



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

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

Reference number: FTS/HPC/PF/19/2223

23 Springfield Terrace, South Queensferry, Edinburgh, EH30 9XF ("the Property")

The Parties:

John Muirhead, 23 Springfield Terrace, South Queensferry, EH30 9XF ("the Homeowner")

Manor Estates Housing Association Ltd, 9 – 11 Washington Lane, Edinburgh, EH11 2HA ("the Property Factor")

Tribunal Members:

**Josephine Bonnar (Legal Member)
Elaine Munroe (Ordinary Member)**

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 2.1 and 2.5 of the Code of Conduct for Property Factors.

The decision is unanimous

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

The Property Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received between 17 July 2019 and 2 February 2020 the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors. The Homeowner stated that the Property Factor had failed to comply with sections 1b and d, 2.1, 2.3, 2.5, 7.1 and 7.2 of the Code. The Homeowner also sought a determination that the Property Factor had failed to carry out its property factor duties in terms of section 17(5) of the Act. The Homeowner lodged documentation in support of the application including a letter dated 6 July 2019, addressed to the Property Factor, which provides details of his complaints regarding property factor duties (the July letter). He also submitted a letter dated 16 December 2019, which provides details of the Code complaints (the December letter). Post office certificates of posting dated 13 August 2019 and 16 December 2019 were also submitted.
2. On 4 March 2020, a Legal Member of the Tribunal on behalf of the President, referred the matter to a Tribunal for a determination. A hearing was assigned to take place on 29 April 2020. This hearing had to be postponed as a result of Government restrictions due to COVID 19. Parties were advised that the hearing would now take place by telephone conference call on 3 September 2020. Parties were provided with a telephone number and passcode.
3. On 28 August 2020, the Property Factor lodged written representations and a bundle of letters and emails. On 28 August 2020, in response to a direction issued by the Tribunal, the Homeowner lodged a bundle of documents.
4. The application called for a hearing by telephone conference call on 3 September 2020. Amanda Hay participated on behalf of the Property Factor, represented by Mrs Mullen, solicitor. The Homeowner participated, represented by his son Mr Gary Muirhead.

The Hearing

5. The written representations lodged by the Property Factor raised a preliminary matter. The Property Factor stated that they had not received the July and December letters. As a result, the Property Factor had not been given prior notice of the Homeowner's complaints, as required by section 17(3) of the 2011 Act. This meant that the Tribunal could not consider the application. However, the written representations proceed to address some, although not all, of the Homeowner's complaints.
6. The Tribunal noted that the application form only refers to breaches of sections 1B and D, 2.5 and 7.2 of the Code. It also refers to a failure to carry out property factor duties. The application was accompanied by an unaddressed letter, which gives information regarding the background to the

dispute. The letter indicates that the Homeowner has had problems with trees located next to his property. In particular, the tree roots, the height of the trees and annual foliage have caused problems. The Homeowner's complaints relate to the failure by the Property Factor to address these issues and deal with his enquiries and complaints in relation to same. This letter does not specifically mention the Code or property factor duties. Mrs Mullen referred the Tribunal to the July and December letters. She stated that the Property Factor did not receive the July letter. They did receive a different letter, in August 2019. However, this letter is not part of the application as the Homeowner had been unable to provide the Tribunal with a copy of it. As a result, the Tribunal is unable to consider the property factor duties complaint. With regard to the December letter, the Tribunal noted that a post office certificate and track and trace report were available and appear to establish that this letter was sent and delivered. Mrs Mullen advised that she had not had sight of the post office receipt but did not dispute that these were available. She advised that the Property Factor was prepared to concede that this letter had been sent and did form part of the application. As a result, the Tribunal could consider the breaches of the code which were listed in this letter. However, she stated that the Tribunal could not consider the sections of the code which were in the application form, but not in the December letter, as complaints under these sections had not been notified.

7. Mr Gary Muirhead confirmed that the post office receipt dated 13 August 2019, related to a letter which was not submitted to the Tribunal. He was not sure if evidence was available regarding the July letter. The Tribunal adjourned the hearing for a short while to give the Homeowner and Mr Gary Muirhead the opportunity to discuss matters and see if the necessary evidence could be produced. Following the adjournment, Mr Gary Muirhead indicated that he was unable to provide any evidence that the July letter had been sent or indeed confirm that it had been posted.
8. The Tribunal proceeded to consider the preliminary matter. Section 17(3) of the 2011 Act states, with regard to an application to the Tribunal, " No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor duties or, as the case may be, to comply with the section 14 duty."
9. The Tribunal concluded that, as the Homeowner cannot confirm or provide evidence that the July letter had been sent, that this letter could not be considered by the Tribunal. No other evidence has been produced that the Property Factor had been notified of a complaint that they had failed to carry out their property factor duties. The Tribunal therefore determined that the property factor duties complaint could not be considered by the Tribunal. The Tribunal is satisfied that the December letter was sent and delivered, and that this letter forms part of the application. Accordingly, the alleged breaches of the Code listed in this letter, could be considered. However, the complaint that there had been a failure to comply with sections 1B and D of the Code could not be considered, as these are only referred to in the application form, and not the December letter. The Homeowner has been unable to submit a copy

of the letter of August 2019. Accordingly, this does not form part of the application and cannot be considered.

- 10.** The Tribunal advised parties that the hearing would proceed in relation to the alleged breaches of the Code listed in the December letter.

Section 2.1 of the Code – You must not provide information which is misleading or false.

11. Mr Gary Muirhead advised the Tribunal that when the complaint was first made to the Property Factor, it was dealt with internally, with no independent investigation. Mr Muirhead was not satisfied with the outcome and the response which was received on 23 January 2020. Mr Gary Muirhead advised that there is a field across from the trees which are next to Mr Muirhead's property, and which are the subject matter of the dispute. For thirty years there has been talk of building houses on this field, but it has never happened. In the Property factor's letter of 23 January 2020, this proposed development was mentioned as an explanation for no action being taken by them to further investigate and address the root spread from the trees. As he was unhappy with the outcome of the complaint, the then Managing Director, Mr Russell, came to see him, and a course of action was agreed. This was confirmed in a letter dated 31 January 2019. The letter stated that the Property Factor would contact Scottish Power to "ascertain the cable routes feeding their substation". In addition, they would take advice on the possibility of "cutting a trench, investigating tree route dispersal". Mr Muirhead has never been provided with a copy of the correspondence with Scottish Power. On 4 February and 9 April 2019 Mr Gary Muirhead sent emails seeking an update of the investigations. On 23 April 2019, a response was received which states, "my colleagues were awaiting details from Scottish Power concerning the location of cables leading to and from the electricity substation which sits on the site. This information has now been received". As the Property Factor's written representations indicate, the response from Scottish Power had actually been received on 21 February 2019. The suggestion that it had only been received shortly before 23 April 2019, was therefore misleading and false. Mr Gary Muirhead advised the Tribunal that there was a visit from a tree surgeon in early May 2019. Mr Russell retired at the end of May 2019. On 30 May 2019 Mr Muirhead received a letter from the Property Factor which stated that the proposed trench was not required and would not be progressed.

- 12.** Mrs Mullen advised the Tribunal that the Property Factor concedes that the information contained within the email of 23 April 2019 was misleading, as it did suggest that the information from Scottish Power had just been received. In fact, it had been received on 21 February 2019. The Property Factor therefore concedes that there has been a breach of Section 2.1 of the Code. By way of explanation, she advised that the complaints process had reached a conclusion with the letter of 23 January 2019. There should have been no further action. The follow up visit and correspondence were therefore not part

of the formal investigation of the complaint. This led to an unintentional delay between the undertaking to contact Scottish Power and carry out further enquiries, and Mr Muirhead being notified of the outcome.

Section 2.5 of the Code – You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

13. Mr Gary Muirhead advised the Tribunal that Mr Muirhead has had to incur the cost of getting work carried out, because the Property Factor has failed to do so. A structural assessment was recommended, but never instructed by the Property Factor. He also advised that although the complaint was technically answered within the specified timescales, Mr Muirhead was not happy with the response. Mr Gary Muirhead advised that the problem with the tree roots has been ongoing for several years. He referred the Tribunal to an email of 1 August 2018, sent to the Property Factor. This email referred to a meeting with a member of staff at the property on 30 July 2018. The email sets out in detail Mr Muirhead's concerns regarding the trees. This was acknowledged on 23 August 2018. On 12 September 2018, the member of staff visited the property with a tree surgeon who was instructed to provide a report on the problem. When no further information was received, Mr Muirhead contacted the Property Factor. On 16 October 2018, he was sent an email which advised that the report had not been received yet and that, as previously advised on 24 September 2018, it was likely to be delayed, as the specialist was busy dealing with emergency storm work. On 30 October Mr Muirhead received a further email which stated that the Property Factor had been chasing the tree surgeon for the report, but he had been on leave. It was not until 6 December 2018 that a letter was received from the Property Factor with a copy of the report.
14. Mrs Mullen referred the Tribunal to the bundle of documents lodged by the Property Factor. This includes a copy of an email from the Property Factor on 1 August 2018, acknowledging receipt of Mr Gary Muirhead's email. Item 3 in the bundle is a copy of an email sent to the tree specialist on 22 August 2018, asking him to arrange to visit the property and provide a report. There is a handwritten note on the copy email which refers to a telephone call with Mr Muirhead and confirms that a site visit has been arranged for 12 September 2018. Item 4 is an email from Mr Gary Muirhead, dated 16 October 2018, seeking an update. The Tribunal was advised that the email of the same date, referred to by Mr Gary Muirhead, is a response to this email. In between times Mr Muirhead had telephoned and spoken to a member of staff on 24 September 2018, when he had been advised of the possible delay in the report being received. Mrs Mullen then referred to emails sent to the tree specialist, dated 15 October and 24 October 2018. She advised that the report was received in late November 2018 and a detailed response was issued to Mr Muirhead, on 6 December 2018, with a copy of the report. The Property Factor concedes there was a delay in getting the report, but that delay was not the fault of the Property Factor. Furthermore, the Property

Factor took appropriate action to chase up the report and keep Mr Muirhead updated.

Section 2.3, 7.1 and 7.2 of the Code

- 15.** Following discussion, Mr Gary Muirhead advised that Mr Muirhead was not insisting on his complaints under these sections of the Code.
- 16.** On 9 September 2020, the Property Factor submitted copy correspondence with Scottish Power, together with evidence that this had been sent to the Homeowner.

The Tribunal make the following findings in fact:

17. The Homeowner is the heritable proprietor of the property.
18. The Property Factor is the property factor for the property.
19. On 23 April 2018, the Property Factor sent an email to the Homeowner which indicated that information from Scottish Power had just been received. The information had been received on 21 February 2018.
20. The Property Factor provided the Homeowner with updates, by email and telephone, regarding a tree specialist report which had been instructed on 24 September, 16 October, and 30 October 2018. A detailed response and copy of the report were sent to him on 6 December 2018.

Reasons for Decision

Section 2.1 of the Code

21. The Property Factor does not dispute that information provided in the email of 23 April was misleading and that this amounts to a breach of Section 2.1 of the Code. The Tribunal is satisfied that the information in question, the date when the information from Scottish Power was received, was also false. The Tribunal is therefore satisfied that the Property Factor has failed to comply with Section 2.1 of the Code. In his submission, Mr Gary Muirhead also referred to the issue of the proposed trench. He indicated that the former Managing Director had indicated that this was the way forward when he visited the Homeowner. However, in the letter of 30 May 2018, which apparently was issued just after Mr Russell's retiral, the Property Factor indicated that a trench would not be effective and was unnecessary. The Tribunal can understand the Homeowner's annoyance, both with the outcome

and the timing of the letter. However, it appears from the letter dated 31 January 2019, that Mr Russell only undertook to take advice on the issue of cutting a trench and did not guarantee that this would take place. As a result, no misleading or false information is established regarding this issue.

Section 2.5 of the Code

22. The Tribunal is satisfied that the delay in the arrival of the tree specialist report was, to a certain extent, outwith the control of the Property Factor. The Tribunal also notes that the Homeowner was provided with some updates, by telephone and email. However, it is evident that the Property Factor was fully aware of the importance of the issue to the Homeowner. In the email to the tree specialist on 22 August 2018, the Property Factor refers to complaints from the Homeowner "repeatedly over the years". The inspection took place on 12 September 2018. The report and the Property Factor's decision regarding any further action, were issued on 6 December 2018. The contact in between appears to be very much at the instance of the Homeowner. Updates were provided by email in response to enquiries from the Homeowner, rather than proactively or routinely by the Property Factor. Furthermore, when the report did arrive, the Homeowner was not notified. He could have been advised that the report was to hand and was being considered. The Tribunal is therefore satisfied that the Property Factor did not keep the Homeowner informed that they required additional time to respond and did not deal with his enquiries as quickly and as fully as possible. They have therefore failed to comply with section 2.5 of the Code. Mr Gary Muirhead advised the Tribunal that this was his only complaint under this section. However, the Tribunal also notes that the delay between the letter of 30 January and email of 23 April 2018 could also be a breach of section 2.5 of the Code.
23. The Tribunal is therefore satisfied that the Property Factor has failed to comply with Section 2.1 and 2.5 of the Code.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEQ"). The terms of the proposed PFEQ are set out in the attached Section 19(2) Notice.

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.

Legal Member

J Bonnar

16 September 2020