

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision: Property Factors (Scotland) Act 2011: Section 19(1) (a)

Chamber Ref: FTS/HPC/PF/19/1574

16 Birnock Water, Moffat, DG10 9DY ("The Property")

The Parties:-

**Mr Michael Phiri, 16 Birnock Water, Moffat, DG10 9DY
("the Homeowner")**

**Ross and Liddell Limited, 60 St Enoch Square, Glasgow, G1 4AW
("the Property Factor")**

Tribunal Members:

**Martin J. McAllister, Solicitor, (Legal Member)
Andrew Taylor, Chartered Surveyor, (Ordinary Member)
(the "tribunal")**

Introduction

In this Note the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules," the First-tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal" and Ross and Liddell Ltd is referred to as Ross and Liddell.

Findings in Fact

- 1. In respect of the matters complained about by the Homeowner, the Factor has complied with the Code.**
- 2. In respect of the matters complained about by the Homeowner, the Property Factor has complied with the property factor's duties in terms of Section 17 (5) of the Act.**

Background

The application made by the Homeowner was received by the Tribunal on 24th May 2019.

The application contended that the property factor had not complied with the property factor's duties and that it had not complied with sections 2.4, 2.5, 6.1, 6.2, 6.3, 6.7, 6.8, 6.9 and 7.2 of the Code.

On 9th October 2019 a legal member of the Tribunal, acting under delegated powers, referred the application to the tribunal for determination.

The Hearing

A Hearing was held at Moffatt Town Hall on 11th December 2019.

On 19th November 2019 the Respondent submitted written representations and Productions.

On 27th November 2019 the Applicant submitted written representations and Productions.

The Homeowner was present and was accompanied by Ms Annabelle McAulay, the co-proprietor of the Property.

Ms Jennifer Johnstone and Ms Anne Marie Hardie of the Property Factor were present and gave evidence.

The Property Factor was represented by Mr Michael Ritchie, solicitor.

Matters of Agreement

The parties helpfully gave the tribunal information on the Property and the development of which it is part.

There are two blocks of flats which were erected around 2005 and which sit in shared grounds. Block One consists of twelve flats numbered 1-12 Birnock Water and Block Two consists of five flats numbered 13-17 Birnock Water. Block Two has flats over three floors with the ground and first floor having two flats each and the second floor having one flat. The Property is situated on the first floor of the block.

The grounds of the development consist of areas of soft and hard landscaping and there are shrub beds in the common areas. The ground floor flats have their own gardens. Ross and Liddell have managed the development since the properties were constructed.

Alleged Breaches of the Code

It was agreed that the tribunal would consider evidence on each alleged breach of the Code.

2.4 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 in emergencies).

Mr Phiri accepted that the Property Factor wrote to him on 16th May 2018 with regard to proposed work to 13-17 Birnock Water. He said that he had not approved the work proceeding. He stated that, if others in the block had consented to the works going ahead, he and his co-proprietor should have been given the opportunity to respond. He said that he should have been provided with evidence that there had been majority consent before the work started.

Respondent Production 3 is the letter referred to. It refers to a proposal to carry out internal and external works and that the quotation from Bell Group be accepted.

In his written representations Mr Phiri states that he did not return the mandate because of the provisions of the Deed of Conditions. The written representations state that no written approval for the works was provided as required by the Code.

The Respondent's written representations state that the Property Factor has a procedure to consult with homeowners and that this is evidenced by its letters to the Homeowner dated 16th May and 23rd July 2018 and the mandates received from other owners.

Respondent Production 8 is a letter from the Property Factor dated 23rd July 2018 in which 25th July is given as the start date for work. The letter states that there is majority agreement and enough funding for the work to proceed.

Mr Phiri's position was that he never received this letter. Ms Hardie said that the letter was sent. Mr Phiri said that there was no evidence that he had received the letter. Mr Phiri challenged the statement in the said letter that funding was in place. Ms Hardie said that the Property Factor took a view that there was sufficient funding either paid or committed to enable the contractor to proceed. Ms Hardie said all the proprietors in the block (with the exception of Mr Phiri and Ms McAulay) had approved the works. Ms Hardie said that the letter to homeowners was part of the Property Factor's process to comply with Section 2.4 of the Code and its written statement of services

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.

Mr Phiri said that he wrote to the Property Factor on 20th May 2018 (Respondent Production number 4) and did not receive a response until 4th June 2018 (Respondent Production number 5). He referred to the Property Factor's written statement of services (Respondent Production 2) in which, he stated, a response should be received within seven days.

The Respondent's written representations state that the timescale for response is dealt with in Section 10 of the written statement of services- "We will respond to written queries within 7 working days of receipt."

Ms Hardie said that the response had to be given in a certain number of working days and the tribunal was directed to the letter which had been date stamped 23rd May 2018 and the fact that in the period between then and 4th June 2018 there had been two weekends and one public holiday.

Mr Phiri also referred the tribunal to his letter to the Property Factor dated 17th June 2018 (Respondent Production number 6) and it was noted that this was date stamped 22nd June 2018 marking the date of receipt by the Property Factor. He said that this letter was not responded to until 27th June 2018. After some discussion Mr Phiri accepted that this response had been sent timeously.

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.

Ms Hardie said that the work commenced on 25th July 2018 and was completed within two weeks. She said that, after the contractor had left the site, there had been snagging issues which had been dealt with.

Mr Phiri's written representations dealt with mandates and communications and did not address the relevant section of the Code.

After some discussion Mr Phiri accepted that the Property Factor has procedures in place to allow homeowners to notify it of matters requiring repair, maintenance or attention.

6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

The Respondent's written representations referred the tribunal to Paragraph 2.1 of the written statement of services. This refers to procedures for emergency repairs.

Mr Phiri accepted that the matters he was complaining about did not relate to emergency repairs.

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 written representations of the Respondent state that no request in terms of this section of the Code had been received by the Property Factor. They state that the Respondent wrote to the Homeowner on 16th May 2018 (Respondent Production number 3) giving details of the contractors who had been approached to give quotations.

Mr Phiri said that he did not understand why a contractor from Airdrie was selected and reference was made to quotations which had been obtained previously and which were cheaper. Mr Phiri's written representations stated that no detailed specification was provided by the Property Factor. Ms Hardie said that the previous quotations

referred to by Mr Phiri did not cover all the items of work dealt with in the recent contract which was completed.

Mr Ritchie referred the tribunal to Respondent Production number 5 at page 40 which is a letter from the Property Factor to the Homeowner and which provides information on the obtaining of quotations for the work.

Mr Phiri said that this letter was superficial in nature and was inadequate in its content. He said that he did not receive sufficient detail of what was to be done by Bell.

Mr Ritchie referred the tribunal to Respondent Production number 3 and in particular the statement—"Copies of the specification and estimates are available to view and download from the Documents section of Your Portal at [REDACTED]." The letter goes on to state "Alternatively should you require a paper copy of the estimates we will make these available on request."

6.7 You must disclose to homeowners, in writing, any commission, fee or other interests that you have with any contractors appointed.

And

6.8 You must disclose to homeowners, in writing, financial or other interests that you have with any contractor appointed.

The Respondent's written representations state that the Property Factor received no such commissions or fees. The representations refer to Paragraph 11 of the written statement of services which states "We do not receive any commission, or derive any benefit, from the instruction of contractors who undertake work on behalf of our clients.....We have no financial in any of the contractors employed on behalf of co-proprietors..."

Mr Phiri said that this is not sufficient and that the Code requires more. He said that he has received no information on any commission or other financial benefit and that no evidence had been produced to support the view that there had been such financial benefit or commission. Mr Phiri's written representations were consistent with this.

Mr Ritchie said that there was no information or evidence to produce because there had been no such commission or financial benefit and there was no financial interest in any contractor.

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.

Mr Ritchie said that, in a contract such as this, there would be no collateral warranty and Mr Phiri did not challenge this.

Both Mr Phiri and Ms McAulay spoke at length about what they considered to be defects and inadequate work carried out by the contractors. They said that there are a number of concrete finishings to the external building and they said that they thought it inappropriate that these should have been painted by the contractors. They said that some concrete surfaces such as the corner stones were not painted and they took issue with the bright pink colour which had been used for some surfaces. Ms McAulay said that this was totally unnecessary and an eyesore. She said that the external décor is not aesthetically pleasing. Mr Phiri's written representations also state that the quality of the work done to the internal portions of the block is poor.

The tribunal was directed to photographs which had been lodged and which Mr Phiri said showed the poor quality of the work.

Mr Phiri referred the Tribunal to Respondent Production number 11 which is a letter to him from the Property Factor dated 12th November 2018. He said that the terms of the letter were misleading in stating that the décor was painted "like for like" and that the staining on the timber is also "like for like." He said that this was not correct.

Mr Phiri said that the timber bin shelters should not have been stained but rather left in their natural state.

Mr Phiri's written representations are detailed in his concerns about what work had been done and the colours used. The representations state that "wrong does not become right just because it is accepted by a majority."

Mr Ritchie referred the tribunal to Production number 11 which was a letter to the Homeowner from Ms Hardie of Ross and Liddell. This letter also stated that there had been minor snagging works which had been resolved in good time.

The tribunal was directed to Respondent Production number 25 which was a photograph showing the building prior to the works. The tribunal were also referred to all the photographs which had been lodged and which, together, portrayed aspects of the building before and after works were done.

Mr Phiri said that it might have been better to clean the concrete rather than paint it. Ms Hardie said that the painting had to be done and that a majority of proprietors approved the suggested works. The tribunal was referred to Respondent Production number 22 which was the estimate request and supporting documents which were sent to prospective contractors. Ms Hardie said that the documents were available to any proprietor who wanted to view them. Ms Hardie said that said that the other proprietors were happy with the work which had been carried out.

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 (Now the First-tier Tribunal for Scotland).

Mr Phiri's position was that the complaint procedure had been exhausted. His written representations state that the tight timescales of the works did not provide him with sufficient opportunity to respond to anything. The representations state that initiation of Court Proceedings by the Respondents meant that progress through the Complaints Procedure was no longer an option. He said that there was also an action for payment in the Sheriff Court which had been raised by the Property Factor. Ms Johnston and Ms Hardie stated that, as far as they were concerned, the complaint procedure had not been engaged and therefore could not be exhausted.

Ms Hardie referred to Respondent Production Number 14 which was a letter from her to the Homeowner which stated "I trust this information is of assistance to you, if however you are still unhappy with my response please follow our complaints process which can be found on our website or as noted below....."

The tribunal noted the terms of the Respondent Productions number 18 and 19. These are style notifications of complaint sent by the Homeowner to the Property Factor. Respondent Productions 20 and 21 are responses sent by the Property Factor to the Homeowner seeking further detail of the complaint.

Breach of Property Factor's duties

In his written representations Mr Phiri referred to obligations contained within the Deed of Conditions relating to the Property Factor having responsibility for the care, maintenance and management of the common parts. The representations state that this meant that the Property Factor required to deal with the landscaped areas.

Ms McAulay said that shrubs and plants had been removed from the common landscaped areas. Ms Hardie said that there is no contract for ground maintenance in the development. She said that, in response to requests of homeowners, the Property Factor obtained a quotation for ground maintenance which was considered by them to be too expensive. As requested, the Property Factor obtained a quotation from a local contractor which was more expensive than the first one and, as a result no contract is in place. Ms Hardie said that she knew nothing about removal of plants. Mr Phiri accepted that what Ms Hardie had said was correct with regard to the obtaining of the quotations for ground maintenance but said that he considered that the Property Factor should have done more to put a contract in place and to find out who had been responsible for the missing plants. Mr Phiri said that removal of plants was also in breach of the planning conditions for the development.

Mr Phiri said that the Property Factor should not have arranged for the fencing in the development to be stained. He said it should have been left alone. Both Ms McAulay and Mr Phiri said that there was a section of fencing which had not been treated and the tribunal was referred to photographs which Mr Phiri said demonstrated this. Ms Hardie said that she was unaware of this and, if it is correct, is something that will be attended to. She said that it might have been missed because a large vehicle is sometimes parked in the parking area and that the contractor may not have been able to get behind it. Mr Phiri said that this was not the case.

Mr Phiri said that the stain used on the fencing was too dark.

Submissions

Mr Phiri said that the Property Factors have been negligent and guilty of dereliction of duty.

He invited the tribunal to consider the timeline of the works and the fact that they were started before he had an opportunity to make representations to the Property Factor. He said that the starting of the works was hurried and that the painting contract was excessive in what it covered. He said that the Property Factor had been dismissive of his efforts to negotiate and find a way forward. He said that the money involved was insignificant but that the point was that things have to be done the right way. He said that he had not been asked if he was happy with the work. He asked that the Property Factor be removed from managing the development.

Mr Ritchie said that he was relying on his written submissions and the evidence before the tribunal. He said that his clients had complied with the Code and had complied with the Property Factor's duties.

Tribunal's deliberations

2.4 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 in emergencies).

The tribunal accepted that there is a procedure in place to seek written approval before providing work or services in addition to the core service. The written statement of services at paragraph 2.iii sets out the procedure. Mr Phiri accepted that the Property Factor had written to him on 16th May 2018 setting out the proposed works.

The tribunal accepted the Respondent's written submissions that this letter evidenced the procedure to consult homeowners.

The tribunal noted that the Code requires the Property Factor to **seek** written approval. It accepted that the Property Factor had done so and then had taken a view on whether or not there was sufficient funding in place or committed to allow the works to progress.

Mr Phiri's issue appears to be that he did not want the works to be done.

The tribunal did not find that there was any breach of this section of the Code.

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.

Mr Phiri accepted that his letter dated 17th June 2018 had been responded to timeously.

The tribunal accepted the evidence of the Respondent in relation to the response to the Homeowner's letter of 20th May 2018. The written statement of services referred to "7 working days." The tribunal accepted that the letter of the Homeowner was received by the Property Factor on 23rd May 2018 and that, when Saturdays and Sundays together with the public holiday were taken into account, the Property Factor had responded timeously to the Homeowner's letter of 20th May 2018.

The tribunal did not find that there was any breach of this section of the Code

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.

Mr Phiri accepted that the Property Factor had necessary procedures in place to comply with the Code.

The tribunal did not find that there was any breach of this section of the Code.

6.2 If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

Mr Phiri accepted that the matters he was complaining of did not involve any issue of emergency repairs.

The tribunal did not find that there was any breach of this section of the Code.

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 evidence on this matter was clear. Mr Phiri's position was that he had not been given the information on why the particular contractor was appointed. He also had questioned why the contractor was from Airdrie and not local and he said that a previous quotation for painting was for less.

The Property Factor relied on the letter to the Homeowner of 16th May 2018 which gave information on the appointment of contractors and referred the Homeowner to where he could get additional information.

The tribunal did not accept Mr Phiri's view that this was superficial and the members did not know what else the Property Factor could be expected to do. The information had been given to the Homeowner.

The tribunal did not find that there was any breach of this section of the Code.

6.7 You must disclose to homeowners, in writing, any commission, fee or other interests that you have with any contractors appointed.

And

6.8 You must disclose to homeowners, in writing, financial or other interests that you have with any contractor appointed.

The members of the tribunal did not accept Mr Phiri's position that the Code requires more than the Property Factor stating that it received no commission, fee, had no other interests with the contractor appointed and had no financial or other interest to declare. The tribunal noted that no evidence was led by the Homeowner which challenged the position stated by the Property Factor.

The tribunal considered that Mr Ritchie expressed matters well- that there was no information for the Property Factor to produce because there had been no commission or financial benefit and that there was no financial interest in the contractor appointed.

The tribunal did not find that there was any breach of these sections of the Code.

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.

Mr Phiri and Ms McAulay gave very clear evidence that they were not happy with the work done. They had concerns about the colour of the paint and woodstain and that certain surfaces were painted or stained where, in their view, they should not have been. The members of the tribunal were not persuaded that the concerns they had amounted to inadequate work. There was no evidence before it that the contractor had failed to follow the specification which had been available to the Homeowner prior to the work commencing. The majority of proprietors supported the work being done and it is a reasonable assumption that they approved of the specification.

The tribunal accepted the evidence of Ms Hardie that there had been snagging issues which the contractor had attended to. It also accepted that she would investigate any areas of fencing which had not been stained and that she would arrange for them to be attended to.

The tribunal did not find that there was any breach of this section of the Code.

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 (Now the First-tier Tribunal for Scotland).

The tribunal did not accept the Property Factor's position that the complaints procedure had not been engaged and it considered that it should have dealt better with the matters raised by the Homeowner. Notwithstanding that there was no evidence that the complaints procedure had been exhausted. The written representations of the Property Factor stated that no complaint was initiated after its letter to the Homeowner dated 11th December 2018 and that the Property Manager sent a copy of the contractor's invoice for the paintwork in response to the Homeowner's request in March 2019. The representations state that an action for payment was raised against the Homeowner and that the first hearing was on 23rd May 2019, two days prior to the application to the First-tier Tribunal. The tribunal did not accept that the Homeowner's representations that the raising of the Court Action meant that he could not be able to progress through the complaints procedure.

The tribunal did not consider that the complaints procedure had been exhausted and that there therefore was no breach of this section of the Code.

Property Factor's Duties

The Homeowner made much of the fact that plants were removed from the common areas. The tribunal did not consider that there was any duty incumbent on the Property Factor to do anything about the removal of the plants. There was no ground maintenance contract. The Homeowner accepted that the Property Factor had obtained quotations for ground maintenance but expected that more should have been done. The members of the tribunal did not know what more the Property Factor could have done.

The tribunal considered that Mr Phiri's reliance on the terms of the Deed of Conditions in this regard is misguided. The Deed of Conditions is in fairly standard terms and deals with ownership rights and responsibilities for repairs for all the proprietors in the development. The Deed of Conditions also deals with the management of the development. In all matters the Property Factor requires to follow instructions from the majority of proprietors. It had obtained two quotations for ground maintenance and these had been rejected by the homeowners in the development.

It was clear that Mr Phiri had concerns about the work which was done and, in particular, the surfaces which were painted/stained and the colours used. The members of the tribunal accepted the evidence that the specification was available for all proprietors and that a majority of proprietors approved the work which was carried out.

The tribunal did not find that the Property Factor had breached its duties in terms of the Act. The Property Factor had identified work which it considered required to be done and it had then obtained authority of the majority of proprietors to have the work done. It had then ensured that any snagging works were dealt with.

Appeals

A homeowner or property factor 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.

Martin J. McAllister,
Legal Member of the
First-tier Tribunal for Scotland
29th December 2019

