

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: HPC/LM/24/1787

54 Gorget Avenue, Glasgow ("the Property")

Ms Lynn Johnstone, 54 Gorget Avenue, Glasgow ("The Applicant")

**Lowther Homes Ltd (Wheatley Homes Glasgow Ltd), Wheatley House, 25
Cochrane Street, Glasgow ("The Respondent")**

Tribunal Members:

Josephine Bonnar (Legal Member) and Sandra Brydon (Ordinary Member)

DECISION

The Tribunal determined that the Tribunal does not have jurisdiction to consider this application.

The decision of the Tribunal is unanimous.

Background

1. The Applicant lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act.
2. The parties were notified that a CMD would take place by telephone conference call on 9 September 2024 at 10am. This was postponed to 4 November 2024. Ms Johnstone participated. The Respondent was represented by Ms McKay and Mr Adams, solicitor. Both joined the call late due to technical difficulties. Prior to the CMD the parties lodged written representations and documents. The Tribunal was also notified that the Respondent had arranged for a specialist contractor to attend at the property in the afternoon of 4 November 2024.

3. The parties were advised that there were preliminary matters which required to be addressed. The Tribunal had obtained and circulated a copy of the Applicant's title sheet before the CMD. In response to questions about the properties, Ms Johstone confirmed that her property is a lower flat in a four in a block. The flat above is also an owner occupier. The upper and lower flats on the other side are owned by Glasgow Housing Association. The upper flat is occupied by a tenant. The lower flat is currently unoccupied as the tenant is in residential care. However, the tenancy has not been terminated. Ms Johnstone said that she and her upstairs neighbour share a drying green. There are two other pieces of garden ground. One is owned by her and the other by her neighbour.
4. In their written response, the Respondent indicated that the Tribunal did not have jurisdiction because the area of ground which is the subject of the application, the drying green, is not common to all four properties and is not maintained by the Respondent. Ms Johnstone confirmed this to be the case. The Tribunal noted that the parties are agreed that the Respondent is the factor but that the dispute between the parties might be between Ms Johnstone and the owner and landlord of the adjoining flats, as it does not appear to relate to common property which is maintained by the Respondent. Mr Adams said although that is their position, the Respondent (as factor) was trying to resolve the dispute and had arranged for a specialist contractor to attend.
5. The Legal Member said that the issue of jurisdiction had to be determined before the Tribunal could consider the complaints. The parties were advised that the CMD would be continued to a later date so that the Applicant could consider her position, take advice and decide whether she accepted that the Tribunal may not have jurisdiction. If so, she could withdraw the application. If she did not do so, the jurisdiction issue would be further discussed at the continued CMD, and a decision would be made by the Tribunal.
6. The parties were notified that a further CMD by telephone conference call would take place on 10 March 2025 at 10am. Prior to the CMD, the Applicant lodged further submissions and documents, including a copy of her title plan. She did not withdraw the application. The Respondent lodged a brief submission which stated that a specialist contractor had attended and provided three options. However, a decision had not yet been made.

The CMD

7. The Tribunal asked if there was an update on the proposed work. The parties confirmed that no work has been carried out and that a decision is awaited by the director.
8. The Legal Member advised parties that the issue of jurisdiction required to be determined. Ms Johnstone was asked to clarify the layout of the garden area at her property by reference to the title plan. She confirmed that areas shaded

pink on the plan are garden ground owned exclusively by her. The yellow and brown areas are a pathway and the drying green, shared with her upstairs neighbour, who is also an owner occupier. She said that she doesn't know if the bamboo from the neighbouring garden has spread to her garden ground, but it has affected the drying green, and she believes that it is only a matter of time. The Legal Member then asked Mrs Johnstone about the invoices that she receives from the Respondent and the services they provide. She said that they are issued every three months and that they do not include gardening. Ms McKay confirmed that the routine charges are for insurance and the management fee. There is no ground maintenance.

9. Mr Adams said that the Respondent's position is that the Tribunal does not have jurisdiction. The dispute in question is between two owners. It relates to ground which is not common property. As a factor, the Respondent cannot resolve the issue but as owner of the adjoining property they may be liable for the damage. The Tribunal referred Mr Adams and Ms McKay to the response issued by the Respondent in relation to the stage 2 complaint. It concludes by advising the Applicant that she can make an application to the Tribunal, if she is not satisfied with the outcome of the complaint. Mr Adams said that they have to include this statement as it is a requirement of the Code and jurisdiction had not been considered at the time the letter was issued. Ms McKay confirmed that she agreed with Mr Adams but said that the Respondent still hopes to find a solution to the issue.
10. Ms Johnstone said that she accepted that there might be a jurisdiction issue but that she had been taken down the wrong path by the Respondent. She said that she understood that the doctrine of personal bar might apply. The Respondent had indicated that this was a factoring matter and should not now be able to claim otherwise.
11. The Tribunal took a short adjournment to discuss the matter. Following the adjournment, the Legal Member confirmed that the Tribunal had determined that they did not have jurisdiction to deal with the complaint. The parties were advised that a decision with statement of reasons would be issued in due course and that, in the absence of jurisdiction, it would not be necessary or appropriate to discuss the application further.

Findings in Fact

12. The Applicant is the owner occupier of the property.
13. The Respondent is the property factor for the property.
14. The property is a lower flat in a block of four flats.

- 15.** The Applicants complaint relates to an area of ground which is owned jointly by the Applicant and the owner of the upper flat.
- 16.** The other two properties in the block are owned by Glasgow Housing Association, which is part of the Wheatley Group. The Respondents factor the property because it is also part of the Wheatley Group.
- 17.** The Respondents do not factor the gardens or drying green at the property as they are not common property.

Reasons for Decision

18. The Applicant's title sheet describes the property in the following terms "Subjects 54 Gorget Avenue, Glasgow, G13 2AF within the land edged red on the title plan being the south by eastmost house on the lower floor of the block 52, 54, 56 and 58 Gorget Avenue with the plots of ground tinted pink on the said plan. Together with In the first place a one half part or share pro indiviso in and to that plot of ground tinted yellow on the said plan, and In the second place, a one half part or share pro indiviso in and to that plot of ground tinted brown on the said plan: Together also with a right in common with the proprietors of the other dwelling houses in the said block of houses to the common parts of the said block of houses meaning the whole parts of the property which are used by or serve more than one of the said dwelling houses excepting parts which are specifically conveyed in any feu grants to the proprietor or proprietors of a dwellinghouse or dwellinghouses as his or their exclusive property..." In the burdens section, the deed of conditions states, "(2) Common parts means the whole parts of the property which are used by or serve more than one dwellinghouses in the property excepting parts which are specifically conveyed in any feu grants to the proprietor or proprietors of a dwellinghouse or to the proprietors of some, but not all, of the dwellinghouses as his or their exclusive or common property..."
19. Based on the documents lodged, and the information provided at the CMD, the Tribunal noted the following

 - (a) The complaint relates to the drying green at the property, an area shaded brown on the title plan.
 - (b) This ground is owned exclusively by the Applicant and the owner of the upper flat. The owner(s) of the adjoining upper and lower flats in the block have no rights in relation to the said drying green.
 - (c) The complaint relates to bamboo growing in the garden or drying green of the adjoining flats, which has spread to the Applicant's drying green.
 - (d) The Applicant has no rights in relation to the adjoining garden or drying green.
 - (e) The Respondent is the factor for the block but does not provide any ground maintenance.

(f) The dispute does not relate to common property

20. The Applicant told the Tribunal that although she accepted that there was a jurisdiction issue, the fault lay with the Respondent. The Tribunal has some sympathy with this position. At no point prior to her application to the Tribunal, did the Respondent, as property factor, advise the Applicant that her complaint is not a factoring matter. Indeed, they treated her complaint as though it was a factoring matter. On 23 August 2023, they issued a stage 2 complaint response which included a paragraph that explained her right to apply to the Tribunal in terms of the 2011 Act. This letter was misleading. The explanation for this error was unsatisfactory. It was stated that that the writer of the letter had not considered the issue of jurisdiction. The Tribunal was also told that the factoring section of the Wheatley Group has been endeavoring to find a solution to the complaint, even though it is not a factoring issue. However well meaning, these efforts have misdirected the Applicant in terms of her legal remedies. However, the Tribunal is not persuaded that the doctrine of personal bar applies. The Tribunal's remit is dictated by the provisions of the 2011 Act. If these do not apply, then the complaint cannot be considered.
21. The Tribunal is satisfied that the Applicant's dispute with the Respondent does not relate to common property. She appears to have a legitimate complaint against the Respondent as owner of the adjoining property, but the Tribunal does not have jurisdiction to consider that complaint in terms of the 2011 Act or the Code of conduct.

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.