

Housing and Property Chamber

First-tier Tribunal for Scotland



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

AMENDED STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017

Chamber Ref: FTS/HPC/LM/19/1376

Re: Hillpark Brae Development, Craigcrook Road, Edinburgh, EH4 7AP ("the Development")

The Parties:-

Mrs Irene Hamilton, 11 Hillpark Grove, Edinburgh, EH4 7AP ("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD ("the Factor")

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr Andrew Taylor (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with section 6.1 of the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act"). The Tribunal further found that the Factor failed to carry out its property factor duties as required by section 17(1)(a) of the Act.

The decision is unanimous.

Background

1. By application dated 3rd May 2019, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with sections 2.1, 3.3, 6.1 and 6.9 of the Code, and whether the Factor had failed to carry out its property factor duties.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including correspondence to and from the Factor, photographs, an inspection report, the Factor's written statements of services, a timeline, and Land Certificate MID56835.
3. The Homeowner intimated her concerns to the Factor by letter dated 8th March 2019.
4. By decision dated 16th May 2019, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
5. Both parties made written representations in advance of the hearing.
6. The hearing was held on 12th July 2019 at George House, 126 George Street, Edinburgh. The Homeowner was present and supported by her husband, Mr Robin Hamilton. The Homeowner had a witness present – Mr Aylmer Millen. The Factor was represented by Ms Karen Jenkins, Client Relationship and Support Manager.

Preliminary Matters

7. There was discussion about the witness for the Homeowner and the fact that his evidence should be restricted to specific areas relevant to the application. It was agreed by the Tribunal that Mr Millen could sit in the hearing throughout.
8. The Tribunal asked about the alleged breach of Data Protection legislation. The Homeowner said that matter had been dealt with and was no longer part of her complaint.
9. The Homeowner produced a plan of the development for the assistance of the Tribunal. Ms Jenkins had no objection to the plan being lodged. The Tribunal allowed the plan to be lodged.

Evidence of the Homeowner

10. The Homeowner supplemented her written submissions with an oral submission to the Tribunal, explaining the background details in relation to the Development, which bounds a nature reserve at Corstorphine Hill. This area is under the control of the local authority. The Factor was appointed in April 2004. The Development was handed over in stages to the Factor until completion around 2016. An unconnected pipe caused problems with flooding in 2012 at the northern boundary. This was rectified by the Developer and local authority. In order to deal with surface water running off the area controlled by the local authority, a land drain was installed with around 40 manholes built along the length of the drain. Further flooding occurred in 2010 on the western boundary. Investigations showed there was no outlet for the drain. This flooding was addressed at the time by the developer and local authority and has not recurred, but certain homeowners are experiencing

problems with flooding on or adjacent to their properties. Owners have pressed the Factor repeatedly to develop a maintenance programme for the land drainage system. To date, no maintenance has taken place, although investigations have been carried out.

11. At a quorate meeting on 23rd October 2017, the homeowners agreed to proceed with land drainage repairs, which were to be carried out by Direct Drains. Works commenced on 29th January 2018; however, the works were abandoned that day as it was discovered that Direct Drains did not have the equipment or experience to carry out the work. Communications from the Factor from May to August 2018 delivered no substantive news.
12. In advance of a meeting of homeowners to be held on 25th October 2018, the Factor issued a mandate form with the option of not proceeding with the drainage works. This was in direct contravention of section D7 of the Title Deeds for the development.
13. The Factor also issued a spreadsheet showing the schedule of repairs for drainage works following a CCTV survey on 19th March 2018. The spreadsheet was produced on two sides of A4 paper and it was very difficult to read. The Homeowner had to have it enlarged to A3. The spreadsheet showed a multi-contractor option, using Lanes Drains, Tecx Roofing and Environclean. The content of the spreadsheet was flawed. It was impossible to compare the three individual tenders received for the work. VAT was not consistently applied to the figures. It was not clear how the sums had been arrived at. One of the columns did not add up to the figure shown. This was a breach of section 2.1 of the Code, which states: *You must not provide information which is misleading or false.*
14. At the meeting on 25th October 2018, a quorum of owners agreed to proceed as soon as possible with the drain maintenance, using the contractor, Lanes. They did not wish to proceed with a multi-contractor option. The content of the spreadsheet was not clearly explained by the Factor at the meeting. The spreadsheet was altered 5 months after the meeting but it still contained mistakes.
15. There followed a period of 5 months with no information provided to homeowners by the Factor. No minutes of the said meeting were produced by the Factor.
16. The Homeowner feels exhausted with the stress of trying to deal with this matter. There has been no flooding at her property, but the manhole in the garden is always two-thirds full of silt. The repairs issue is hanging over her and her husband, and they fear acute damage to the drains and properties. The health of the Homeowner and her husband has been affected.
17. The Factor has breached section 3.3 of the Code, which states: *You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are*

charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance. The Factor failed to give details in their letter of 28th September 2018 of the sums collected from owners towards the drainage works. There was a lack of clarity over sums paid to the contractor, Lanes. It was unclear whether owners had paid twice for the same work. The Factor failed to provide a description and explanation of the works charged to owners.

18. The Factor has breached section 6.1 of the Code, which states: *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.* The Factor has neglected to give estimated timescales for starting and completing maintenance/repair works.
19. The Factor has breached section 6.9 of the Code, which states: *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.* The Factor failed to pursue the contractor who was delaying in providing a service. The Factor blamed the contractor for failing to provide the information needed to allow the maintenance works to proceed, yet the Factor did not pursue the contractor for this information. The Homeowner finds it difficult to believe that a company such as the contractor would take 5 months to provide all the information necessary to proceed with the maintenance works.
20. The Factor has failed to carry out its duties to a reasonable standard by unreasonably delaying, stalling and postponing essential maintenance and repairs, taking a huge risk with the owner property sales values and insurance. Repairs were authorised in 2017. At that time, homeowners agreed to a contingency fund of £10 a quarter from each household. This levy was not implemented by the Factor for more than 18 months. The Factor took 5 months to issue minutes of the meeting of 25th October 2018.
21. The Factor has failed to carry out its duties to a reasonable standard by sending out a mandate with an option not to carry out the works, which is in direct breach of the Title Deeds.

Evidence of Mr Millen on behalf of the Homeowner

22. Mr Millen clarified matters in relation to the 2010 flooding which occurred at the northern boundary of the development. The drain was flushed through and an outfall provided to connect to a Scottish Water drain. The storm drain on the western boundary drains into this drain.

23. Mr Millen said the spreadsheet referred to was discussed at the meeting on 25th October 2018. There was some 'high level' explanation by the Factor as to what the figures meant. The homeowners were not happy with the proposal for multiple contractors and wanted one contractor to carry out the work. The spreadsheet had been produced following an earlier phase and was informed by contractor input.

Evidence on behalf of the Factor

24. In relation to the alleged breach of section 2.1 of the Code, Ms Jenkins explained that the spreadsheet produced was an attempt to compare the costs of the different contractors. It had been compiled by a previous employee of the Factor, a surveyor who left the company in September 2018. It had taken Ms Jenkins some time to understand it. She agreed it was not the best layout and it appeared complicated. She denied it was false or misleading, but conceded it was not clear. It contained provisional sums in relation to sectional and costly repairs.

25. Initially, the drain was jet washed and a CCTV survey carried out. This showed defects in the drain. The work was put out to tender and two meetings were held with homeowners. Homeowners decided at the meeting on 25th October 2018 that they would prefer one contractor to carry out all the works.

26. The mandate provided in advance of the October 2018 meeting was not clear, as the Factor was still awaiting information from contractors. However, enough owners agreed at this meeting that the work should proceed.

27. In relation to the alleged breach of section 3.3 of the Code, Ms Jenkins said homeowners receive quarterly billing. There is a description section on the quarterly statements sent to homeowners. Routine maintenance is not described, but ad hoc work is described. All invoices and charges are on the client portal. For project work, there are advance charges which are invoiced separately. The account for this work is ringfenced. With regard to the drainage works, not much work had been done so far. Information has been given to homeowners as matters have progressed. At this stage, the Homeowner indicated that she was not complaining about the quarterly information given in relation to routine maintenance, but about the lack of clarity, description and information in relation to the drainage works.

28. In relation to the alleged breach of section 6.1 of the Code, Ms Jenkins conceded that there had not been a great deal of information given to homeowners following the meeting on 28th October 2018. This was due to problems with Lanes, the contractor. Their computer system went down. They are a large company with different offices. The Factor had met with them in November 2018 and asked them to revisit their quote. There was further discussion and re-pricing. It was impossible for the Factor to give timescales due to the third-party delays. Ms Jenkins said she could have kept in touch with homeowners to inform them that the Factor was still working on this matter, although she would not have had any particular information to pass on. Responding to questions from the Tribunal, Ms Jenkins said there is now

an estimated start date of 22nd July 2019 for the works. The Factor requires 75% of the cost upfront from the homeowners before works can commence.

29. In relation to the alleged breach of section 6.9 of the Code, Ms Jenkins said the contractor had been chased up by letters, and meetings had been arranged to discuss progress. Ms Jenkins referred the Tribunal to her handwritten notes lodged with her written submission, which indicated meetings and contact with Lanes.
30. In relation to the alleged breaches of property factor's duties, Ms Jenkins said she did not accept there had been unreasonable delay. Responding to questions from the Tribunal regarding the fact that problems had first been identified in 2010 and, 9 years later, no work had yet been carried out, Ms Jenkins said she had been involved since 2017. There have been two sets of tendering since that time. The Factor has not stalled matters; it has just taken time.
31. Responding to questions from the Tribunal regarding the matter with Direct Drains, and their inability to carry out the work, Ms Jenkins conceded that the Factor could have given a more detailed specification in advance of the works commencing, which would have avoided this problem occurring.
32. With regard to the matter raised by the Homeowner that the Factor had undertaken to seek monetary contributions towards repair from the local authority and the Developer, Ms Jenkins said the Factor does not yet have all the facts. They may seek monetary contribution from the local authority in the future. The Developer currently denies liability. Much will depend on the outcome of works to open up the drainage before it can be ascertained whether there are any legitimate claims against the Developer.
33. With regard to the Homeowner's complaint that there had been an 18-month delay in collecting the levy of £10 per month proposed by homeowners, Ms Jenkins said the person responsible for this left in August 2018. Ms Jenkins then discovered the levy had not been collected in full. £5 per month had been collected, as this arrangement was already in place for a planting fund. The homeowners had agreed to transfer this funding to the drainage project.
34. Ms Jenkins said the reason the minutes of the meeting were delayed for 5 months was because she was awaiting costs from Lanes.
35. In relation to the complaint regarding breach of the Title Deeds, Ms Jenkins said she could not comment as to whether there had been a breach, but the Factor had to seek permission from the homeowners as the costs for the proposed works were over the threshold at which they could carry out work without consent.

Findings in Fact

36.

- i. The Homeowner is the joint owner and occupier of the property at 11 Hillpark Grove, Edinburgh, which is registered in the Land Register of Scotland under Title Number MID56835.
- ii. The Development is a mixed development consisting of 156 properties.
- iii. The Development was commenced in or around 2002 and was completed in stages until final completion in or around 2016.
- iv. The Factor acquired the business of the previous Factor, Safe Hands, in or around October 2003.
- v. The Factor registered as a Property Factor on 7th December 2012 under registration number PF000153.
- vi. The Factor acts as agent for the homeowners within the development in terms of a Deed of Conditions registered in the General Register of Sasines by the Developer on 4th April 2002, and the Factor's Written Statement of Services.
- vii. The Development site slopes from west to east, and borders an area of nature conservation at Corstorphine Hill, which is under the control of the local authority.
- viii. The Developer installed a land drain along the western boundary of the Development. Tributaries run from the main drain and discharge along the north boundary into the surface drainage system. There are approximately 40 manholes along the extent of the drain.
- ix. Parts of the Development have suffered drainage problems and flooding. There was a significant flood in 2010. This has not recurred but some homeowners have continued to have drainage problems.
- x. Investigations have been carried out and remedial works proposed. Homeowners have agreed to the remedial works. No work has yet commenced.
- xi. The Factor has not provided information which is misleading or false.
- xii. The Factor has failed to inform homeowners of the progress of the work, including estimated timescales for completion.
- xiii. The Factor has failed in carrying out its duties by failing to progress the drainage works in a satisfactory and timeous manner.

Determination and Reasons for Decision

37. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

Failure to comply with Section 2.1 of the Code

38. The Tribunal found that the Factor had not provided information that was misleading or false. The Tribunal considered that the spreadsheet complained of by the Homeowner was confusing and difficult to understand. The information could have been provided in a better format. However, there was no intent by the Factor to provide misleading or false information; neither was there the level of carelessness that might lead to a finding of failure of this section. This was a working document and the Factor explained the

information at a subsequent meeting. The Tribunal made an observation that it was not appropriate to expect homeowners to make a decision on the works when the information in the spreadsheet was incomplete.

Failure to comply with Section 3.3 of the Code

39. The Tribunal found that the Factor had not failed to comply with this section of the Code, which deals with financial breakdowns to be provided to homeowners at least once a year. The Homeowner accepted that the Factor provided quarterly statements and said she was complaining about information in relation to the specific drainage matters. These are not included in the Factor's quarterly statements and are dealt with in separate correspondence. This would not appear to be the appropriate section of the Code under which to bring this complaint.

Failure to comply with Section 6.1 of the Code

40. The Tribunal found that the Factor had failed to comply with this section of the Code by failing to keep homeowners informed of the progress of the drainage works, including estimated timescales for completion, over a protracted period.

Failure to comply with Section 6.9 of the Code

41. The Tribunal found that the Factor had not failed to comply with this section of the Code. This section refers to a failure to pursue a contractor to remedy defects in inadequate work or service provided. There had been no such work or service provided. The Tribunal was not persuaded by the Homeowner's assertion that Lanes were providing a service during the five month period of discussion over the proposed works.

Failure to carry out the Property Factor's duties

42. The Tribunal found that the Factor had failed in carrying out its property factor duties by failing to progress matters in relation to the drainage works. The Tribunal was not impressed at the excuses given on behalf of the Factor that various people had left the employment of the Factor, thus leading to delays. This is not a valid excuse for failing to carry out the factoring duties. The delay caused by the appointment and inability of Direct Drains to carry out the works could have been avoided had the Factor ensured that a proper specification of works was provided to the contractor at the start of the process. The Factor delayed in collecting the agreed levy from the homeowners. The Factor delayed in providing minutes of a meeting. The Tribunal considered that minutes of a meeting should be provided as soon as reasonably possible after a meeting, and should not be delayed while the Factor awaits further information. The Tribunal considered that the Factor's approach in recommending three different contractors delayed matters.

43. The Tribunal did not find that the Factor had breached the Title Deeds by including an option that the works not be carried out in its mandate. The

Factor cannot carry out any works without the authorisation of homeowners, notwithstanding the terms of the Title Deeds.

Proposed Property Factor Enforcement Order (PFEO)

44. Having determined that the Factor has failed to comply with the Code and failed in carry out its property factor duties, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

45. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failure to comply with section 6.1 of the Code and by failing to carry out its property factor duties.

Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations. The Tribunal proposes to make the following PFEO:

“The Property Factor is required to pay to the Homeowner within 21 days of intimation to them of the PFEO the sum of £350 from their own funds and at no cost to the development homeowners, in order to compensate the Homeowner for the distress, frustration and inconvenience caused as a result of the Factor's failure to comply with the Property Factors Code of Conduct and to carry out its property factor duties.”

46. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

47. 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.

Helen Forbes

Legal Member and Chairperson

20th August 2019

