

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017

Chamber Ref: FTS/HPC/LM/18/0605

Re: Inverbakie Drive, Invergordon, IV18 0HZ ("the Development")

The Parties:-

Ms Sandra Kennedy, 84 Inverbakie Drive, Invergordon, IV18 0HZ ("the Homeowner")

Highland Residential, 94-104 High Street, Invergordon, IV18 0DL ("the Factor")

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr Mike Scott (Ordinary Member)

Decision

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with section 2.1 of the Property Factor Code of Conduct ("the Code").

The decision is unanimous.

Background

1. By application received in the period from 14th March to 24th May 2018 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with sections 2.1, 2.2 and 2.4 of the Code.
2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence to and from the Factor, photographs, written statements of services, and Land Certificate ROS8807.

3. By Minute of Decision dated 31st May 2018, a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.
4. On 5th July 2018, Notice of Referral and Hearing was sent to the Parties. A hearing was set down for 22nd August 2018.
5. On 18th July 2018, an email was sent to the Tribunal from Martin Rattray, informing the Tribunal that he had accompanied the Homeowner to meetings with the Factor and outlining the issues discussed.

Hearing

6. A hearing took place at 10.00 on 22nd August 2018 at Dingwall Community Centre, Tulloch Street, Dingwall, IV15 9JZ. The Homeowner was present. The Factor was represented by Sam Cribb, Business Development Manager, Colin MacLeod, Factoring Officer and Miriam Blain, Factoring Co-ordinator.
7. The Tribunal raised the following preliminary points:
 - (1) Clarification of the relationship between the Factor and Albyn Housing Society ("AHS"): Ms Cribb said that Highland Residential is a wholly owned subsidiary of AHS, set up and registered in 2017. Previously, factoring services were provided by Albyn Enterprises Limited, which was set up in April 2015 following a review of factoring services.
 - (2) Clarification of the properties within the Development: There are 52 houses in the Development – numbers 52 to 103 – there is a mix of privately owned and AHS owned properties. The garages within the Development are owned by AHS and leased to tenants, owners and others.

Evidence and Representations

The Tribunal then dealt with each of the Homeowner's complaints in turn.

Failure to comply with section 2.1 of the Code

8. Section 2.1 states: *You must not provide information which is misleading or false*

The Homeowner said on one occasion she was provided with a statement showing a breakdown of costs and she noticed that AHS tenants were paying less than homeowners for factoring services. Some of the homeowners signed a petition regarding this matter. They were told they could go and discuss this with the Factor, then they were told they had to create a residents' association before the Factor would discuss matters with them as a group. With regard to the matter of tenants paying less, the Factor informed the Homeowner that AHS paid part of the factoring charge for its tenants; however, other neighbours were told something different. A tenant provided the Homeowner with a letter in this regard that she copied and showed to other homeowners, including a Mr Sutherland. Mr Sutherland went to the Factor and they denied all knowledge

of the letter, saying it had been sent out by mistake. In short, the Homeowner said the Factor provides different information to everyone.

The Homeowner said she was charged by the Factor for cutting down trees out the back of her property a few years ago. The Factor said the trees had been cut but they had not. More recently, the Factor said trees and shrubs had been planted, but she has never seen any new planting in the Development. She had written to the Factor about the trees by letter dated 14th April 2018. The Homeowner said she had been given false or misleading information in relation to the trees behind her property. She and other homeowners had asked that the trees be cut, as they have reached a height that is causing stress to the Homeowner, particularly on windy days. Initially, the Factor told the Homeowner that the land on which the trees are situated belonged to Highland Council. They then said the land belonged to the distillery. It was only when this application was made that the Factor said the land belonged to AHS.

The Homeowner said that the Factor had issued invoices that showed a significant difference between what was being charged for and the actual work done. The Factor said a meeting would be arranged to discuss matters but this was not done. The Factor had said there was one meeting with Councillor Rattray and that matters were resolved, but there had actually been two meetings and no resolution.

The Homeowner said the Factor had charged for gritting the previous year when no gritting was carried out. On other occasions, the gritters came out when gritting was not required. The Homeowner said there was no reason the gritters could not get to the Development as the main roads were always gritted. There was an occasion when it was sunny and the homeowners were charged for gritting. The suppliers were charging for a service that was not being provided. The Factor had promised white grit would be used but it was always brown grit that was used. The Homeowner had spoken to Ms Blain on several occasions about this.

The Homeowner said homeowners had now been informed that the land on which the garages are sited is amenity ground. There are 29 garages, 23 of which are rented out. Some of the garages are rented to individuals that do not live in the Development, or even in Invergordon. There are drains outside the garages and homeowners have been charged a share of clearing the drains. The drains had been neglected by AHS until they were badly blocked. The Homeowner does not agree that this is amenity ground. There was to be a meeting with staff from AHS to discuss the garages and surrounding ground but it did not go ahead as a suitable time could not be found. The Homeowner said she can do nothing on the ground around the garages and it cannot be amenity ground. She objects to having to pay for upkeep of this area when drivers outwith Invergordon are using the area.

The Homeowner said that, around two years ago, a manhole cover had been broken and the homeowners had to pay to replace it. The Homeowner contacted the contractor and was told that the grass cutting machine had driven

over the manhole cover, causing the damage. The Homeowner got an abrupt phone call from a member of AHS asking why she had contacted the contractor.

On behalf of the Factor, Ms Cribb said the Factor has attempted to explain the matter of how homeowners and tenants are charged to homeowners. All properties are charged a 1/52 share of service and maintenance charges. AHS are charged a 1/52 share for each of their properties. Whether AHS subsidise that amount is nothing to do with the Factor. Ms Blain said she had seen the letter provided by Mr Sutherland. The letter contained redacted information and she was unable to comment upon it. Although the Factor shares an office with AHS, the Factor would not have access to information on the charges paid by tenants.

In relation to the matter of trees being cut down, Ms Cribb said she was unable to comment on anything that had taken place before 2015, as the factor was AHS at that time. More recently, there had been communication about ownership of the trees. There was a question over the boundary. On initial review, they could not identify the boundary. There is a community wood and it was thought that the trees were outwith the Development boundary. There was discussion with the community and some further plans were obtained, and it is now clear that the trees are within the Development boundary. In response to questions from the Ordinary Member as to whether there had been any maintenance of the trees, Ms Cribb said a survey had been carried out and no maintenance was necessary. They are mature oak trees. Ms Cribb said they would uphold the Homeowner's complaint as they had previously missed the fact that the trees were within the Development. They would now inspect and maintain the area. In response to questions from the Legal Member as to what checks were carried out, Ms Cribb said they went over this matter a number of times and there was a question mark over the boundary. They got hold of different plans from AHS that showed the trees were outwith the boundary. British Aluminium had asked for a change to the boundary. When asked if corrective conveyancing had been carried out, it was said on behalf of the Factor that it must have been. Mr MacLeod said that, as part of the Factor's grounds maintenance, branches had been removed. There had also been some consultation in 2016 concerning the removal of a large dead tree in another part of the Development, but tree maintenance had been rejected by the homeowners.

With regard to the differences in invoices, Ms Blain said the Factor had facilitated invoices from AHS in this regard, by passing them on to the Homeowner. Ms Cribb said the Development was being factored by AHS at the time these invoices were sent out. The Factor put the Homeowner in touch with AHS but was unaware of what response was given. The Ordinary Member questioned whether AHS, Albyn Enterprises and Highland Residential were all part of the same organisation. Ms Cribb said Highland Residential was a subsidiary organisation of AHS. She said that, despite meeting with the Homeowner, she was unaware this matter had not been sorted out. At this point, the Homeowner said that she had been dealing with Ms Blain in this regard. The representatives of the Factor continued to say that they had been merely 'facilitating' the matter.

In response to the complaints about gritting, Ms Cribb said the Homeowner had not come back to the Factor to clarify the dates that she was concerned about. It had previously been the case that the Development was gritted on a forecast basis. Even if the contractors travel to the site and find it does not require gritting, there would still be a cost. Sometimes the gritting lorry had been unable to get to the Development due to the weather. There had been dissatisfaction with the gritting service. Following consultation, there was now only a gritting bin service provided. There had been queries from the Homeowner on the gritting costs. The costs are budgeted in advance on an annual basis and will be credited if not incurred. There will be a service review at the start of the year, at which time this issue will be addressed. Ms Cribb said the Factor had always specified white grit to the supplier. Ms Blain said she did not recollect discussing this with the Homeowner, but she confirmed that the supplier had been informed that they must supply white grit.

With regard to the garages, Ms Cribb said they are owned by AHS, who maintain the garages, but the land around the garages is amenity ground. There are bin stores situated on that land, and access to roads and a park. There is a public right of way and a recreational area. The Factor took advice from a solicitor in August 2016, and the solicitor advised that the area around the garages was an amenity area. In response to questions from the Legal Member, Ms Cribb was unable to say whether the rent from the garages is used for upkeep. The rent goes to AHS.

In response, the Homeowner said she does not use the area around the garages. It is a dead-end. Her bins are not kept in that area. It is not an amenity area that is available to her. She does not have to go near the garages to get to the path. Prior to 2016, no charges were imposed in relation to the area around the garages. It was only when the drains became blocked due to lack of maintenance that the homeowners were charged. Ms Blain said AHS had previously absorbed the costs for the maintenance of this area. When asked by the Legal Member what had changed, Ms Blain said she did not know as she had no involvement with the area previously.

Ms Cribb said that the manhole cover was not broken by the grass-cutting contractor, as it was before the grass-cutting season started, and there was no contractor on site when the manhole cover was damaged.

Failure to comply with section 2.2 of the Code

9. Section 2.2 states: *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)*

The Homeowner said she had attended a meeting with Ms Blain and another woman. She took along the letter she got when she bought the house that stated she would only have to pay for grass-cutting. Ms Blain told her it was not a legal document and said she would have to pay for whatever the Factor decided to provide and if she was not happy, she should seek legal advice. The

Homeowner said she felt intimidated by Ms Blain, and that she was extremely upset. She felt she had an agreement with AHS and they then added extra services and costs. The Homeowner said she left the letter with Ms Blain and said they would have to take her to court. She had budgeted at the time of buying the house. She would not have bought the house had she realised how much she would have to pay. The factoring sums were increasing every year.

On behalf of the Factor, Ms Cribb said she was the other woman at the meeting. Councillor Rattray was also there. Ms Cribb advised the Homeowner that she needed legal guidance from a solicitor who could review the letter and the Deed of Conditions in the title deeds. Ms Cribb said she could not remember exactly what the letter said, but it was unfortunate if it did only mention grass-cutting. The Deed of Conditions is clear on the maintenance of amenity areas. That is what service charges cover. It had been the case that AHS were subsidising homeowners in the past. A letter was sent out to explain the situation. Ms Cribb said she was surprised that there was an accusation of abusing or intimidating the Homeowner. This was not raised at the time. Ms Cribb said they were simply trying to explain and advised the Homeowner to take legal advice. This was followed up with a letter. She denied that the Homeowner had been told that the Factor would decide what services would be provided.

Ms Blain said she felt every conversation and meeting was polite and professional. She was shocked at the Homeowner's complaint in this regard. The mention of legal advice was not meant to be a threat; it was for the Homeowner's assistance.

There was some discussion as to whether the Factor had refused to meet with homeowners as a group unless they formed a residents' association, as alleged by the Homeowner. The representatives for the Factor denied this was the case. Responding to questions from the Legal Member, Ms Cribb said they would welcome a meeting with homeowners even without a residents' association.

There was discussion about a situation with rats in the Development. The Homeowner said the Factor refused to deal with this, and said it would only be dealt with if a tenant complained. The evidence on behalf of the Factor was that this was before they became involved, and, as Factors, they have no dealings with tenants. The Homeowner indicated that she had written to the Factor on 2nd March 2016, mentioning the problem with rats. The Factor was asked by the Tribunal members whether, given that they are all part of the same organisation, they could look back at correspondence and documents sent before Highland Residential came into being. Ms Cribb responded that the Homeowner had failed to give specific dates when raising issues, and they are dealing with over a thousand homeowners.

Failure to comply with section 2.4 of the Code

10. Section 2.4 states: *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 emergencies)

The Homeowner said that homeowners were only consulted over the matter of the dead tree and the drains. Otherwise, they do not get consulted on anything. She said she felt the roads and paths should be the responsibility of AHS. She has paid significant sums over the years and does not know where all the money has gone. She has regularly asked for more information. The estate is a disgrace, particularly compared to the adjacent council estate, which is well kept.

On behalf of the Factor, Ms Cribb said there is a procedure that satisfies this section of the Code. There is no threshold sum for the Development and all works go to consultation. There has to be agreement before work can be carried out.

The Legal Member asked why the Homeowner had been told that the Tenements (Scotland) Act 2004 was relevant, and signposted to information about tenements, when her property is not a tenement. Ms Cribb said the Factor had been told at training that this was a point of reference for people to help them understand burdens.

In summary, Ms Cribb said that she felt the Factor had tried to accommodate the Homeowner and attend to areas raised.

Findings in Fact

11.
 - i. The Homeowner is the heritable proprietor of the Property registered in the Land Register for Scotland under Title Number ROS8807.
 - ii. The Factor has been a registered property factor since 6th April 2017. The Factor's duty under section 14(5) of the Act to comply with the Code arises from that date.
 - iii. The Factor derives their authority to act for the properties within the development from Deed of Declaration of Conditions by Albyn Housing Society Limited recorded in the General Register of Sasines for Ross and Cromarty on 10th December 1987.
 - iv. When the Homeowner purchased her home in 2007, she signed a document to the effect that she would have to pay for grass-cutting services. A letter dated 20th December 2007 was sent to her by AHS, stating that she would have to pay for 'the cost of common landscaping'. The Homeowner did not expect to have to pay for any further services. She has been in dispute with the Factor in recent years as she does not believe the Factor is entitled to charge her for any other services.

- v. The Factor is entitled to charge each proprietor a proportionate share of the cost of maintaining amenity areas serving the dwellinghouses in the Development by means of an annual service charge subject to review periodically to cover the actual cost of maintaining the amenity areas, as set out in paragraph 2(h) of the Deed of Declaration of Conditions.
- vi. Amenity areas are defined in the Deed of Declaration of Conditions at paragraph 1(4) as 'all areas of cultivated, grassed, landscaped or recreational ground within the Development (including play areas, and areas reserved for sport and other activities) which are provided for the benefit of all residents of the Development.'
- vii. The Homeowner has complained to the Factor about various matters relating to the factoring service over recent years, including dissatisfaction with the gritting service, poor standard of grass-cutting, lack of maintenance of roads and parking areas, business vehicles parked in the Development, over-charging for services, charging for services that were not received, and wrongly charging for services.
- viii. Twenty-one homeowners in the Development signed an undated letter from the Homeowner to the Factor complaining about an increase in service charges following notification on 1st April 2015 that charges would increase.
- ix. Following dissatisfaction with the factoring services in the Development, a dedicated factoring service, Albyn Enterprises, was set up, with the change taking effect from 1st April 2015.
- x. The Homeowner met with the Factor to discuss matters on 5th November 2015.
- xi. The Factor's Ms Blain wrote to the Homeowner on 19th November 2015 to follow up on discussions from the meeting of 5th November. Ms Blain stated that the trees behind the Homeowner's house belonged to The Highland Council.
- xii. By letter dated 2nd March 2016, the Homeowner made a formal complaint to the Factor about services and charges.
- xiii. By letter dated 9th March 2016, the Factor's Ms Blain wrote to the Homeowner responding to the Homeowner's concerns.
- xiv. On 1st April 2017, the factoring services were transferred from Albyn Enterprises to Highland Residential, a subsidiary organisation of AHS.
- xv. The Factor wrote to the Homeowner on 24th November 2017 stating that homeowners were responsible for a share of unblocking the drains around the garages, and enclosing a voting slip for response.

- xvi. The Factor wrote to the Homeowner on 28th November 2017 stating that the gritting service would change so that only grit bins would be provided.
- xvii. By letter dated 14th April 2018, the Homeowner complained to the Factor about false and misleading information being provided, differences in service charges, gritting services, trees and shrubs, maintenance and upkeep of the area around the garages, intimidating and threatening behaviour by the Factor and procedures for consulting with homeowners.
- xviii. By letter dated 20th April 2018, the Factor's Ms Cribb responded to the Homeowner stating that matters would be looked into and requesting further information. Ms Cribb wrote that the complaint about intimidating and threatening behaviour would not be looked into as it was outwith the time allowed within the Factor's complaints procedure.
- xix. Ms Cribb wrote to the Homeowner by letter dated 14th May 2018. The Homeowner's complaints were not upheld with the exception of the matter relating to ownership of the trees at the back of the Development. Ms Cribb wrote that, having reviewed the title deeds, she was satisfied that the trees were on land that is common to the Development.

Determination and Reasons for Decision

- 12. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

Failure to comply with section 2.1 of the Code

- 13. The Tribunal found that the Factor had failed to comply with this section of the Code, in relation to the matter of the ownership of the land on which the trees are situated. The Tribunal took account of the false and misleading information provided to the Homeowner over a period of years, as regards the boundaries of the Development. The Tribunal had before it a letter from the Factor dated 19th November 2015, stating that the trees belonged to The Highland Council. The Tribunal accepted the evidence of the Homeowner that various different statements had been made as to ownership of the land where the trees are sited. In her letter dated 14th May 2018, Ms Cribb mentions 'misunderstanding as to the owner of the trees'; however, having reviewed the title deeds, she is satisfied that the area on which the trees are planted forms part of the development. Despite the explanation proffered by the representatives of the Factor at the hearing, to the effect that extensive investigations and possibly corrective conveyancing had been carried out, no compelling evidence was provided to the Tribunal to substantiate this, or to mitigate the fact that false and misleading information was provided on several occasions to the Homeowner.

The Tribunal did not find that false or misleading information had been provided by the Factor in relation to the other areas of complaint raised by the Homeowner under this section. The Tribunal appreciated the Homeowner's

concerns about having to pay for additional services to those mentioned when she purchased her home; however, the Deed of Declaration of Conditions clearly provides that all homeowners will pay a proportionate share of the cost of maintaining amenity areas. While the Tribunal appreciated the concerns and frustration of the Homeowner, there was a lack of evidence to substantiate the claims of incorrect charging or services charged for and not provided. The Factor is not concerned in determining the amount of service charge paid by tenants, and could not be expected to provide such information to homeowners. It is correct that costs should be split between the 52 properties.

Failure to comply with section 2.2 of the Code

14. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The Tribunal accepted the Homeowner's evidence that she felt upset at the meeting with the Factor's representatives; however, that does not equate to abusive, intimidating or threatening behaviour by the Factor.

Failure to comply with section 2.4 of the Code

15. The Tribunal did not find that the Factor had failed to comply with this section of the Code. The Factor has a procedure for consultation as required by the Code.

Observations

16. The Tribunal was concerned by the attitude of the Factor's representatives. It matters not to a homeowner what particular organisational structure a factor has chosen to adopt. As far as this Homeowner is concerned, Albyn Housing Society have provided factoring services over the years, whether under their own name, or that of Albyn Enterprises, or Highland Residential. It is not acceptable for the Factor to hide behind a new structure and dismiss the concerns of the Homeowner because of a structural change. The Factor would do well to adopt a more understanding attitude towards homeowners. It is clear that there have been significant concerns on the part of the Homeowner and other homeowners about the factoring services provided to the Development over the years, and there was little evidence of the exceptional customer service mentioned in the Factor's letter of 14th May 2018.

There would seem to have been a lack of clarity over the core services that are provided. While the Tribunal did not find this to be false or misleading information, more could have been done by the Factor over the years to clarify what services were to be provided.

In relation to the land surrounding the garages, the Tribunal was not persuaded that this constitutes an amenity area, as defined in the Deed of Declaration of Conditions. It is difficult to see how this area is provided for the benefit of all residents of the Development if the majority of the garages are rented out to people outwith the Development. The Tribunal accepted the evidence of the Homeowner that she has little or no need or opportunity to use the garage area as an amenity area, and that she can access adjacent areas without passing

through this area. The Tribunal noted that the information given by the Factor in this regard resulted from legal advice, therefore, the Tribunal did not find that the Factor had given false or misleading information; however, homeowners would be well advised to take their own independent advice on this matter.

Proposed Property Factor Enforcement Order (PFEO)

17. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.
18. The Tribunal proposes to make a PFEO requiring the Factor, within 21 days of intimation of the PFEO, to pay the sum of £150 from their own funds and at no cost to the Development homeowners, in order to compensate the Homeowner for the distress, frustration and inconvenience caused as a result of the Factor's failure to comply with the Property Factors Code of Conduct

Right of Appeal

19. 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.

Helen Forbes

Legal Member and Chairperson

22nd August 2018