



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: FTS/HPC/LM/19/1424

**Shrubbery Gardens opposite, 23 West Park Road Newport-on-Tay, Fife DD6 8NP
("the Property")**

The Parties:-

**Mr Gordon Logan, 32 West Acres Drive, Newport-on-Tay, Fife DD6 8NR
("the Homeowner")**

**Caledonia Housing Association, 5 St John's Place, Perth PH1 5SU
("the Factor")**

Tribunal Members:

**Graham Harding (Legal Member)
David Godfrey (Ordinary Member)**

DECISION

The Factor has not failed to carry out its property factor's duties.

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 are referred to as "the Rules"

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 8 May 2019 and subsequently amended on 22 May 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 2.1, 2.2, 6.3, 6.4, 6.6 and 6.9 of the Code as well as being in breach of its property factor duties. The Homeowner provided the Tribunal with written submissions in support of his application.
2. By Notice of Acceptance dated 20 June 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. The Factor's representatives Harper Macleod LLP, Solicitors, Glasgow, lodged written submissions by email dated 2 August 2019. The Homeowner responded by submitting further written submissions by email on 12 August 2019.

Hearing

4. A hearing was held at Dundee on 16 August 2019. It was attended by the Homeowner supported by Mr Douglas McBride and the Factor was represented by Ms Keri Preece of Harper MacLeod LLP. There were two witnesses for the Factor namely Mr Andrew Kilpatrick, Asset Management Director and Mr Bill Lambie, Clerk of Works.
5. By way of a preliminary matter the Tribunal noted that the Homeowners latest submissions had been lodged on 12 August 2019 and were therefore late. However, Ms Preece confirmed that she had no objection to the documents being admitted and accordingly the Tribunal allowed the submissions to be received although late.

Summary of submissions

Sections 2.1 and 2.2 of the Code

6. The Homeowner submitted that in its letter of 30 November 2017 addressed to his mother who occupied the property at 23 West Park Road, Newport-on-Tay, despite suggesting a spend of nearly £6000.00 the Factor provided no clarification as to the area involved and that the proposed installation of barriers was the only option available. He felt that he along with other owners did not know what was happening and several owners had contacted the Factor for further information. This had resulted in the Factor sending a further letter to owners including the Homeowner's mother on 5 December 2019. That letter had explained that it would not be possible to have a meeting between the Factor and homeowners before Christmas. As a result, the homeowners had arranged their own meeting that took place on 12 December to discuss the proposed installation of barriers around the shrubbery at the property. The homeowners had discovered that the proposed installation of barriers had come about as a result of a new contractor taking over the contract for garden maintenance and determining that barriers were required following a risk assessment. The homeowners

were aware however that the same regulations had been in force for over a decade and previously it had not been considered necessary to have barriers. The Homeowner went on to say that at a meeting with the Factor on 17 January 2018, although it had initially been presented as a fait accompli, other options were explored. The Homeowner said that he had asked the Factor to bring someone from the new contractors to the meeting but the Factor had refused to do this. As far as the Homeowner could recall the Homeowner thought that the other options that were considered at the meeting and subsequently investigated by the Factor had been suggested primarily by the homeowners. The Homeowner felt that by initially not explaining in detail where the barriers were to be installed and expressly why they were deemed to be necessary and also by failing to canvass other available options with the homeowners the Factor was in breach of Section 2.1 of the Code in that the letters of 30 November and 5 December 2017 provided information that was false or misleading.

7. For her part Ms Preece submitted that the letters were not false or misleading. They made it clear that a risk assessment had been carried out by the new contractors and that there was a health and safety risk but no work would be carried out unless a majority of residents were in favour. The letter of 5 December made it clear that the Factor had taken on board the homeowners concerns and that a meeting would be arranged and again that it would require a majority of owners to be in favour. Ms Preece felt that given the alternative options that had been considered at the meeting with homeowners in January 2018 were similar to those mentioned in the I D Verde risk assessment it was likely that some had been proposed by the Factor rather than the homeowners.
8. Mr Kilpatrick explained that a new contractor had taken over the business of the original contractor who had gone into liquidation. The new contractor I D Verde was aware of a fatality due to a fall from height and two developments managed by Caledonia had been identified where preventative measures were required. The Factor had its Health and Safety team consider the contractors risk assessment and felt it was reasonable. Subsequently the Factor had obtained a quotation for the preferred works and written to the homeowners. It had been necessary to consult with the owners to start the process. Having gone through that process it became apparent that owners did not want to spend that amount of money and following the meeting in January 2018 took away the other options, considered and costed them and came back to a meeting of owners on 28 March 2018. At that meeting it was decided to proceed to cut gaps through the shrubbed areas as it was felt that was a better and cheaper solution.
9. The Homeowner went on to say that it was apparent from the minute of the meeting of 17 January 2018 that as Lynda Mutch had felt obliged to apologise for the ill feeling that had been caused that was indicative that the earlier correspondence was abusive and intimidating. The Homeowner was of the view that given the average age of the homeowners the correspondence received from the Factor regarding the need to erect barriers had come across as intimidating. The Homeowner said he felt that if he did not agree to

the barriers being erected the garden contractors would withdraw their services.

10. Ms Preece said she strongly opposed any suggestion that the correspondence of 30 November and 5 December 2017 was in any way abusive, intimidating or threatening within the ordinary meaning of the words. The Factor had been advised of the risk assessment that had been carried out and had considered the erection of barriers reasonable. The homeowners would be required to pay for that and there was a requirement to keep people informed.

11. Mr Kilpatrick was of the view that the letter of 5 December set out the contractors preferred option and this was followed up when it was evident homeowners were not happy. It was necessary for the Factor to consult with homeowners. With the benefit of hindsight, it would have been possible to have put more information about alternative options in the original letter but that would not have made the correspondence any more or less intimidating as he did not consider it was intimidating. For his part the Homeowner felt if more information had been provided in the initial letter there would have been much less difficulty going forward.

Section 6.3 of the Code

12. The Homeowner explained that his complaint in this regard was in respect of his request in December 2017 and January 2018 for the costings for the erection of the barriers. There were no written requests before the Tribunal and the Homeowner thought the request had been made at the meeting of owners in January 2018. Ms Preece commented that as the homeowners had decided at that meeting not to proceed with the erection of the barriers because of the cost and to explore alternative options there would have been no point in producing information relating to the barriers.

13. The Homeowner said that he had been asking for more information because new contractors had been appointed and he had wanted to know who was doing what. At the meeting on 17 January the owners ought to have been able to have seen the tender documents.

14. Mr Kilpatrick said he was unaware of any email correspondence from the Homeowner to the Factor requesting any such tender documentation. At the time of the contractor going into administration the Factor was tied into a contract for 2019/2020. I D Verde took over that contract. It was not re-tendered. Mr Kilpatrick went on to say that the Factor was obliged to follow public procurement regulations and tender documents could be accessed on the Public Contracts Scotland portal. It was not practice to send out tender documents to every customer but they would be available on request subject to redaction of commercially sensitive information. Mr Kilpatrick went on to say that for contracts up to £5000.00 the Factor would only obtain one quote. For contracts between £5000.00 and £20000.00 they would obtain three quotes. However, if necessary additional quotes would have been obtained. Mr Lambie confirmed that the quote for the erection of the barriers was a ball

park figure that he would have expected but agreed that other quotes could have been obtained.

Section 6.4 of the Code

15. The Homeowner stated that he had seen a list of repairs for ground maintenance and maintenance of common areas but did not recall ever seeing a programme of cyclical maintenance. Mr Kilpatrick said that the Factor operated a number of different programmes at the development. Mr Lambie as clerk of works was responsible for ground maintenance. There would be periodic walks around the development to identify any issues. The main cyclical maintenance would be in respect of the paintwork. This would be dealt with every five years. There would be an inspection after about four years to determine whether the paintwork would require to be repainted sooner than five years or perhaps could be left for a further year. Any common repairs such as in the stairwells would be dealt with on an ad hoc basis if reported by owners with the issue of a works order. Other issues would be discussed at annual meetings.
16. The Homeowner was of the opinion that the Factor should submit a schedule that set out the cyclical maintenance programme as it would be good to know.

Section 6.6 of the Code

17. The Homeowner indicated that his submission in this regard was in a way a duplication of his previous submission in with regards to Section 6.3. There were discrepancies in the availability of information depending on who he communicated with at the Factor's office. The Property Factoring Officer was usually the first point of contact. Mr Kilpatrick indicated that it was usually better for owners to communicate by email as there was then a record of the communication.

Section 6.9 of the Code

18. The Homeowner pointed out that it was clear from the documentation lodged that it had been necessary for the Factor to have the contractor return two or three times to remedy the work done in cutting access paths into the shrubbed area. In addition, the Homeowner had surveyed the other residents at the development after the work had been done and a majority had indicated the work was not acceptable. The Homeowner referred the Tribunal to photographs of the shrubbery taken in the week prior to the hearing. He pointed out a "u" shaped path that had been cut rather than the straight paths that had been shown on the plan given to owners prior to the work being done. He pointed to another area which had a deep section cut out and which he said looked as if something had accidentally been driven into it. The homeowner also referred to another picture which had a number of smaller shrubs growing and which he thought looked better than the area with the large shrubs. The Homeowner said that the Factor had told owners that the area would gradually recover but that one year on it still did not look attractive.

19. For the Factor, Mr Lambie confirmed it had been necessary to get the contractor back three times to complete the work to a satisfactory standard. He described their initial attempt as "a Friday afternoon job". It had been hurried and there had been a lack of supervision. The bushes had been left with jagged sharp points. Mr Lambie confirmed that the contractors had borne the additional cost of returning to complete the work. There had been no extra cost to owners. Mr Lambie said that he had supervised the work on the third occasion and by then everything had been completed in line with what had been intended. He explained that he had forty years' experience in the industry. He was aware a man had died working on a shrub bed at another location and that there was a real safety aspect working on mature shrubs on a steep slope. He explained that working on mature shrubs did require some fall protection in these conditions and that barriers would be an appropriate measure. The alternative of cutting paths was in his opinion value for money given the owners did not wish to erect barriers.
20. For his part Mr Kilpatrick confirmed that removal of the shrubs had been considered as an option at the meeting on 28 March 2018 but had been ruled out and the cost of removal and replanting with smaller shrubs would have been more expensive than the option chosen. Mr Lambie confirmed that from the recent photographs the paths are remaining as channels to service cutting the shrubs. The shrubs were natural plants and last years growing season had been poor. It had been better this year and the appearance would continue to improve.
21. The Homeowner said that there were not six pathways as had been planned. There were many stumps that affected safety and the pathways themselves were not being used by the contractors who were using extended equipment. Mr Lambie explained that in some instances stumps had been left as they allowed growth to side coverage. If the paths were not being used that was a management problem for the new contractors. Ms Preece suggested that this was departing from the issues around Section 6.9.
22. The Homeowner repeated his submission that he was not satisfied that the work done by the contractor had been to a satisfactory standard. For the Factor Mr Kilpatrick explained that it had not been apparent that the Homeowner had a clear mandate to represent all the homeowners. He explained he would have expected to have seen a jointly signed letter or a petition whereas all that had been sent was the Homeowners email. The contractors work had been signed off as satisfactory by the clerk of works and by the nature of the works it had been accepted that it would initially look unsightly but it would get better over time.

Property Factors Duties

23. The Homeowner submitted that there had been a lack of clear communication by the Factor in dealing with the issues raised and that in making a complaint an owner gets lost in the procedure. He felt that the survey that he had carried out ought to have been given more weight by the Factor and that he had been unaware that more would have been needed of him to show that he was

acting for the majority of the owners. He felt there had been too many contradictions and that the project had been a waste of money as the paths were not used and the whole area was accessible by extended equipment. The cost of the work done by I D Verde should therefore be returned to the homeowners. The shrubbery should not be left in its current condition and there needed to be a way forward to find a solution that was acceptable to the owners and the contractor. Mr Logan confirmed that he had been of the opinion that he was representing other owners in the Development and had not been aware of other owners contacting the Factor direct although he had been aware of an owner raising court proceedings that were around the same subject but had been settled subject to a non-disclosure agreement. Ms Preece said she had no involvement in that case and in any event, it was not relevant to the current proceedings.

24. For the Factor, Ms Preece submitted that the Homeowners complaints had been investigated and Mr Kilpatrick explained that even although the complaint had been treated as being on behalf of only one owner it was still followed through and at the stage two complaint Gary Savage who was entirely independent of Mr Kilpatrick's team had done a comprehensive investigation so it was apparent that the Homeowners complaint was still taken seriously. Ms Preece submitted that there was a duty to comply with the Working at Height Regulations. However, the contractor was ultimately responsible for the safety of its own employees. The Factor having been provided with the contractor's risk assessment referred it to its own Health and Safety team who concurred with the contractor's findings. The works initially proposed were not undertaken and the owners' instructed the Factor to proceed with the work that was carried out. Ms Preece said that the Factor could not be criticised for that. Had the owners not wished to have the work done it would have been open to them to have arranged their own contractor.

The Tribunal make the following findings in fact:

25. The Homeowner is the owner of 23 West Park Road Newport-on-Tay, Fife ("the Property")
26. The Property is a flat within Westpark, Newport (hereinafter "the Development").
27. The Factor performed the role of the property factor of the Development.
28. The flat is occupied by the Homeowner's mother.
29. Following the demise of the previous garden maintenance contractors, the garden maintenance contract at the Development was taken over by I D Verde.
30. I D Verde carried out a Work at Height risk assessment dated 26/04/17 and concluded that their preferred option was the installation of permanent edge protection along approximately 35 metres of wall.

31. The previous contractors had not considered edge protection necessary.
32. Alternative options were also considered in the risk assessment.
33. The Factor's Health and Safety team considered the Work at Height risk Assessment prepared by I D Verde to be reasonable and the Factor recommended in a letter to the Homeowner's mother dated 30 November 2017 that barriers should be installed at the Development at a total cost of £4998.00 excluding VAT.
34. The Homeowner and other owners were not happy with the proposal and the Factor sent a further letter to the Homeowner's mother dated 5 December 2019. This letter provided the Homeowner with some further detail as to the length, height and construction of the proposed barrier and indicated a majority vote was required for the proposal to proceed.
35. The letter also confirmed that the Factor would not be able to attend to any areas of ground that were not accessible from ground level if the barriers were not erected.
36. The letters of 30 November and 5 December 2017 were not intimidating, abusive or threatening.
37. The owners at the Development held a meeting to discuss the proposed barriers on 12 December 2017. Thereafter a meeting was held between the owners and the Factor on 17 January 2018 to discuss the way forward.
38. At that meeting the owners rejected the proposal for erecting barriers and instructed the Factor to explore and cost alternative options including those contained in the I D Verde Work at Height Risk Assessment.
39. The Factor's representative at the meeting Ms Lynda Mutch apologised to the owners for any ill feeling that had been caused as a result of the proposals.
40. A further meeting of owners at the Development was held on 28 March 2019. The view of the meeting was that of the alternative options considered the cutting of 5 or 6 paths through the shrubs and leaving a natural barrier along with reducing the height of the shrubs was the best option.

41. The cost of this option was £750.00 plus VAT. A letter was sent to owners on 2 April confirming the decision to proceed unless there were any comments.
42. All but one of the owners agreed to the works proceeding.
43. I D Verde carried out the cutting of the paths through the shrubbed area at the development and the reduction in height of the shrubs.

44. The initial work was not done to a satisfactory standard and the contractors returned on three occasions before the Clerk of Works Mr Lambie signed it off.
45. There was no additional cost to owners for the remedial work.
46. The initial appearance of the shrubbed area following the cutting of the paths and height reduction was unsightly.
47. The Homeowner was not happy at the standard of the work. He contacted other owners at the development and organised a survey of their opinion.
48. Although the Homeowner complained to the Factor about the work carried out it was not apparent to the Factor that the Homeowner had a mandate to represent the majority of owners at the Development.
49. The Homeowner's complaint was progressed through the Factor's complaints procedures and at Stage 2 was investigated by Mr Gary Savage who did not uphold the complaint and who wrote to the Homeowner by letter dated 26 November 2018.
50. The Factor follows Public Procurement regulations when tendering for contracts.
51. The garden maintenance contract was re-tendered in 2018 for the year 2019/2020 and I D Verde are no longer the contractors. The current contractors use extended equipment to trim the shrubs.
52. The shrubs at the Development are less unsightly following growth this season but have not yet returned to their previous condition.
53. The core service provided by the Factor includes periodic property inspections and a cyclical maintenance programme for external painting.

Reasons for Decision

Section 2.1 of the Code

-
54. The Tribunal was of the view that in the Factor's initial letter of 30 November 2017 it might have been helpful if it had contained more information with regards to the reasons for the need for fall protection, more detail as to the specifications of the proposed barriers and more information on the range of alternative options that might be available. That said, in the every day understanding of the meaning of "misleading or false" it cannot be said that the information provided in either that letter or the letter of 5 December 2018 fell into that category. Furthermore, the Factor went to considerable lengths thereafter to investigate and cost alternative options in the light of opposition from homeowners to the erection of barriers and only proceeded once it had

the consent of the majority of owners. Accordingly, the Tribunal was not satisfied that the Factor had breached this section of the Code.

Section 2.2 of the Code

55. Whilst the Homeowner attempted to argue that because the average age of the residents in the Development was high and that this meant that they may be likely to feel more intimidated by correspondence such as that received from the Factor in November and December 2017, the Tribunal had to take into account not the feelings of other residents but those of the Homeowner. The Tribunal did not accept that the Homeowner would in fact feel intimidated by the wording of the letters. Although the letter of 5 December indicated that the Factor would be unable to maintain the area of ground in question if the barriers were not erected the Tribunal was of the view that the mere fact of not carrying out a service was not in itself intimidating. The Tribunal therefore found that the Factor had not breached this section of the Code.

Section 6.3 of the Code

56. It did not appear to the Tribunal that the Homeowner had properly addressed his complaint with regards to this section of the Code. He did not produce any correspondence to show that he had requested the Factor to produce the information. It also appeared that the information with regards to the quote for the erection of barriers was superseded by the owners' decision at the meeting on 28 January 2018 not to install them. Furthermore, the Factor offered a reasonable explanation at the hearing that in accordance with its procurement procedures it would only obtain one quote for works costing up to £5000.00 and at that time it was tied into a contract with I D Verde. The Tribunal also accepted that the Factor had provided information regarding the Public Contracts Scotland portal. Accordingly, the Tribunal did not find that the Factor had breached this section of the Code.

Section 6.4 of the Code

57. The Written Statement of Services at Part 1 of the Schedule does make provision for periodic visits and periodic decoration of common parts. It appeared to the Tribunal from the evidence from the Factor's representative, Mr Kilpatrick, that there would be different programmes depending on how the work was identified either through an inspection or by a referral from an owner. By way of an observation it seemed to the Tribunal that there could be merit in agreeing with homeowners timescales for any periodic visits and any cyclical maintenance as at present the arrangement appears somewhat unspecific. However, the Tribunal did not consider that the lack of any timescale in itself would amount to a breach of this section of the Code and it did appear that if following a periodic inspection works appeared necessary a programme of works would be prepared. The Tribunal did not consider the Factor was in breach of this section of the Code.

Section 6.6 of the Code

58. Once again it appeared to the Tribunal that the Homeowner had failed to provide any documentary evidence to show that he had asked for information relating to any tendering process. Furthermore, the Tribunal was satisfied from the evidence provided on behalf of the Factor that if such a request had been made it would have been provided either via the Public Contracts portal or in paper form from the Factor. The Tribunal was not persuaded that the Factor had breached this section of the Code.

Section 6.9 of the Code

59. The Factor accepted that the Homeowner and indeed other owners were not happy with the standard of work carried out at the Development by I D Verde when trimming the shrubs and cutting the paths. As a result, they arranged for the contractors to return on three separate occasions to remedy the defects before being satisfied that the work had been done to a reasonable standard. It was anticipated by the Factor and had been explained to owners that following the paths being cut and the shrubs trimmed that their appearance would be unsightly for a time. The Tribunal accepted that due to the weather last year growth was poor. It did appear from the recent photographs that the overall appearance was improving and to some extent this was accepted by the Homeowner although he remained critical of the work that had been done and did not consider it value for money. The Tribunal also considered that it was likely that the appearance of the shrubbery would continue to improve with time. The Tribunal also accepted that it was not apparent to the Factor that the Homeowner was representing the majority of owners when complaining about the work that was done. The Factor could not be expected to know that this was the case in the absence of written authority from a majority of other owners either in the form of a letter, mandate or petition. The Tribunal therefore was not satisfied that the Factor was in breach of this section of the Code.

Property Factors Duties

60. It appeared to the Tribunal that the Homeowner's complaint that the Factor had failed in its property factor duties was largely replicating his complaints regarding the alleged breaches of the Code. It might be that the Homeowner rightly considered that there had been a lack of communication particularly during the early stages in November 2017 and with the benefit of hindsight the Factor could have provided more information in the letter of 30 November but as soon as owners contacted the Factor with their concerns it was apparent that the Factor took steps to address those concerns. Although the Tribunal could appreciate why the Homeowner would be frustrated after having agreed on Health and Safety grounds to the paths being cut and the shrubs trimmed for the contractors not to use the paths it also accepted that following a change of contractors the Factor would not have direct control over the management of that contractors operatives. The Tribunal accepted that once it had been brought to the Factor's attention by I D Verde that there

was a working at height risk it had no option other than to make recommendations to the owners. The preferred option of barriers would have resulted in the shrubs remaining as they were. The barriers however were not acceptable on aesthetic and cost grounds to the owners. Replacing the shrubs might have been an acceptable alternative but appeared to have been ruled out on cost grounds also. The Tribunal therefore did not accept that the Factor had failed in its duties.

61. Having carefully considered all of the evidence both in the written submissions and at the hearing the Tribunal was satisfied that the Factor was not in breach of any of the sections of the code or its property factors duties.

62. The decision of the Tribunal is unanimous.

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.

G Harding

Legal Member and Chair

26 August 2019 Date