

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

Jennifer Toft, 34 Lochan Road, Kilsyth, Glasgow G65 0DW (“the Applicant”)

SG Property Management Ltd, 272 Bath Street, Glasgow G2 4JR (“the Respondent”)

Re: Property at 34 Lochan Road, Kilsyth, Glasgow G65 0DW (“the Property”)

Chamber Ref: FTS/HPC/LM/23/0158 & 0159

Tribunal Members:

John McHugh (Chairman) and Ahsan Khan (Ordinary (Housing) Member).

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

The Respondent has not 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 34 Lochan Road, Kilsyth, Glasgow G65 0DW (hereinafter “the Property”).
- 2 The Property is located within a modern development of houses and associated common areas known as Barrwood Quarry (hereinafter “the Development”).
- 3 The Respondent is the property factor responsible for the management of common areas within the Development.
- 4 The property factor’s duties which apply to the Respondent arise from a Statement of Services. The duties arose with effect from 1 October 2012.
- 5 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from 1 November 2012. From 16 August 2021 it was under a duty to comply with the updated 2021 Code.
- 6 The Applicant moved into the Property in June 2015. She has complained to the Respondent regarding deficiencies in ground maintenance from that time.
- 7 To the rear of the Property lies a fenced area which is informally planted with shrubs (hereinafter “the Fenced Area”). It is the site of a steep drop and is kept locked to avoid the risk of accidents occurring.
- 8 Adjacent to the Property is a small area planted with shrubs (hereinafter “the Shrub area”). It lies next to the pavement.
- 9 The Applicant has complained that the Fenced Area is overgrown and that plants from that area grow into her rear garden. She has complained that the bushes in the Shrub Area overgrow the pavement making passage by pavement users more difficult.
- 10 The Respondent is to maintain the Fenced Area and the Shrub Area in accordance with a Ground Maintenance Specification.
- 11 The Respondent uses a contractor, known as KENE, to carry out grounds maintenance.
- 12 The Applicant’s complaint has not been dealt with using the Respondent’s Complaints Procedure.
- 13 The Respondent has failed to respond adequately to the Applicant’s complaints.
- 14 The Respondent has failed to maintain the Fenced Area and the Shrub Area in accordance with the Ground Maintenance Specification.
- 15 The Applicant has, by her correspondence, including by her letters of 28 February 2023 informed the Respondent of the reasons why she 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.
- 16 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A Case Management Conference took place by telephone conference on 14 June 2023.

It was agreed at that hearing that the matter would proceed to determination by the Tribunal at a further hearing.

An in-person hearing was fixed for 17 August 2023.

On 16 August 2023, the Applicant informed the Tribunal that she would be unable to attend the hearing as she was a head teacher and her work commitments required her to be in school. The Applicant provided further written submissions and appeared to intend that the hearing should proceed in her absence. There being no application to postpone the hearing and the Tribunal being in possession of written submissions, the Tribunal resolved that the hearing should proceed as scheduled.

By the time of the hearing, the Respondent had been in correspondence with the Applicant. The Respondent had written off its late payment charges. It had offered to pay £100 in compensation, which the Applicant has refused. The Respondent has also arranged for the Shrub Area and the Fenced Area to be cut back and to ensure that they are maintained in acceptable condition in future.

The hearing took place at the Glasgow Tribunals Centre. The Respondent was represented by its Joseph O'Hara and John Bryson.

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 1 November 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 the Respondent's Ground Maintenance Specification.

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 Applicant relies upon the Respondent's Ground Maintenance Schedule as the source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code both in its original and revised forms.

The Applicant complains of breaches of Sections: 2.5; 4.2; 4.3; 6.1; 6.9; 7.1 and 7.2 of the original Code and Overarching Standards of Practice 2, 3, 6 and 11 as well as Sections 2.5; 4.2; 4.3; 6.1; 6.9; 7.1 and 7.2 of the revised Code.

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

"SECTION 2: COMMUNICATION AND CONSULTATION...

...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 4: DEBT RECOVERY...

...4.2 If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.

4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required...

...6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

...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...

...Overarching Standards of Practice

- *You must be honest, open, transparent and fair in your dealings with homeowners.*

- *You must provide information in a clear and easily accessible way...*

- *You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective...*

- *You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure...*

...Section 2: Communication and Consultation...

...2.5 A property factor must provide a homeowner with their contact details, including full postal address with post code, telephone number, contact e-mail address (if they have an e-mail address) and any other relevant mechanism for reporting issues or making enquiries. If it is part of the service agreed with homeowners, a property factor must also provide details of arrangements for dealing with out-of-hours emergencies including how a homeowner can contact out-of-hours contractors...

...Section 4: Debt Recovery

4.2 It is a requirement of section 1 of the Code (written statement of services) that a property factor informs homeowners of any late payment charges and the property factor's debt recovery procedure is made available to homeowners...

...4.3 Any charges that a property factor imposes in relation to late payment by a homeowner must not be unreasonable or excessive and must be clearly identified on any relevant bill and financial statement issued to that homeowner...

...SECTION 6: Carrying Out Repairs and Maintenance...

6.1 This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their

property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard...

...6.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available if requested by a homeowner...

...Section 7: Complaints Resolution

Property Factor Complaints Handling Procedure

7.1 A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request. The procedure must include:

- The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.*
- The complaints process must, at some point, require the homeowner to make their complaint in writing.*
- Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.*
- How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.*
- Where the property factor provides access to alternative dispute resolution services, information on this.*

7.2 When a property factor's in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing."

The Matters in Dispute

The Applicant complains in relation to the following issues:

- (1) The Respondent's failure to adequately maintain two areas of ground adjacent to the Property.
- (2) The Respondent's inadequate response to her complaint including imposing late payment charges.

We deal with both aspects together below.

Background

The Development contains landscaped and planted areas.

To the rear of the Property lies a fenced area which is informally planted with shrubs (hereinafter “the Fenced Area”). It is the site of a steep drop and is kept locked to avoid the risk of accidents occurring.

Adjacent to the Property is a small area planted with shrubs (hereinafter “the Shrub area”). It lies next to the pavement.

The Applicant has complained that the Fenced Area is overgrown and that plants from that area grow into her rear garden. She has complained that the bushes in the Shrub Area overgrow the pavement making passage by pavement users more difficult.

The Respondent maintains the Fenced Area and the Shrub Area in accordance with a Ground Maintenance Specification. The Respondent uses a contractor, known as KENE, to carry out grounds maintenance.

The Applicant has made complaints to the Respondent regarding the Fenced Area and the Shrub Area since 2019. She complained that the areas were overgrown. The Respondent's response had been informal at that time. After discussion, the Respondent had, in 2020, dealt with the two areas to the Applicant's satisfaction. The two areas became overgrown again and she had expressed her concerns to the Respondent that things seemed to have reverted to how they had been in 2020.

The Applicant has withheld payment of the element of the Respondent's charges which related to grounds maintenance. These are £419.81/month for the Development of which her 1/150th share is £2.80/month.

On 28 May 2021 the Applicant set out her concerns in detail in a letter to Mr Bryson. Mr Bryson provided a detailed response on 30 September 2021. The Applicant responded by letter of 24 November 2021 in which she maintained her complaint. The next correspondence appears to have been a further email by the Applicant dated 7 April 2022 in which she sought confirmation that her complaint was being dealt with. There had evidently been some intervening telephone calls. Mr Bryson responded on the same day to say that he would chase up KENE.

Further discussions took place between the parties on 1 July 2022. The Applicant followed up by email of 16 July 2022 in which she complained about a lack of response and requested a copy of the Respondent's complaints procedure. There appears to have been no written response to this. Mr Bryson pointed out at the hearing that the Complaints Procedure was available to the Applicant via the Respondent's website.

At the hearing, Mr Bryson acknowledged that the Applicant's complaints had not been referred to the Respondent's formal Complaints process. He thought that the approach had always been to deal with the complaints informally as it was felt that that would lead to a resolution. He confirmed that the telephone records of the Respondent were kept only for a short time so he could not confirm what efforts had been made to respond to the Applicant by telephone.

While we acknowledge that the Respondent has engaged in some efforts to address the Applicant's concerns, it seems obvious given the content of the Applicant's correspondence

and its prolonged nature that this was a case where the Respondent's formal complaints procedure should have been followed. We consider that the failure to respond adequately to the Applicant's complaints amount to breaches of the Clauses 2.5 and 7.1 and 7.2 of the original Code and the fourth OSP, and Section 7.1 and 7.2 of the revised Code. We have not identified a specific breach of property factor's duties in this regard.

As regards the late payment charges, the Respondent had originally applied charges of £165 to the Applicant's account. At the hearing, the Respondents explained that the late charges had been imposed at a time when the Respondents had understood that they had completed the works required of them to the Applicant's satisfaction and that she had expressed a willingness to make payment. The Respondents had since accepted that the Applicant had remained dissatisfied with the maintenance and had withheld her payments regarding that element in full. They had since agreed to waive their charges and, in the circumstances, we make no finding that there has been a breach of the Code or of property factor's duties in this respect.

As regards the failure to maintain the Shrub Area and the Fenced Area, the Applicant has produced evidence that these areas had become overgrown and that she had had to repeatedly bring the matter to the Respondent's attention. This was not disputed although the Respondent's representatives emphasised that they had liaised with their contractor to try to have maintenance of those areas carried out with a degree of regularity which would prevent them from overgrowing onto the pavement/Applicant's garden. We consider that the Respondent has failed in its property factor's duties in respect of its failure to meet the requirements of the Ground Maintenance Specification in particular the requirements to clear fence lines and to prune shrubs which were overhanging or obstructing paths. It also represents a breach of Section 6.9 of the original Code.

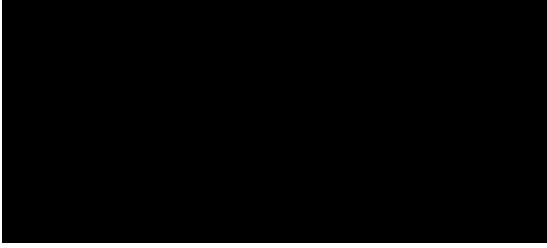
We have not identified any additional breaches of property factor's duties or of the Code.

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. The terms of the PFEO reflect that the breaches were relatively minor but prolonged and are designed to ensure that there is unlikely to be a repeat of the situation. The sum awarded is equivalent to 12 months' payments of the ground maintenance charge.

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.



DATE: 21 August 2023