Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by

Aylmer Millen, 5 Hillpark Grove, Edinburgh EH4 7AP ("the Applicant")

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

Reference No: FTS/HPC/LM/20/1387

Re: Property at 5 Hillpark Grove, Edinburgh
("the Property")

Tribunal Members:

John McHugh (Chairman) and David Godfrey (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to carry out its property factor's duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of 5 Hillpark Grove, Edinburgh EH4 7AP (hereinafter “the Property”).
2 The Property is located within a mixed development of houses and flatted blocks and associated common areas known as Hillpark Grove (hereinafter "the Development")
3 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.
4 The Respondent is the property factor responsible for the management of common areas within the Development.
5 The property factor’s duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
6 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 7 December 2012.
7 A meeting of owners of properties within the Development was held on 16 May 2019.
8 At the meeting it was agreed that the Respondent should proceed with works to the coping stones of the retaining wall at a cost of £1548.
9 It was agreed that the Respondent should obtain three quotations for play park works and advise the homeowners of those quotations.
10 It was agreed that the grounds maintenance works should be re-tendered with effect from 1 August 2019.
11 A meeting of owners of properties within the Development was held on 25 October 2018. At that meeting it was agreed that the Respondent would provide owners with detailed reports of the findings of contractors engaged in drainage works.
12 On 20 April 2020 the Applicant requested certain documents regarding the drainage works. The Respondent has not provided them.
13 On 21 February 2020, the Applicant received the Respondent's January newsletter and invoice for the period to 1 January 2020.
14 The newsletter contained limited information about the drainage works.
15 The newsletter advised that a play park contractor had carried out works,
16 A cap of £5000 had been agreed in relation to the Development Contingency Fund.
17 The invoice to 1 January demanded a contribution towards the Contingency Fund although the cap had already been reached.
18 The invoice contained a figure of £840 for the coping works.
19 The grounds maintenance works were not re-tendered on or after 1 August 2019.
20 The Applicant has, by his correspondence, including by his emails of 27 February, 15 and 20 April 2020, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor’s duties and its obligations to comply with its duties under section 14 of the 2011 Act.
21 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at by telephone conference on 2 November 2020.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by Marianne Griffiths, Associate Director; David Hutton, Managing Director and Sean Currie, Director. No other witnesses were called by either party.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent 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.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Conditions by MacTaggart & Mickel Limited recorded 4 April 2002, which we refer to as "the Deed of Conditions" and the Respondent's Written Statement of Services marked as dated June 2014 (updated 1 January 2018) which we refer to as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services and the Deed of Conditions are relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 2.1; 2.4; 2.5; 3.3; 6.3; 6.6; 7.1 and 7.2 of the Code.

The elements of the Code relied upon in the application provide:

"SECTION 2: COMMUNICATION AND CONSULTATION

2.1 You must not provide information which is misleading or false.…

…2.4 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)…

…2.5 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 (Section 1 refers)…

*…**SECTION 3: FINANCIAL OBLIGATIONS…***

…3.3 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 or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance…

…SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE…

6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff…

…6.6 If applicable, documentation relating to any tendering process (excluding any 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 this charge in advance…

…SECTION 7: COMPLAINTS RESOLUTION

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 you 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."

The Matters in Dispute

The Applicant complains in relation to the following issues:

(1) The Respondent has issued a Newsletter dated January 2020 which was not received until 21 February 2020.

(2) Failure to communicate between May 2019 and February 2020.

(3) The instruction of a contractor to perform playpark works without authority.

(4) The instruction of a contractor to perform coping replacements at a different amount from that authorised.

(5) Arrangements concerning the completion of the drainage works

(6) Renewal of the grounds maintenance contract.

(7) Errors in the invoice to 1 January 2020.

(8) The handling of the Applicant's complaint to the Respondent

We deal with these issues below.

1 Delayed Newsletter dated January 2020

The Applicant complains that the Respondent issued a newsletter entitled "January 2020" but which he received on 21 February 2020. That newsletter was accompanied by the Respondent's invoice to 1 January 2020. The newsletter itself contained information concerning some of the entries on the invoice.

The Respondent accepts that there was a delay in issuing the newsletter and confirms that an apology for this lateness was included within the newsletter. After the Applicant had complained the Respondent's Client Relations Manager had offered an explanation for the lateness which was that it had been delayed awaiting the provision of certain information and the reference to January should have been altered but that this was missed in error.

In the circumstances, we consider the matter to be so minor that it does not amount to a breach of the Code or of property factor's duties.

2 Failure to communicate between May 2019 and February 2020.

The Applicant complains that from the date of a homeowners' meeting on 16 May 2019 until the receipt of the January newsletter on 21 February 2020, there had been no communication from the Respondent other than a letter dated 20 August on the subject of the drainage works. The Respondent accepts that this is an accurate history.

The Applicant considers that there were important ongoing issues upon which he would have expected to receive communication including the drainage works; works to the play park; the re-tendering of the ground maintenance works; and works to coping stones on the retaining wall. He considers that there should have been updates as to progress or, at least, confirmation of the reasons for any lack of progress. He considers that the lack of communication during this period amounts to a breach of the Respondent's obligation to carry out its duties to a reasonable standard in terms of section 17(4) of the 2012 Act.

The Tribunal agrees. In particular, there was a specific need for correspondence re the grounds maintenance contract as it was due to be retendered with effect from 1 August 2019 (see below) and there was a specific undertaking by the Respondent to provide details of tenders regarding the play park works (see below) and progress as to the drainage works (see below). There was no explanation of an error which had resulted in the coping stone work becoming cheaper than expected nor was there an explanation regarding how the drainage works had become more expensive than expected. In addition, when the January newsletter arrived, it failed to explain these matters in any detail.

3 The instruction of a contractor to perform playpark works without authority

At the meeting on 16 May 2019, it was agreed that the Respondent would obtain three quotations for the required works and that the quotations would be sent to the homeowners. At the time the Respondent held one quotation which it was agreed was acceptable in terms of its amount. The January invoice showed that a different contractor, Vermicon, had carried out works.

The Respondent accepts that the course set out at the May 2019 meeting was not followed in that the quotations obtained were not sent to the owners prior to instructing the works. The Respondent accepts that the works are not yet complete.

We consider the Respondent's conduct to amount to a breach of Code section 6.3.

4 The instruction of a contractor to perform coping replacements at a different amount from that authorised.

The Applicant was surprised to find that the charge for the coping works was much lower than the £1548 agreed at the May 2019 meeting. No explanation was provided for this in the newsletter or otherwise until he queried the matter with the Respondent. The Respondent was able to confirm that there had been a misunderstanding in relation to the contractor's quotation which had informed the figure agreed at the May 2019 meeting. The Respondent accepts this factual history as being correct. The Tribunal considers that the Respondent ought to have explained the position to homeowners and that its failure to do so constitutes a failure to carry out its property factor's duties to a reasonable standard.

5 Arrangements concerning the completion of the drainage works

The Applicant complains that there has been a long history regarding the storm drain at the western boundary of the Development. He had found the Respondent's communication to be inadequate in that since the May 2019 meeting he had received only one update letter dated 20 August and the information contained in the January newsletter. The information contained in the latter amounted to only a few lines. The Applicant explained that the storm drain situation was an ongoing and complicated one. He expected detailed information about what the contractors had identified as being the problem and its cause. He believed that homeowners should be interested in this information as it was an issue of importance and might help inform them as to whether they have a claim against any third party. He specifically observed that the works had been completed on 9 December and not mid-December as per the newsletter. He considered that the information from the contractors should have been made known to homeowners sooner than 21 February 2020.

He advised that at a 25 October 2018 homeowners' meeting, the Respondent had agreed to provide access to detailed reports concerning the contractors' findings. The Respondent accepted that this was accurate.

The Applicant had by email of 20 April 2020 asked the Respondent to provide him with copies of: the invoices of Lanes and any other contractors involved in the drainage works; the CCTV survey report of the drains; reports of the condition of the drain; and the Respondent's correspondence with third parties in respect of the workmanship, fitness for purpose and maintenance of the drain to enable him to consider where liability for the condition of the drain may lie. The Respondents accept that they have not provided that information.

We find the Respondent's conduct to be a failure to carry out its duties to a reasonable standard in terms of section 17(4) of the 2012 Act.

6 Renewal of the grounds maintenance contract.

The Applicant complains that the grounds maintenance contract was due to be re-tendered with effect from 1 August 2019. This was discussed at the May 2019 meeting. It later transpired that the existing contractor remained in place. At the hearing, the Respondent's representatives explained that there had not been agreement on the specification and so they could not re-tender. They considered that they required to obtain the authority of the owners at a meeting before they could re-tender. The Applicant disagrees with that history. He considers that the discussion at the meeting was that there would be a re-tender and that there was no current change to the specification of works.

Whatever the exact position regarding the specification, there is no dispute that the Respondent did not contact homeowners regarding the specification or any changes to it or to seek their views at a meeting or by other means. The Respondent did not proceed with the re-tendering.

We consider the Respondent's conduct to amount to a breach of Code sections 2.4 and 6.3.

7 Error in the invoice to 1 January 2020.

The Applicant explains, and the Respondent accepts, that the January invoice contained a demand for payment of contribution towards the Contingency Fund although it had already been agreed that no further contributions would be demanded as the agreed limit had been reached. The Respondent quickly remedied this error once reported to it.

As this was an isolated oversight, we consider that there is no breach of the Code or of property factor's duties.

8 The handling of the Applicant's complaint to the Respondent

The Applicant complains that the Respondent has failed to follow its own complaints procedure in its handling of his complaint of 27 February 2020. In particular, the Respondent by email of 19 May had failed to address the complaint meaningfully and had failed to indicate the availability of a reference to the Tribunal. The Respondent accepts that this is the case and has apologised. The Respondent advises that the issue arose because of a failure by a then member of staff. New measures have been introduced to avoid repetition of this situation.

We consider there to have been a breach of Code sections 7.1 and 7.2.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

APPEALS

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 6 November 2020