

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision on Homeowners' Application in terms of Section 19 (1) (a) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") and The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/21/0404

The Property: 34 Hillman Crescent, Paisley, PA3 3FD ("the Property")

The Parties:-

**Mr Andrzej Suwik 34 Hillman Crescent, Paisley, PA3 3FD ("the Applicant"), and
Lloyd Younger Ltd, Midland Centre, Fenwick, KA3 6BY ("the Respondent")**

Tribunal Members:

G McWilliams (Legal Member) and C Jones (Ordinary Member)

Decision

The Respondent has failed to comply with its duties under Section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") in that it did not comply with Sections 1.1a D I, 2.1 and 2.5 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code") and also failed to carry out its Property Factor's Duties in terms of Section 17 (5) of the 2011 Act.

This decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") is unanimous.

The Tribunal considered matters and has determined that, in relation to the Application before it, the Respondent has not complied with the Code and not carried out its Property Factor's Duties. The Tribunal propose to make a Property Factor Enforcement Order ("PFEO") in the following terms:

The Respondent is to make a compensation payment to the Applicant, in the sum of £200.00, within 14 days of the date of issue of the PFEO

Introduction

1. The Respondent is the registered property factor for the Property and it has a duty to comply with the Property Factors Code of Conduct (“the Code”) under Section 14 (5) of the 2011 Act and to carry out its Property Factor’s Duties in terms of Section 17 (5) of the 2011 Act.
2. The Applicant applied under Section 17(1) of the Property Factors (Scotland) Act 2011 (“the 2011 Act”). In his Application the Applicant complained that the Respondent had acted in breach of Sections 1, 2 and 7 of the Code and failed to comply with its Property Factor’s duties in terms of Section 17 (5) of the 2011 Act.

Hearings on 29th April 2021, 24th June 2021 and 2nd December 2021

3. An evidential Hearing proceeded remotely by telephone conference call at 10.00am on 29th April 2021. It continued on 24th June 2021 and concluded on 2nd December 2021. Reference is made to the Notes on the Hearings which took place on 29th April 2021 and 24th June 2021.
4. On 2nd December 2021 the Hearing continued by telephone conference call. The Applicant and the Respondent’s company secretary, Mrs L Murdoch, attended. The Applicant’s partner Ms B Duszkiwicz and the Respondent’s employee Mrs A Toote also attended as observers.

Evidence and Submissions

5. The Applicant and Mrs Murdoch agreed that, after each had taken legal advice following the Hearing on 24th June 2021, the issue of ownership of the area of land, adjacent to the Property where knotweed had been discovered, had still to be determined. They agreed that the issue may take a considerable period of time to resolve and sought that the Tribunal decide upon the Application.
6. Regarding Section 1.1a B d of the Code the Applicant stated that the Respondent’s Statement of Services should include exact details of the areas of land which the Respondent was maintaining on behalf of Homeowners. He then acknowledged that this Section of the Code did not require such details and that the Tribunal’s role is not to make any determinations regarding land ownership.
7. In respect of Section 1.1a D I, and also Section 7.1 of the Code, the Applicant stated that the Respondent’s Statement of Services, which he had been sent, was out of date as it referred to the Tribunal’s predecessor, the Homeowner Housing Panel (“HOHP”). Mrs Murdoch accepted that an old version of the Statement of Services had been sent to the Applicant due to an administrative oversight. The Applicant acknowledged that the Respondent’s Statement of Services referred to procedures and timescales for responses to telephone and written enquiries and complaints.

- 8.** The Applicant further referred to Section 1.1a D m and n of the Code. He had acknowledged that the Respondent's Statement of Services referred to procedures and timescales for responses to telephone and written enquiries and complaints, as stated in paragraph 7 above..
- 9.** Regarding Section 2.1 of the Code, the Applicant stated that the Respondent had provided him with misleading or false information as the Statement of Services referred to the HOHP rather than the Tribunal. The Applicant said that he had "Googled" and ascertained that his Application should be submitted to the Tribunal as the HOHP's successor. This took some time and effort to do.
- 10.** In respect of Section 2.4 of the Code the Applicant stated that he had asked the Respondent to consult with other homeowners, regarding the knotweed issue, on numerous occasions. Mrs Murdoch said that the Respondent, has a procedure for consulting homeowners but has not consulted with other owners on this matter as the issue of ownership of the area of land where the knotweed had been discovered, and responsibility for the knotweed outbreak and necessary remedial works, had not yet been determined. The Applicant also referred to the potential risk of knotweed being discovered in an area where a pylon is being taken down in the development in which the Property is situated. Mrs Murdoch stated that she had liaised with Scottish Power and they were aware of the need to check for possible knotweed in that area. Both the Applicant and Mrs Murdoch acknowledged that this was a new issue which did not fall to be determined by the Tribunal.
- 11.** The Applicant further stated that the Respondent had not responded to complaints within prompt timescales, in breach of Section 2.5 of the Code. He said that the Respondent had not replied to his email of 4th December 2020 until 12th January 2021. He also said that he would have liked an update at least and made the point that if he is ever late with payment of an invoice there is an automatic fine imposed by the Respondent. Mrs Murdoch apologised for the Respondent's delay in this regard. She said that there are two staff, including herself, working in the Respondent's office. She stated that she only works on 3 days each week, was off due to illness in December 2020 and the Respondent's office was closed for two weeks during the Christmas and New Year holiday at that time. The Applicant said that he had not submitted a formal complaint to the Respondent. He said that he lodged this Application after receiving the Respondent's late reply to his email dated 4th December 2020.
- 12.** In respect of Section 7 of the Code the Applicant said the homeowners do not know where to go if they have a complaint, Mrs Murdoch accepted this and said it would be remedied. It was agreed by the parties that this complaint was more relevant to the Applicant's complaint under Section 2 of the Code.
- 13.** Regarding the Respondent's Property Factor's Duties, the Applicant again raised the issue of land ownership and responsibility for maintenance of the disputed areas and also stated that the Respondent had failed to carry these out as it had not notified other homeowners of the knotweed issue at the

Property and the risk of it spreading to other properties. He said that the Respondent should have acted in the interest of all the homeowners by notifying them and asking if they wanted a survey carried out. Mrs Murdoch said that the Respondent had not contacted other homeowners regarding this matter as ownership of the area of land where knotweed has been discovered, and responsibility for the knotweed outbreak and necessary remedial works, has not yet been determined.

14. In summing up the Applicant said that the Respondent had not adhered to their timescales for responding to complaints, had not acted when notified of the knotweed and referred again to the ownership issue, saying that the Respondent had not accepted maps attached to title deeds for the Property.
15. Mrs Murdoch submitted that the Respondent had sent an older version of their Statement of Services to the Applicant. She said that the Respondent was late in replying to the Applicant's email of 4th December 2020. She stated that the Respondent had not received any complaints from other homeowners in the relevant development.
16. The Applicant added that the Respondent had responded timeously to all of his other communications.

Findings in Fact and Law

17. The Applicant and his partner have owned the Property since May 2018.
18. The Respondent performs the role of property factor of the development within which the Property is situated.
19. The Respondent sent the Applicant a Written Statement of Services setting out the services and works which may be required to be carried out in fulfilment of their role as property factor.
20. The Respondent's Written Statement of Services, setting out details of services and works that may be required to be carried out, does not require to state exact details of land under management.
21. The Respondent's Written Statement of Services, which was sent to the Applicant, erroneously referred to the HOHP, the Tribunal's predecessor.
22. The Respondent's Written Statement of Services, sent to the Applicant, referred to procedures and timescales for responses to telephone and written enquiries and complaints.
23. The Respondent has procedures for consulting with homeowners but has not consulted with other owners regarding the knotweed issue.
24. The Respondent did not reply to the Applicant's email of 4th December 2020 until 12th January 2021.

25. The Respondent has not acted in breach of Section 1.1a B d of the Code.
26. The Respondent has acted in breach of Section 1.1a D I of the Code.
27. The Respondent has not breached Section 1.1a D m and n of the Code.
28. The Respondent has acted in breach of Section 2.1 of the Code.
29. The Respondent has not acted in breach of Section 2.4 of the Code.
30. The Respondent has breached Section 2.5 of the Code.
31. The Respondent has failed to carry out their Property Factor's duties.

Reasons for Decision

32. The Tribunal considered and weighed all of the evidence, oral and written, and submissions.
33. The Applicant acknowledged that Section 1.1a B d of the Code does not require the Respondent to state exact details of land under management. The parties agreed that ownership of the area of land, adjacent to the Property, where knotweed had been discovered, has not yet been determined. The Applicant acknowledged that the Respondent's Statement of Services referred to procedures and timescales for responses to telephone and written enquiries and complaints, in compliance with Section 1.1a D m and n of the Code. Accordingly, the Tribunal finds that the Respondent has complied with their duties under Section 1.1a B d, Section 1.1a D m and n.
34. The Respondent accepts their breaches of Sections 1.1a D I, and Section 2.1 of the Code. They erroneously referred to the HOHP in their Written Statement of Services sent to the Applicant. Accordingly, the Tribunal finds that the Respondent has not complied with the terms of Sections 1.1a D I, and Section 2.1 of the Code.
35. Section 2.4 of the Code states that the Respondent should have a procedure to consult with homeowners and seek written approval before providing work or services. The Respondent does have a procedure for consulting with homeowners and has not breached the Code in this respect. Accordingly, the Tribunal finds that Respondent has complied with their duties under Section 2.4 of the Code.
36. The Respondent also accepts their breach of Section 2.5 of the Code. They did reply late to the Applicant's email of 4th December 2020. The Tribunal therefore finds that the Respondent has acted in breach of Section 2.5 of the Code.

37. Regarding the Respondent's Property Factor's Duties in relation to management of common land owned by homeowners, their position is that they has not contacted other homeowners as the issue of ownership of the area of land where knotweed has been discovered, and responsibility for the knotweed outbreak and necessary remedial works, has not yet been determined. The Tribunal finds that the Respondent's decision not to follow their procedure for informing homeowners of the knotweed issue, at this time, is not in compliance with their Property Factor's duties. The Tribunal finds that, notwithstanding that determination of the ownership issue, and responsibility for such works, is pending, it is reasonable, and appropriate, in the circumstances to expect the Respondent to notify homeowners of the presence of Japanese knotweed in the vicinity of their homes and also inform them of the land ownership issue, given the potential impact, in practical and monetary terms, upon them. Accordingly, the Tribunal finds that the Respondent has failed to comply with their Property Factor's Duties.
38. As the Tribunal determines that the Respondent has acted in breach of the Code and failed to comply with their Property Factor's Duties, they will make a proposed Property Factor Enforcement Order ("PFEO").
39. Having considered and weighed all of the evidence and submissions, the Tribunal finds that a proposed PFEO in an amount of £200.00 is proportionate to compensate the Applicant for the inconvenience, stress and frustration which he has suffered as a result of the Respondent's breaches of the Code and their Property Factor's Duties.

Observation

40. The Tribunal expect that the Respondent has now amended their Written Statement of Services to include reference to the Tribunal rather than the HOHP, and that all client homeowners have been provided with an updated copy of the Statement.

Appeal

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 within thirty day of the date the Decision was sent to them.

G. McWilliams, Legal Member

22nd February 2022