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

Property Factors (Scotland) Act 2011 ("the Act"), Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Procedure) Regulations 2016 ("the 2016 Regulations")

Chamber Ref: FTS/HPC/PF/17/0282

Property at 24 Roanshead Road, Easthouses, Midlothian, EH22 4HJ ("the Property")

The Parties: -

Mr John McPake, residing at the Property ("the Homeowner")

Melville Housing Association Limited, 200 High Street, Dalkeith, Midlothian, EH22 4HJ ("the Factor")

Tribunal Members: -

Maurice O'Carroll (Legal Member)
Andrew Murray (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has not failed to comply with the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act. No further action on the part of the Factor is therefore required.

Background

1. By application dated 21 July 2017, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 6.9 of the Code of Conduct for Property Factors ("the Code"). The application did not raise any other parts of the Code or any issues regarding property factor duties arising from any other source.

2. Formal notification of the alleged Code breach in compliance with section 17(3) of the Act was intimated to the Factor by the Homeowner on 13 July 2017.

3. By decision dated 22 August 2017, a Convenor on behalf of the President of the Housing and Property Chamber decided to refer the application to the

Tribunal for a hearing. Notices of referral were sent to the parties on 6 September 2017 and a hearing was set down for 2 November 2017.

4. A hearing took place on that date within George House, George Street, Edinburgh at 10am. The Homeowner appeared on his own. The Factor appeared and was represented by Mrs Nancy Booth, Property Services Manager and Mr Andrew Noble, Chief Executive of the Factor. Evidence was heard from all parties present.

5. The written submissions and documentation produced by each of the parties were taken into account by the Tribunal, in addition to the oral evidence led at the hearing.

Tribunal findings

The Tribunal makes the following general findings in fact pursuant to Rule 31(2)(b)(i) of Schedule 1 to the 2016 Regulations:

6. The Property is a semi-detached dwelling house. The Homeowner lives at number 24 Roanshead Road and the adjoining house is number 26. The Homeowner has lived at the Property, originally a council house, since the 1970s and has normally maintained it himself since that time. In particular, for the past 20 years, the Homeowner had maintained an ivy plant which had extended up the wall of the Property and onto its roof.

7. The Property has a back garden which is fenced off from the back garden pertaining to the neighbouring property at number 22. Number 22 is a rented property occupied by Mr Darren Rowley and his five boys. The Factor is the landlord of the property at number 22 and acts as a factor for owner-occupied properties which had previously been rented out by the local authority.

8. The Factor was registered as such on 7 December 2012 and its obligation to comply with the Code arose from that date.

9. There is no factoring contract between the Homeowner and the Factor. However, no issue regarding the Tribunal's jurisdiction was taken at the hearing and the hearing proceeded on the assumption that the Tribunal did in fact have jurisdiction.

10. Due to personal circumstances, the Homeowner had been unable to maintain the back garden to his Property with the result that by March 2017, it was clear that it had become overgrown and that the mutual fence between the gardens of the Property and that of number 22 required to be replaced. The Homeowner had originally approached the local authority for assistance unaware of the fact that the Factor had taken over ownership and responsibility for number 22.

11. Eventually, the Homeowner made contact with the Factor and spoke to Scott Borthwick, Property Officer and Inspector for the Factor. It was agreed between those two parties that a mutual repair was necessary. The works required were the removal of excess vegetation and the erection of a replacement fence. A quotation was obtained from Tree Work Scotland who

quoted £600 plus VAT (£720) to carry out the works. The Tribunal was provided with a copy of the quotation dated 8 May 2017.

12. Initially, the Homeowner considered that the quote was rather high and so investigated the possibility of carrying out part of the work himself with the aid of one of his sons-in-law. The Tribunal was provided with a letter dated 18 May 2017 signed by the Homeowner agreeing to replace the fence between the two properties on condition that the Factor would remove the old fence, remove a tree and cut the hedge leaving the ground ready for the new fence.

13. That did not prove possible in the end with the result that the Homeowner agreed to let the Factor carry out all of the works, with the cost to be split equally between the parties, which is to say £360 each. By agreement, the Homeowner is paying that cost in instalments by means of direct debits of £36 per month.

14. The Tribunal was provided with a printed agreement signed by the Homeowner dated 19 May 2017. The repair listed was described as follows: "To remove small elder tree, cutting & facing of overgrown hedge, remove mesh fence and install 8m of 900mm high fencing."

15. The Homeowner was therefore aware of the works to be carried out and had agreed in writing to pay a one-half share of the cost. He was not informed of the start date for works.

16. At the end of May, the Homeowner became aware that works had commenced. He had initially been out of the house and found that work was in progress when he returned. He went over to speak to the contractor. After a general discussion about removal of items in the garden, the Homeowner stated before leaving that the ivy was to be left untouched. That was the sole conversation which took place between the Homeowner and the contractor.

17. That conversation is the main matter of dispute between the parties. In fact, as shown by a photograph produced to the Tribunal, the main root of the ivy plant was cut in the course of the works carried out to construct the replacement fence.

18. According to a contemporaneous hand-written note produced by Mrs Booth, the Homeowner appeared at the Factor's office in person looking for compensation because of the removal of the ivy which he stated he had been growing for 20 years. She thereafter spoke to the contractor who said that he had to remove it in order to get to the fence.

19. The written note had been placed onto a copy of the agreement of 19 May 2017. In terms of that written note, according to the contractor, while the works were being carried out, the Homeowner had requested that more vegetation be removed, but since that work did not form part of the quotation, it had been left. When Mrs Booth had telephoned the contractor, he had assumed that it would have been in order to pass on a complaint that further clearance of vegetation had not been carried out as requested by the Homeowner.

Findings in relation to the alleged Code breach
The Tribunal makes the following specific findings in relation to the alleged breach of the Code:

Section 6.9 of the Code

20. The relevant part of section 6.9 of the Code provides as follows: "You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided."

21. There is a conflict of evidence in relation to the conversation which took place between the Homeowner and the contractor. Only the Homeowner appeared in order to provide direct evidence of that conversation. He was accepted by the Tribunal as being a credible witness. Mrs Booth's evidence, although also credible, could only amount to hearsay. Hearsay evidence is admissible in civil proceedings in Scotland. However, the best evidence is the direct testimony of a witness who was present at the relevant time in order to speak to the matter in dispute.

22. Mrs Booth had a signed statement from the contractor which was not actually referred to (due to it not having been intimated in advance). Even with that, the only direct evidence, subject to questioning at the hearing, was that of the Homeowner. He was one of the two parties to the conversation at issue. Therefore, his evidence is direct evidence of what he said and not hearsay. The Tribunal therefore accepts that the Homeowner did state to the contractor that he should leave the ivy alone.

23. However, that is not the end of the matter. Firstly, as he himself stated, the Homeowner could not be sure whether or not the ivy root had already been cut by the time he had his conversation with the contractor due to the extent of vegetation on the ground. The Tribunal therefore had no evidence on this point. Secondly, and most importantly, the question before the Tribunal is whether the Factor failed in its duty to comply with the Code.

24. Mrs Booth gave evidence that if during the discussion about the works required, the question of leaving the ivy had been specifically mentioned, it would have been part of the work order. The Tribunal accepted that evidence. The work order only mentioned "removal of a small elder tree" and "cutting and facing of overgrown hedge".

25. The Homeowner's claim, if it were to succeed, would mean that the Factor had a duty to ensure that its contractor complied with specific instructions received from the Homeowner while on site and in the course of carrying out the works in question. There was no discussion about or agreement in relation to that possibility prior to the commencement of the works. Effectively, it would also mean that there was a duty on the Factor to indemnify the mistakes of its contractor, even where such a mistake (if indeed it was one) had occurred prior to the conversation in question. The Tribunal was of the view that the Factor's duty did not extend that far.

26. More importantly, looking at the terms of section 6.9 itself, the duty is on the Factor to pursue the contractor to remedy defects in any inadequate work or service provided. Arguably, there were no inadequate works as the contractor complied with the terms of the quotation: he cleared the ground of vegetation and erected the fence. In any event, as stated by the Homeowner in his formal intimation of 13 July 2017, once the ivy had been cut it could not be restored

27. The Factor had in fact made an offer to plant new ivy, but that was unacceptable to the Homeowner because he had tended the cut ivy plant for more than 10 (according to the application) or 20 (in terms of his conversation with Mrs Booth on 27 June) years. This could not now be restored on a like for like basis.

28. In light of that offer, and against the background of the circumstances narrated above, the Tribunal was of the view that there was nothing more that the Factor could reasonably have done or offered to do. The obligation is to pursue a contractor to put right inadequate work carried out, not to achieve the impossible or provide indemnity itself.

29. The Homeowner considered that in light of that impossibility, his half share of the costs of the common repair should be substantially reduced. The Tribunal is of the view that the obligation under section 6.9 of the Code does not entail such a requirement, as discussed above in paragraph 25. The Tribunal will not make such an order. The Factor is therefore entitled to receive the sum of £180 from the Homeowner as agreed between the parties on 19 May 2017.

Conclusion

30. In light of the above discussion, the Tribunal finds the Factor did not act in breach of section 6.9 of the Code.

31. No further action on the part of the Factor is therefore required.

Appeals

32. 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 30 days of the date the decision was sent to

M O'Carroll
Legal Member

Date: 6 November 2017