



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/20/0699

23 Hillside, Houston, Renfrewshire, PA6 7NT ('the Property')

The Parties:

Gerald King, residing at 23 Hillside, Houston, Renfrewshire, PA6 7NT ('the Homeowner')

Macfie & Co, 5 Cathkinview Road, Glasgow, G42 9EA ('the Factor')

Committee members:

Jacqui Taylor (Chairperson) and Helen Barclay (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has not failed to comply with sections 6.3 and 6.6 of the Code of Conduct and the Property Factor duties.

The decision is unanimous.

Background

1. The Homeowner purchased the property 23 Hillside, Houston, PA6 7NT on 17th September 1987.
2. Macfie & Co were registered as a property factor on 7th December 2012. Macfie & Co took over the factoring of the development of which the Property forms part in January 2013.
3. By application dated 24th February 2020 the Homeowner applied to the First-tier Tribunal for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also the following Property Factor's duties.
 - Section 6: Carrying out Repairs and Maintenance.

Sections 6.3 and 6.6

4. The application had been notified to the Factor.
5. By Notice of Acceptance by Martin McAllister, Convener of the First-tier Tribunal, dated 10th November 2020, he intimated that he had decided to refer the application (which application paperwork comprises documents received between 27th February 2020 and 27th July 2020) to a Tribunal.
6. An oral conference call hearing by conference call took place in respect of the application on 8th January 2021.

The Homeowner attended on his own behalf.

The Factor was represented by Brian Fulton, Property Manager and John Walker, Director.

6.1 At the beginning of the hearing the parties confirmed and agreed the following facts, which were accepted by the Tribunal:-

- 6.1.1. The Homeowner purchased the Property 23 Hillside, Houston on 17th September 1987. His title is Land Certificate REN43463.
- 6.1.2. The Property forms part of a development of 134 houses, known as Hillfoot and Hillside, Houston. The development is delineated red on the Supplementary Title plan that forms part of Land Certificate REN43463.
- 6.1.3. The Deed of Conditions by O'Brien Properties Limited registered under title REN43463 on 24th October 1984 defines the common parts of the development and contains provisions for a Residents Association and Factor.
- 6.1.4. Part of the development is subject to a Tree Preservation Order by the County Council of Renfrew recorded GRS (Renfrew) 28th April 1966, which contains conditions affecting trees or groups of trees (including prohibitions against cutting down, topping, lopping, wilful destruction thereof).
- 6.1.5. The Constitution of the Hillside and Hillfoot Residents Association is dated May 2012. The last AGM was held in 2018. The Residents Association is inactive.

6.2 The details of the application and the parties' written and oral representations are as follows:

Code of Conduct Section 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.

The Homeowner's complaint: He had asked the Factor (by letter dated 1st October 2014) to show why they appointed a contractor (Ayrshire Tree Surgeons) to carry out work without a competitive tendering exercise process. The Residents Association

Constitution specifies that anything over £500 must involve the residents with their say and permission.

His letter of 1st October 2014 was in the following terms:

'....You have stated in your letter of 25th September 2014, that the Ayrshire Tree Works Report costing all residents of HSHF a total of £840, was a decision taken by the HSHF Residents Committee, to go ahead with this cost at a committee meeting held at the Carrick Centre on 25th February 2014.

May I remind your company and the HSHF Residents Committee that a mandate for anything over £500 has to be submitted to the residents for approval and show a selection process of 3 tenders for residents permission. This has clearly not been done. I was at the AGM in May and it was not discussed, nor a vote taken on this. If you check your minutes of the meeting at the AGM, there is no mention of Ayrshire Tree Report.

It clearly states in your company's book of services that the process has to be adhered to according to the Code of Conduct for Property Factors (Scotland) Act 2011 and in our own HSHF Constitution.

Should these procedures not be adhered to then I will be deducting these costs from my quarterly common charges invoice.

Just a note as a previous past chairperson, this section of woodland area behind Hillside has an annual survey in place every year as a TPO area by Renfrewshire Council. Who will notify the committee if any work is required.

So I confirm that the cheque of £19.32 that I have submitted to Macfie & Co can be processed.

I have also attached my previous correspondence to you regarding this matter.'

Mr King explained that since the Factor had been appointed in January 2013 they have just gone ahead with works that cost over £500 and they have not asked the residents to vote to approve the proposed expenditure.

Mrs Barclay asked Mr King if he has specifically asked the Factor to show how and why Ayrshire Tree Surgeons were appointed as contractors. After a short adjournment Mr King referred the Tribunal to his email to the Tribunal administration dated 8th May 2020.

The Factor's response:

Mr Fulton explained that the Residents Association had obtained a report by the arborist Ian Murrat. Ian Murrat had obtained quotations for the works required and he had carried out the tendering process, this was confirmed in the letter they produced dated 17th December 2013.

He explained that they have tended to instruct Ayrshire Tree Surgeons as they have carried out work on the development before and their work is considered to be satisfactory. He produced a copy of a letter the Factors had sent to the residents of the development dated 21st December 2017 which explained that they intended to instruct Ayrshire Tree Surgeons on 15th January 2018 and would proceed unless a majority of the residents objected.

The Tribunal's Decision:

The Tribunal determined that the Factor has not breached section 6.3 of the Code of Conduct. Mr King has not provided the Tribunal with any evidence that he asked the Factor to show how and why Ayrshire Tree Surgeons were appointed as contractors. Mr King's letter to the Factor dated 1st October 2014 did not ask the Factor to show how and why Ayrshire Tree Surgeons were appointed. The email of 8th May 2020 that Mr King referred the Tribunal to was not an email addressed to the Factor, it was an email to the Tribunal Administration.

Code of Conduct Section 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.

The Homeowner's complaint: Mr King explained that no quotations had been provided for works over £500 and the Factor had not kept him up to date properly.

The Factor's response: Mr Fulton explained that quotations are obtained as required. All invoices are available on request. He does not recall Mr King asking for estimates to be provided.

The Tribunal's Decision:

Section 6.6 of the Code of Conduct requires the Factor to provide tendering documentation if requested. Mr King had not provided any evidence that he had asked the Factor to provide copies of the tendering documents. Accordingly, the Tribunal found that the Factor had not breached section 6.6 of the Code.

Alleged Breach of Property Factor Duties:

The Homeowner's first complaint: The Factor has failed to comply with the title deeds.

Mr King explained that the complaint is that the Factor did not take a vote from the residents on expenditure exceeding £500. Mrs Taylor asked him to advise the Tribunal of the section of the Title Deeds that requires the Factor to take such a vote. He accepted that there was no such provision in the Title Deeds and the provision is contained in the Residents Association Constitution.

The Factor's Response:

Mr Fulton advised that there is no provision within the title deeds that requires the Factor to take a vote from the residents on expenditure exceeding £500.

The Tribunal's Decision:

The Tribunal determined that there is no provision within the Title Deeds that requires the Factor to take a vote from residents on expenditure exceeding £500.

The Homeowner's second complaint: The Factor has not complied with instructions from the title deeds that for any proposed expenditure over £500 the residents must be informed and three tenders quotations must be given at all times to all residents to accept or reject work before it commences. He explained that since Macfie & co became their factors, up to the present day they have never complied with residents title deeds in this matter. Mrs Taylor also asked Mr King to point out to the Tribunal the sections of the Title Deeds that require the Factor to inform residents where expenditure over £500 is proposed and requires three quotations to be provided to residents before they decide to accept or reject the work. Mr King accepted that there was no such provision in the Title Deeds and the provisions are contained in the Residents Association Constitution.

The Factor's Response:

Mr Fulton advised that there is no provision within the title deeds that requires the Factor to inform residents where expenditure over £500 is incurred and there is also no requirement to provide three quotations to residents before they decide to accept or reject the work.

The Tribunal's Decision:

The Tribunal determined that there is no provision within the Title Deeds that requires the Factor to inform residents where expenditure over £500 is proposed or requires three quotations to be provided to residents before they decide to accept or reject the work.

The Homeowner's third complaint: There has never been any paper voting by residents regarding any large expenditure on behalf of Hillside and Hillfoot Residents (134 properties).

The Factor's Response:

Mr Fulton acknowledged that the Written Statement of Services provides that if the anticipated cost of repairs or maintenance exceeds £600 plus VAT the works will only be carried out when the work has been approved by a majority of the owners, after submission of an estimate or estimates by the Factor and the Factor has been placed in funds by the owners to the full amount of the estimated costs. He confirmed that they have in the past obtained competitive tenders for works carried

out to trees and play equipment. He directed the Tribunal to copies of letters he had produced (4th September 2013, 21st December 2017, 23rd July 2018, 20th March 2019, 23rd January 2020, 7th April 2020) where the Factors have advised the residents of the proposed works and explained that the works will not proceed if they receive objections from a majority of the residents.

The Tribunal's Decision: The Tribunal determined that Mr King has not provided the Tribunal with evidence that the Factor is under a property factor duty to carry out paper voting by residents regarding any large expenditure. The Tribunal acknowledged that the Written Statement of Services provides that if the anticipated cost of repairs or maintenance exceeds £600 plus VAT the works will only be carried out when the work has been approved by a majority of the owners, after submission of an estimate or estimates by the Factor and the Factor has been placed in funds by the owners to the full amount of the estimated costs. The Tribunal accepted that the copies of the letters provided by the Factor dated 4th September 2013, 21st December 2017, 23rd July 2018, 20th March 2019, 23rd January 2020 and 7th April 2020 show that the Factor has in the past advised the residents of the proposed expense and explained that they will only proceed if they do not receive objections by a majority of the residents.

The Homeowner's fourth complaint: There has been no Residents Association AGM for 2 years.

The Factor's Response: Mr Fulton explained that the Residents Association is responsible for arranging the AGM and the Factor is not under a duty to arrange an AGM.

The Tribunal's Decision: The Tribunal acknowledged that the Residents Association Constitution states that an AGM will be held in May each year, at which time the election of the Chairperson, Secretary, treasurer and appointment of independent auditors shall take place. The Tribunal determined that the Factor is not a party to the Residents Association Constitution and is under no duty to arrange the Residents Association AGM. This is a matter for the Residents Association.

The Homeowner's fifth complaint: On 14th January 2020 between 10.30am and 10.45 Mr King received two mobile calls from Mary Forbes of Macfie and co. She asked if he would pay the outstanding amount of £55.24, to which he refused as he was in dispute with their company. On the second mobile call Mary Forbes said to him that she would not waste her time in going to court for £55.24. Within 2 weeks he had received sheriff Court papers for non payment of this amount. Mr King received final reminders for non payment, even though his cheque has been sent to Macfie & Co and the funds had already been taken from his bank account.

The Factor's Response: Mr Fulton explained that the Factors are under a duty to recover debts.

The Tribunal's Decision: Mr King has not established a breach of a property factor duty.

The Homeowner's sixth complaint: The original Residents Association Constitution had been changed by committee members without majority vote and Macfie & Co accepted this. The change to the Constitution was to increase the level of expenditure requiring prior authorization to £600. Mr King acknowledged that he had not provided the Tribunal with a copy of the amended Constitution.

The Factor's Response: Mr Fulton explained that the Constitution of the Residents Association is published on their website and it still shows a figure of £500 for expenditure that requires prior authorization.

The Tribunal's Decision: The Tribunal were unable to make a determination as Mr King has not provided evidence that the Constitution has been changed or that the change referred to by Mr King would be a breach of a property factor duty.

The Homeowner's seventh complaint: Lack of maintenance at boundary lines. Mr King explained that in the past there had been trees that had been overhanging from the common area of the development into his garden. The Residents Committee did not agree to having maintenance carried out to the trees so he ended up paying for the trees to be cut back privately.

The Factor's Response: Mr Fulton explained that the Factor had not received any requests for the work to be undertaken. He explained that as the wooded area is subject to a Tree Preservation Order, if works are required he has to apply to the Council for consent. He tends to have the tree maintenance work attended to during the period November to March, out with the growing season.

The Tribunal's Decision: The Tribunal were unable to make a determination as Mr King has not provided evidence that the Factor had been asked to carry out maintenance work at the boundary lines and had failed to carry out the work.

6.3 Decision

In all of the circumstances narrated above, the Tribunal finds that the Factor has not failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Sections 6.3 and 6.6 of the Code of Conduct and the Property Factor duties.

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 9th January 2021

Chairperson