

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 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/23/1095

Property address: Communal land, 19 Darochville Place, Inverness, IV2 6FG (“the Property”)

The Parties

Mr Alan Stewart, 19 Darochville Place, Inverness, IV2 6FG (“the Homeowner”)

Ross & Liddell, 6 St Enoch Square, Glasgow, G1 4AW (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mrs S Hesp (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has not failed to carry out its property factor duties as required by section 17 of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Findings in Fact and Law

1.

- (i) The Homeowner is the heritable proprietor of 19 Darochville Place, Inverness, which is situated within the Ness Castle Development.
- (ii) There are 98 houses within the Development.
- (iii) The Property Factor registered as a Property Factor under registration number PF000196 on 1st November 2012.

- (iv) A Deed of Conditions dated 31st July 2018 was registered in respect of the Development by the Developer.
- (v) In terms of the Deed of Conditions, all homeowners are Members of the Ness Castle Owners' Association.
- (vi) In terms of the Deed of Conditions, the Owners' Association can elect an Advisory Committee. The Owners' Association has elected an Advisory Committee, of which the Homeowner is a member.
- (vii) In terms of the Deed of Conditions, the Property Factor was appointed as Manager of the Development.
- (viii) The Property Factor has been managing the Development since handover in April 2022.
- (ix) At the time of handing over the Development, landscaping works remained outstanding.
- (x) The Developer continued to carry out landscaping works after handing over the Development.
- (xi) A Service Level Agreement is in place between the Property Factor and homeowners.
- (xii) In or around June 2022, and at several points thereafter, the Homeowner requested documentation under clause 4.8 of the Schedule to the Deed of Conditions.
- (xiii) On or around 9th December 2022, the Homeowner raised a formal complaint with the Property Factor for their failure to provide requested documentation.
- (xiv) The Property Factor's Ms Johnston responded to the complaint on 11th January 2023. The Homeowner's complaint was not upheld.
- (xv) On 29th January 2023, the Homeowner requested a review of the complaint and response.
- (xvi) The Property Factor's Ms Harkins responded to the Homeowner on 17th February 2023. The Homeowner's complaint was not upheld.
- (xvii) The Property Factor is unable to provide some historical documentation as it is no longer available.
- (xviii) The Property Factor has provided summaries and updates to homeowners following communication with the Developer.

- (xix) The Property Factor has refused to provide to the Homeowner all correspondence between the Developer and the Property Factor relating to the issues in question.
- (xx) The Property Factor has communicated with the Developer in respect of landscaping issues raised by homeowners. The matters covered by this communication fall within management of the Development.
- (xxi) The Property Factor has not failed in carrying out its property factor duties.

Background

2. By application received on 6th April 2023, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to carry out its property factor duties. Details of the alleged failures were outlined in the Homeowner's application and associated documents.
3. By email dated 6th June 2023, the Property Factor lodged written representations.
4. A Case Management Discussion ("CMD") took place by telephone conference on 3rd July 2023. The Homeowner was in attendance. The Property Factor was represented by Mr David Doig, Solicitor. Ms Jennifer Johnston, Mr Scott Quinn and Mr Gavin Baird were in attendance from the Property Factor.
5. The main issue was that the Homeowner had requested documentation from the Property Factor in terms of paragraph 4.8 of the schedule to the Deed of Conditions for the Property, which states: *Any member may require the manager to allow that member to inspect a copy of any document, other than any correspondence with another member, which relates to the management of the development; and if the document is in the manager's possession or it is reasonably practicable for the manager to obtain a copy of it the manager must comply with the requirement.* The Property Factor's position was that the requests for information lacked specification, and that communications between the Property Factor and the Developer were subject to commercial privilege. All information that could be provided had been provided. The case was continued to a hearing.

The Hearing

6. A hearing took place by telephone conference on 7th September 2023. Evidence was part-heard; however, it became clear that documents lodged by the Homeowner had not been received. The hearing was adjourned to allow the Homeowner to submit a further inventory of productions. The Homeowner lodged a further inventory of productions on 26th September 2023.
7. The adjourned hearing took place by telephone conference on 30th November 2023. The Homeowner was in attendance. The Property Factor was represented by Mr David Doig, Solicitor. Ms Jennifer Johnston and Mr Gavin

Baird were in attendance as observers. Evidence was heard from Mr Scott Quinn.

Preliminary Matters

8. The Tribunal enquired whether everyone had the same documentation. It was confirmed that, although formats and numbering varied, everyone had the three inventories lodged by the Homeowner, the first of which was included with his application, and the written representations of the Property Factor.
9. The Homeowner objected to the Property Factor leading a witness as no witness list had been lodged. The Tribunal decided to allow the witness to give evidence, as notification of Mr Quinn being called as a witness had been given orally on the previous hearing date, and this had been accepted by the Tribunal.

The Homeowner's position

10. The Homeowner said issues had arisen because the Developer had not carried out landscaping works as planned to the Development. The local authority has been chasing up the Developer, but they are not getting the information they require. The Homeowner has been trying to discover who is going to carry out the landscaping work, and whether the Property Factor is in discussion with the Developer in this regard. The Homeowner referred to emails from June 2022 where he was making a request for documentation and information from the Property Factor's Mr John Duthie. By email dated 7th June 2022, the Homeowner asked for a copy of all documentation possessed by the Property Factor related to the management of the Development, as residents were concerned they did not know what they were paying for.
11. By email dated 23rd June 2022, the Homeowner chased up Mr Duthie, and by email dated 29th June 2022, the Homeowner asked Mr Duthie for a copy of the Property Factor's contract with the Developer. At that time, the Homeowner stated that it was a provision of the deeds that an association member could see any information related to the management of the development. The reason for asking for the information was that the Developer had not left the development in the way it should have been left. This was causing issues for homeowners. The Homeowner made three attempts to get this information to no avail. He was advised by Mr Quinn that Mr Duthie was on sick leave.
12. By email dated 27th July 2022, the Homeowner contacted the Property Factor's Mr Baird to request developer plans and other documentation. In the email, the Homeowner referred to documents provided at tender. The Homeowner told the Tribunal that he had assumed there was tender documentation related to the Property Factor taking over the Development from the Developer. By email dated 28th July 2022, Mr Baird responded, stating that information could be uploaded to the web portal. He invited the Homeowner to provide input as to the documentation he would wish to see, and referred to further discussion to take place at a forthcoming meeting. By email dated 28th July 2022, the Homeowner responded to say that he had

asked to see tender information and information relating to remedial works. He stated that he wished to compare these documents with the maintenance plan which the Developer had provided to the local authority. The Homeowner also stated that he would wish to see all documentation other than correspondence with another member which related to the management of the development. The Homeowner told the Tribunal information was uploaded to the web portal, but no communication between the Property Factor and the Developer was uploaded.

13. By email dated 12th August 2022, Mr Quinn stated that there was an update from the Developer which was being analysed, and an update would be provided to homeowners at a forthcoming meeting. By email dated 16th August 2022, the Homeowner asked Mr Quinn for details of the update. Mr Quinn responded the following day to say he did not have access to the update. There was an email exchange between the Homeowner and Mr Baird on 17th August 2022, whereby the Homeowner asked for details of the update, and Mr Baird responded that a list of noted remedial works with the update from the Developer would be shared with all homeowners at the forthcoming meeting. The Homeowner told the Tribunal he did not want an update from the Property Factor. He wanted to see the actual update from the Developer. It was his position, as put to Mr Quinn at the time of the exchange, that providing the update to him would mean it reached a larger audience. The following day, the Homeowner again requested of Mr Baird a copy of correspondence from the Developer in relation to the issues raised. The Homeowner told the Tribunal it was unlikely many homeowners would attend the meeting, and he had a Facebook group where information could be shared with a larger audience, if provided to him by the Property Factor.
14. The Homeowner referred to the minutes of a meeting of homeowners on 14th September 2022, where it was stated that he had raised the point at the meeting that grounds maintenance tender documentation was not on the web portal. Among other matters, the Homeowner also raised issues in relation to hedge maintenance. It was his position that the Property Factor provided incorrect information in this regard. It seemed to him, from the Property Factor's responses, that they were not speaking to the Developer to rectify matters, as things were not getting done, including the replacement of failed shrubs. At the meeting, Mr Baird had stated that dealings with the Developer were at a senior level, which confirmed to the Homeowner that there was communication between the Property Factor and the Developer. Following the meeting, the Homeowner wrote to Mr Quinn on behalf of the Advisory Committee, again requesting to have access to information provided to the Property Factor by the Developer, and outlining issues of concern, with photographs provided. The Homeowner told the Tribunal there was an update given by the Property Factor at the meeting on 14th September 2022, but that was not what he had asked for. He said he wanted to see evidence in hard copy that he could pass to the local authority, his MP and the community council. It was his position that the Developer has now 'cleared off' and the only communication now is with the Property Factor. The homeowners need to know what is happening. The Homeowner told the Tribunal, in response to

a question as to whether he had contacted the Developer, that the Developer does not answer and it is for the Property Factor to address this matter.

15. By email dated 7th October 2023, Mr Quinn responded to issues raised by the Homeowner. He addressed the appointment of the Property Factors, stating that the extent of the Developer's request for them to provide factoring services involved the presentation of the Deeds and a plan, and thereafter the Property Factor's interpretation of the requirements.
16. By email dated 9th October 2023, the local authority's Strategic Projects Team advised the Homeowner that they had written to the Developer and been provided with a holding response. The local authority provided a summary of issues raised and responses. The Homeowner provided this information to the Property Factor, together with a response from the homeowners' committee to the email of 7th October. The Homeowner told the Tribunal that there were issues in relation to tree branches dumped by the Developer. Mr Quinn had said he would chase this up over a year ago, and the problem had not been addressed.
17. The Homeowner referred to minutes of a meeting between the Advisory Committee and the Property Factor on 24th October 2022, that showed the Property Factor had said the communications between the Developer and the Property Factor would be distributed soon. The Homeowner told the Tribunal he wanted to see all communication, and particularly that concerning hedges, trees and meadows. By email to Mr Quinn dated 10th November 2022, the Homeowner chased up issues from the meeting of 24th October, including a further request for the communication as previously requested. By email dated 15th November 2022, Mr Quinn stated that a full communication would be provided to all owners with various updates including an update on the grounds maintenance contract. In regard to the communications between the Property Factor and the Developer, Mr Quinn stated that there was little in the way of formal instruction and nothing of relevance within archived information. He stated that there was no access to historical records, which had been handed by a former Managing Director. Mr Quinn stated that the Developer may have documentation and it would be up to them to share it if deemed appropriate. The Homeowner told the Tribunal he had not asked the Developer for this information.
18. The Homeowner referred to a development plan dated 26th July 2017, which showed a five-year plan for the Development. It was his position that the works on the plan were not being carried out.
19. The Homeowner referred to an inspection report dated 9th November 2022 which showed that certain works had not been carried out.
20. The Homeowner referred to an inspection report dated 16th August 2023, which showed that certain works had not been carried out. The Homeowner told the Tribunal the homeowners expected the Property Factor to go to the Developer to ask them to remedy the defects. Asked by the Tribunal what he had been told by the Property Factor on raising these matters, the

Homeowner said he had been told the Developer was happy with the development and would not be doing any more work. The local authority is not happy with this and are pushing the Developer to finish the works. Asked about the powers of the local authority, the Homeowner said they can make enforcement orders, but if it goes that far, the local authority will be unable to share any documentation. The Homeowner said he feels it is disgusting that the Developer can walk away from this. In terms of the Title Deeds, there is land that the Developer should have passed to the homeowners, but they have not done so, but they expect the homeowners to maintain this area. The Homeowner said the Property Factor has been asked to get a report on the condition of the ground from the contractor. The contractor changed in April 2023.

21. By email dated 2nd December 2022, the local authority provided a further update to the Homeowner. The Homeowner told the Tribunal that the local authority consider that the lands and maintenance schedule is not being met. The homeowners are paying to maintain land that is not maintainable. They wish to have sight of the communications so they can address the issues.
22. Asked by the Tribunal whether the homeowners had considered appointing a different property factor, the Homeowner said it had been discussed at the Advisory Committee. Some homeowners are scared they will not get another property factor. Some are unhappy with the Homeowner for pursuing the Property Factor.
23. Asked by the Tribunal what information the Homeowner believes he has not been provided with, the Homeowner said he wants to see all information about everything. It was his position that he does not trust the verbal information provided by the Property Factor. He pointed out that the Property Factor responded to his letter of complaint on 11th January 2023 by stating that it was agreed that the Deed of Conditions provided that there is a right to such communication, but it must be understood that this cannot be to the detriment of the relationship between parties and that commercially sensitive information could not be provided. It was stated that the Property Factor did not have the express permission of the Developer, which permission had been sought and denied. The Homeowner said it is clear the Property Factor and the Developer do not want to upset each other. He is not asking for anyone's bank details. He is asking for information specifically relating to the Development. The Property Factor has the information he is seeking, and the Developer will not allow the homeowners to have it.

Cross-examination of the Homeowner

24. The Homeowner said he should be given a copy of key communication between the Property Factor and the Developer. He understands that some communication could be commercially sensitive. He accepted that he had been told to take matters up with the Developer, but it was his position that he was not going to go to the Developer as the Property Factor can do this. The Homeowner said he is not saying the Property Factor must give him everything, but there are various things that they may have answers to. They

are in the middle and best placed to liaise with the Developer. The Homeowner said he was looking for correspondence from the last 18 months addressing current issues. The Property Factor had said they would share this, and they had not done so.

- 25.** The Homeowner disagreed that the Property Factor took over the Development in 2022. It was his position that they signed as factor in August 2018 and they were responsible for management and meetings after that date.
- 26.** Asked whether he accepted the homeowners had a right to pursue the Developer, the Homeowner said he had done that and gone to the local authority, but the Property Factor has the documents.
- 27.** The Homeowner said he would expect the Property Factor to ask the Developer to come back and remedy defects. It was his position that the Deed of Conditions has a higher priority than the Service Level Agreement.
- 28.** Referred to the email from Mr Quinn dated 7th October 2022 which stated that previous information had been given to the Homeowner, the Homeowner said the only information that was shared was the Property Factor's interpretation. The Homeowner said he had never stated that the Property Factor was liable for the works, but that they had a responsibility to know what was going on. He would expect to see communications between the Developer and the Property Factor, and he does not trust the interpretation provided by the Property Factor. It was his position that their relationship with the Developer is of more importance to the Property Factor than their relationship with homeowners. The Homeowner said if he was given the information, he would give it to the local authority.
- 29.** The Tribunal asked Mr Doig if the Property Factor had any remedy against the Developer in respect of unfinished ground works. Mr Doig said the Property Factor can make representations to the Developer and the evidence will show that is what was done. They have no power to compel the Developer in this regard.

The Property Factor's position

Evidence of Mr Quinn

- 30.** The Tribunal heard evidence from Mr Scott Edward Quinn, Senior Property Manager for the Property Factor. He has been in the Property Factor's employment for three and a half years, and has been in his current position for just over two years. He was previously a property manager.
- 31.** Mr Quinn confirmed that he took over his role from Mr Duthie. The Property Factor was appointed by the Developer by virtue of the Deed of Conditions within the Title Deeds. The handover of the Development took place in mid-2022. Mr Quinn said there was no management role before then, to his knowledge, and homeowners were not billed before then.

- 32.** Mr Quinn said his understanding regarding documents about the Property Factor's appointment were with a retired Director and were unavailable. It was his position that the Property Factor was able to provide what they had, such as email chains that were appropriate. The procedure for appointment had been a simple procedure. The Property Factor had tendered and been appointed. Mr Quinn said he was not generally involved in this area but he would expect the Deed of Conditions to be provided to the Property Factor with a copy of the development plan at takeover.
- 33.** Asked to what extent the Property Factor was obliged to issue correspondence, notes or records to anyone who asks, Mr Quinn said the Property Factor can share information when they have permission. It would not be reasonably practicable to fulfil every request for information. The Property Factor would pass on updates but not every item of correspondence. Updates are generally provided to the Development rather than one homeowner. This could be done by electronic means or verbally at a meeting. All homeowners are notified if a document is put on the web portal. The web portal contains various updates.
- 34.** Mr Quinn said requests regarding issues in relation to shrubs etc. had been passed to the new business team. He does not have regular contact with them. The new business team puts any issues to the Developer. The Developer generally does not allow the Property Factor to share correspondence. The Developer's response is used to feed back to homeowners. Mr Quinn said there is a professional relationship between the Property Factor and the Developer, rather than a contractual relationship. The Property Factor has no powers to compel the Developer to carry out any works. Any request to the Developer is done as a courtesy to the homeowners. This does not interfere with the homeowners' rights against the Developer. The Property Factor maintains and manages the Development. Mr Quinn said he did not think the Property Factor would accept a development if it was in an appalling state at handover. He referred to Mr Baird's report on remedial works and said it had been shared with homeowners.
- 35.** Mr Quinn said the minute of the meeting held on 24th October 2023 may be a proper minute, but he could only share documents if he had permission to do so. Asked what he meant in his email of 15th November 2022 by 'As discussed, there is very little in the way of formal instruction,' Mr Quinn said he was referring either to the recent meeting or phone calls with the Homeowner. It was his understanding that the Homeowner was requesting historical documents and recent correspondence. Earlier on, the Homeowner had wanted clarity on how the appointment came to be. This issue has become muddled. The Homeowner later sought further information.
- 36.** There was no cross-examination of the witness.

Summing up by the Homeowner

37. The Homeowner's complaint is that the Property Factor refuses to share documentation. He accepts there are no historical tender documents available. He is looking for documentation about the remedial works. The Property Factor has confirmed they have had updates. The homeowners want to see the actual correspondence. They have never implied that the Property Factor can force the Developer to carry out remedial works. The Homeowner is not acting alone, but as the representative of the Advisory Committee. The Deed of Conditions sets out the duties of management. All the matters raised with the Property Factor concern the management of the Development.

Summing up on behalf of the Property Factor

38. The Respondent rejects the Homeowner's claim. It would be inappropriate for any order to be made compelling the Property Factor to provide the information sought. The Property Factor took over the Development as handed to them by the Developer. They have been responsible for maintaining the common parts since April 2022. Their remit is to manage the ground as it is handed over. The Property Factor cannot compel the Developer to do anything. They can raise issues of concern and have done so, in response to the complaints of the homeowners, although this is not part of their management of the Development. There is nothing to prevent the homeowners, with or without the local authority, to pursue the Developer for any breaches. The Property Factor rejects the allegation that they have failed to exhibit documents relating to the management of the Development. The peripheral issues are the basis of the Homeowner's complaint. The Tribunal should not consider any complaints after 6th April 2023, when the application was lodged. The Property Factor has not failed to carry out its property factor duties. It has complied with its service level agreement. There is a right for the homeowners to request documentation regarding the management of the Development. The Property Factor provided the documentation that was available. The Property Factor would concede that some early documentation should be provided, but it was unavailable. The management of the Development concerns the day-to-day work of the Property Factor in terms of the service level agreement and the written statement of services. That is what constitutes management of the Development.

Decision of the Tribunal

- 39.** Section 17(5) of the Act provides that property factor's duties means in relation to a homeowner – (a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land— (i) adjoining or neighbouring residential property owned by the homeowner, and (ii)available for use by the homeowner.
- 40.** The Tribunal found that the Property Factor has not failed to carry out its property factor duties by refusing to provide the requested information to the Homeowner.

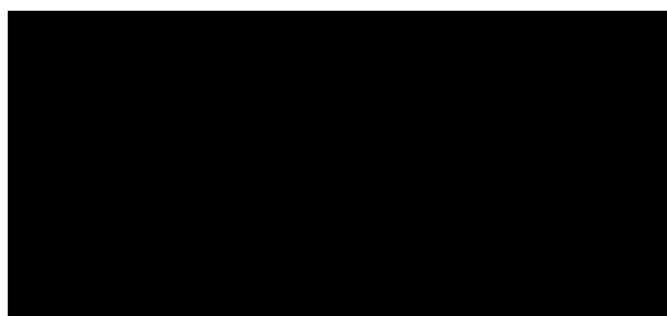
- 41.** The Tribunal found that the communications between the Property Factor and the Developer regarding remedial landscaping works constitute communications about the management of the Development. It is clear that there have been communications between these parties which cannot relate to anything other than management of the Development. The Property Factor has a duty in terms of the Service Level Agreement to arrange routine maintenance repair work to common parts. If the common parts require remedial works, and the Property Factor is in discussion with the Developer in this regard, this would seem to fall within management of the Development.
- 42.** The Tribunal did not accept the oral evidence that any discussion with the Developer on remedial works instigated by the Property Factor takes place only as a courtesy. This was not borne out by the documentary evidence lodged. At no time during the prolonged period during which the Homeowner had been asking for such correspondence by email was he told by any of the Property Factor's staff that they were only carrying out these discussions as a courtesy or that any resulting communications did not fall within the management of the Development. Instead, he was initially told the information would be provided. Following his complaint, Ms Johnston stated that there was a right to such communication, but this could not be to the detriment of the relationship between parties, that no commercially sensitive information could be disclosed, that there were GDPR issues, and that the permission of the Developer had been sought and denied. At the final stage of the complaint, Ms Harkins stated that they were not at liberty to provide such communication. Neither member of staff dealing with the complaint stated that these communications fell outwith management of the Development.
- 43.** The Homeowner has a right in terms of clause 4.8 of the Deed of Conditions to inspect a copy of a document, other than correspondence with other homeowners, which relates to the management of the Development. However, the Homeowner's request for all communications between the Property Factor and the Developer relating to the management of the Development is too wide in scope for the Property Factor to comply with. The Homeowner's evidence was that he wished to see 'all information about everything'. The Tribunal considers that the provision within the Deed of Conditions relates to specific documents, and it does not allow a homeowner to ask for all communications with no specification. The Homeowner stated in cross-examination that he was not saying the Property Factor must give him everything, but there are key documents and various things that the Property Factor may have answers to. This lack of specification suggests a fishing exercise, and it cannot be the case that the Homeowner is entitled, in terms of the Deed of Conditions, to be provided with every item of correspondence between the Property Factor and the Developer. However, if the Homeowner was to identify specific documents that fell within the terms of the relevant clause of the Deed of Conditions, it is difficult to see how the Property Factor could refuse to provide them, as long as they did not contain commercially sensitive information.

Observations

- 44.** The Tribunal observed that the local authority is already involved in discussion with all parties in regard to the landscaping issues. The local authority representative stated in his update of 2nd December 2022 that they would continue to assist to take matters forward as much as possible. While the Homeowner is, understandably, frustrated at the difficult position in which he and other homeowners find themselves due to the Developer's failure to complete landscaping works, it appears that matters are moving forward.
- 45.** Having determined that the Property Factor has not failed to carry out its property factor duties, the Tribunal determined not to make a Property Factor Enforcement Order.

Right of Appeal

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.



Legal Member and Chairperson
21st December 2023