsoever to any of the owners of their possessions, and furthermore was carried out at an extremely competitive rate. I would suggest that similar work executed by a firm with insurance cover… would come at a cost which could easily be tripled or quadrupled when compared to the cost as estimated in this instance."

15. The homeowner remained dissatisfied with the response of the property factor. A formal complaint was intimated to the property factor by the homeowner's letter of 30th June 2020 (before the Tribunal). In so far as is relevant, the letter read,

> *"You appointed a contractor who is clearly not insured despite the Code of Conduct stating that you must only appoint contractors who have public liability insurance. This is the reason why I raised an objection as I suspected Mr Douglas Inglis Gardening Services was not insured. In reading the Code, its become very clear to me that you are not carrying out your duties as a factor and you are not complying with the code."*

16. The property factor replied by letter of 9th July 2020. The letter confirmed the property factor's earlier admission that Mr Inglis was without any public liability insurance. Mitigating factors were provided by the property factor by way of an explanation for Mr Inglis' appointment to undertake gardening services at the property as per paragraph 14, above.
17. Notwithstanding its reasons for appointing Mr Inglis, the property factor provided an undertaking to the homeowner that Mr Inglis would not be doing any further work at the property,

> *"We now accept that given section 6.5 of the Property Factors (Scotland) Act 2011 Code of Conduct (hereinafter referred to as COC), and despite no objections having been raised by any owner either prior to, or after the instruction to proceed was given, we should only have authorised approval for Mr Inglis to proceed on the basis of a reimbursement of material costs. We therefore accept your comments in this regard.*

We shall ensure that Mr Inglis does not carry out any further works on behalf of his co-proprietors in the future."

18. The homeowner received a further email from the property factor's Mr McTavish on 27th July 2020. The email in so far as is relevant read,

    "…I have reconsidered my decision with regard to gardening/general maintenance. In retrospect therefore, I feel that it would be appropriate meantime to include Mr Inglis in any future dealings on behalf of the development, and I therefore retract my statement in the final sentence of the response to your complaint reference 1."

19. The homeowner did not feel that the property factor's change in position was appropriate. The homeowner replied to the property factor's email of 27th July 2020 enquiring if Mr Inglis now had public liability insurance in place. She never received a reply. Remaining concerned that the property factor was relying on services being provided by someone who was without the necessary insurance in place and being unable to reach a resolution to the matter with the property factor, the homeowner brought her application before the Tribunal.

Evidence of the property factor

20. In response, Mr McTavish denied any breach of section 6.5 of the Code or the property factors' duties.
21. It was accepted that Mr Inglis was without any *"personal"* public liability insurance when he was instructed to undertake works at the common areas of the property. However Mr McTavish argued that there was no necessity for Mr Inglis to have public liability insurance in the circumstances.
22. The property factor argued that there were 2 reasons why this was this was the case; (i) section 6.5 of the Code applies where a property factor is appointing a contractor but Mr Inglis was not acting as a contractor and; (ii) a block insurance policy in place for the building in which the property is located provided public liability cover for maintenance works being undertaken by owners, such as Mr Inglis.

(i) Mr Inglis not a contractor

23. In respect of (i) Mr McTavish argued that Mr Inglis was not operating in a commercial capacity when he was instructed by the property factor. Firstly, the sum of £130 to complete the extent of the works involved could not be considered a commercial rate. Mr McTavish explained that he would have reasonably expected contractors to have charged as much as three times this sum for the same work. Secondly, Mr McTavish submitted that Mr Inglis was not paid for the work. Reference was made by the Tribunal chair to the document on headed notepaper from Douglas Inglis Gardening Services. Mr McTavish explained that although the document bore the heading, *"invoice"* it was no more than an estimate. From this estimate of £130, Mr Inglis' expenses for carrying out the works came to approximately £112. Therefore, any element of profit to Mr Inglis amounted to not much more than £17 which Mr McTavish preferred to consider as a *"commission."* The sum of £130 was not a labour charge therefore.
24. Mr McTavish admitted that the *'estimate'* from Douglas Inglis Gardening Services is silent on any expenses incurred by Mr Inglis.
25. When asked why Mr Inglis would have provided a formal estimate on business notepaper if he was acting as an owner, Mr McTavish explained that he had requested this from Mr Inglis. He had only requested it because of the homeowner's complaint. Also, it enabled the property factor to demonstrate to the representatives from the residents' group which works were to be carried out at the garden. Mr McTavish insisted that the property factor would not normally request a formal estimate from an owner carrying out maintenance works at the property.
26. No explanation could be provided as to why Mr Inglis would provide the estimate on the notepaper of his business when he was not acting in a commercial capacity. Mr McTavish conceded that it would have been easier if the estimate had been provided on blank paper. Mr McTavish admitted that owners (including the

homeowner) might perceive the estimate from Douglas Inglis Gardening Services to indicate that Mr Inglis was operating as a commercial contractor. However Mr McTavish submitted that this was definitely not the case.

27. Mr McTavish confirmed that Mr Inglis was yet to be paid. In light of the complaint brought by the homeowner, Mr McTavish had felt that he could not pay Mr Inglis until that complaint was resolved.
28. The property factor confirmed that Mr Inglis is instructed as a contractor to undertake similar gardening services at other properties managed by the property factor.

(ii) Block insurance policy providing public liability cover

29. In respect of (ii) Mr McTavish submitted that there could be no breach of section 6.5 of the Code by the property factor because (by undertaking the works as an owner) Mr Inglis was covered by the common insurance policy in place at the block.
30. The property factor had produced various parts of the Zurich insurance policy. It was submitted that Property Owners and Public Liability cover was included within the policy and had been so, historically. Mr McTavish explained that his company had taken over management of the property only the previous year. He advised that the existence of the public liability cover within the policy had been highlighted to him by the homeowner, in fact.
31. The Tribunal was drawn to the section of the insurance policy which provided,

> *"The insurance policy you have with Zurich, specifically includes the undernoted within the business of property owners:-*
>
> *Maintenance of property and premises owned or occupied by you.*
>
> *As you know, the policy is in the name of Co-proprietors and Bondholders of Braemar Gardens FTRRI and this means each owner is included as an insured."*

32. Within his written submissions of 29th October 2020, Mr McTavish submitted that the insurers had confirmed to him that owners have full cover and,

"are permitted to involve themselves in and deal with, "maintenance issues such as gardening, stair cleaning…"

33. Therefore, notwithstanding the admission that Mr Inglis was without public liability cover to undertake gardening works in a commercial capacity, the property factor argued that the relevant cover was in place for Mr Inglis to undertake the gardening works in his capacity, as a homeowner.
34. Mr McTavish submitted that he had contacted the insurers in June 2020 after he received the homeowner's complaint and after Mr Inglis had completed the works.
35. He sought confirmation from the insurers that gardening works would be covered by the common policy and received assurance that the policy extended to an owner carrying out gardening works.
36. The property factor confirmed to the Tribunal that the works undertaken by Mr Inglis included applying weed killer to the common areas. Mr McTavish confirmed that he did not mention this to the insurers. Rather he enquired of his insurers whether *"general gardening"* would be covered by the policy. Mr McTavish confirmed that he did not advise the insurers that the works were already complete and had been carried out by an owner who also ran a commercial garden business. Nor did he make the insurers aware of Mr Inglis estimate of £130 including a modest *"commission."*
37. Mr McTavish did not see the relevance of making the insurers aware that weed killer was to be applied. He considered that it ought to have been inferred by the insurers that, *"general gardening"* might be expected to include the application of weed killer as most people would apply weed killer in the course of general gardening in the summer months. Mr McTavish admitted that this concerned an area of common property and not a private garden and that the use of chemicals carried a potential health and safety risk.
38. However Mr McTavish had undertaken his own assessment of risk to those coming onto the property and to their belongings. Mr McTavish was aware that Mr Inglis was a retired employee of the local council and he had enquired with Mr Inglis whether he held any certificates for spraying weed killer. No further enquiries were made by the property factor. Although he had never asked for sight of these

certificates, Mr McTavish accepted that Mr Inglis' certificates and employment history meant that he was suitably qualified and competent enough to apply chemicals to the common areas.

39. The Tribunal asked the property factor for an explanation for retracting the statement in its letter of 30th June 2020 that Mr Inglis would not be carrying out any further works at the property. Mr McTavish explained that he had made the statement in his letter of 30th June 2020,

> *"simply in an attempt to defuse the situation. However, a short time later, it became clear to me that it was wholly inappropriate to discriminate against any one owner, and I therefore retracted my original comment."*

40. Mr McTavish was keen to emphasise that by instructing Mr Inglis, huge savings were afforded to the other owners as the work was completed at an extremely competitive rate.
41. Further, Mr McTavish submitted that in carrying out the gardening works for his neighbours, Mr Inglis was complying with the requirements of the title deeds. A copy of the Burdens section was lodged by the property factor. The following sections had been highlighted by the property factor for the Tribunal's attention,

> *"2(b) The proprietors of the flats shall be bound to lay out insofar as not already done and to maintain in all time coming the common garden areas and amenity ground, to plant and replant suitable plants, trees, shrubs and bushes therein and to renew the same as necessary to maintain an attractive appearance for the development site as also to erect so far as not already erected and to maintain in all time coming all boundary walls, fences and hedges…The Common Areas, shall be maintained at all times in a neat, clean tidy and serviceable condition, and shall remain open and unbuilt on in all time coming. It shall be competent for us or our foresaids to instruct a gardener or other persons or persons to maintain the Common Areas in a neat, clean and tidy condition, to undertake planting, repairs and renewals and to recover the costs of expenses thereof from the proprietors of the flats in the same proportions as are referred to in sub-paragraph (a) above."*

42. It was submitted that, in carrying out the gardening works, Mr Inglis was not only satisfying all obligations incumbent on the owners in terms of this section of the title deeds but demonstrated that Mr Inglis had, *"the development's interests at heart."*
43. Finally Mr McTavish emphasised that the property factors had acted appropriately at all times. A professional service had been provided at the development and the only complaint received had been that of the homeowner which was firmly denied.

Findings in Fact

44. That the property factor manages the common areas of the property including the garden areas.
45. That the property factor has managed the common areas since June 2019.
46. That gardening works were undertaken at the common areas in June 2020.
47. That the gardening works were executed by Douglas Inglis.
48. That Douglas Inglis is a homeowner at the development at which the gardening services were to be executed.
49. That Douglas Inglis runs a business which provides professional gardening services.
50. That the business is Douglas Inglis Gardening Services.
51. That a document from Douglas Inglis Gardening Services was produced on 4th June 2020 addressed to the property factor.
52. That the document provides specification of the works which Douglas Inglis intended to carry out to the common areas.
53. That the document from Douglas Inglis Gardening Services provides a cost for the works which were to be carried out to the common areas.
54. That Douglas Inglis undertook to provide materials and labour for a job.
55. That the cost for the gardening works was £130.
56. That Douglas Inglis did not have public liability insurance in place at the time he was appointed to undertake gardening services at the common areas of the property.
57. That the property factor admits that Douglas Inglis was without any public liability insurance at the time the property factor appointed Douglas Inglis to do the works.
58. That the property factor admitted to the homeowner in June 2020 that Douglas Inglis was without any public liability insurance.

59. That the property factor allowed Douglas Inglis to proceed with gardening services at the common areas of the property in the knowledge that there was no public liability insurance in place.

Reasons for decision

60. The property factor has a statutory obligation to meet the terms of the Code of Conduct and the Property Factors' duties in terms of section 17 of the Act. Section 6.5 places a mandatory obligation on a property factor to *"ensure"* that all *"contractors"* appointed by the property factor have public liability insurance in place at the time. The word, *"ensure"* is significant. The Oxford English dictionary defines "ensure" as, *"make certain that something will happen or be so."* This suggests that there is an obligation on a property factor to undertake enquiries in advance of a contractor being appointed. There is no evidence before the Tribunal that the property factor made certain that Douglas Inglis had public liability insurance in place. On the contrary, the property factor admitted to the homeowner that there was none. This admission was made to the Tribunal. Notwithstanding this, the property factor allowed Douglas Inglis to go ahead with the works.
61. The property factor insists that Douglas Inglis was acting as a homeowner and not as a contractor. He invites the Tribunal to accept this on the basis that the sum of £130 does not represent a commercial rate; that there was no labour charges within this sum and; that there was only a modest *"commission"* afforded to Mr Inglis within the sum of £130. The Tribunal rejects this argument. Taking the definition of a "contractor" from the Oxford English dictionary (*"a person who undertakes a contract or provide materials or labour for a job.")*and giving the word its usual meaning, Douglas Inglis was acting as a contractor. Douglas Inglis is a business which provides gardening services. It was appointed by the property factor to provide gardening services at the property. A document was issued by this business on headed notepaper on 4th June 2020. It was addressed to the property factor. The fact that Douglas Inglis resides at the development at which he was intending to carry out the works is irrelevant. That document specified which works were anticipated and the costs for those works (£130). The property factor appointed Douglas Inglis to do the

works specified on the document. The property factor accepted the sum of £130 for the works to be completed. Whether that document is an *"invoice"* or an *"estimate"* (as Mr McTavish preferred it be considered) is irrelevant. The property factor has not paid Douglas Inglis for the services so far. Presumably when it does, the property factor will pay Douglas Inglis, £130. The fact that this represents a far lower charge than other companies may charge is irrelevant. The fact that this figure, when broken down, represents a significant amount of expenses is irrelevant. The Tribunal rejects the submission from the property factor that Douglas Inglis was not acting as a contractor.

62. Finally the Tribunal rejects the arguments by the property factor that the existence of a block insurance policy including public liability insurance for homeowners undertaking works negates any suggestion that the property factor has breached the code. The Tribunal does not accept that the property factor provided the block insurers with an accurate picture of what works were intended and by whom they were to be carried out. Mr McTavish admits that he refrained from mentioning to the insurers that the works included the spraying of weed killer. Neither is it clear whether the insurers were advised that the individual carrying out the works ran a professional gardening business. However these matters are separate to the issue of whether or not the property factor has complied with section 6.5 of the Code. Even if there was a block insurance policy in place which provided public liability insurance, this was not investigated by the property factor until after Douglas Inglis had completed the works at the property. And further, for the reasons set out, above, the Tribunal determines that Douglas Inglis was acting as a contractor to carry out the works.

Decision

63. In all of the circumstances narrated, the Tribunal finds that the property factor has failed in its duty to carry out the property factor's duties under section 17 (1) (b) of the Act and that the property factor has failed to comply with section 6.5 of the Code.

64. The Tribunal determine to issue a Property Factor Enforcement order ("PFEO").

65. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.

66. The Tribunal proposes to make the order in the following terms:

Within 14 days from the date of issue of this order, for the property factor to:-

- *Issue a letter to the homeowner providing an undertaking to produce to homeowners details of the system by which the property factors ensure that all those appointed by them to undertake a contract or provide materials or labour for a job at the development have public liability insurance.*

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

Legal Chair, At Glasgow on 21st December 2020