



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 (“the Act”) and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/LM/19/1620

The Parties:

Mr Aylmer Millen, residing at 5 Hillpark Brae, Edinburgh EH4 7AP (“the homeowner”)

And

Charles White Limited, incorporated in Scotland under the Companies Acts (SC212674) and having its registered office at Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD (“the property factors”)

Tribunal Members – George Clark (Legal Member/Chairman) and Helen Barclay (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties in terms of Sections 2.5 and 7.2 of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 (“the Act”). The property factors have not failed to carry out the Property Factor’s duties.

The Tribunal does not propose to make a Property Factor Enforcement Order.

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 as “the Code of Conduct” or “the Code”; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as “the Tribunal”.

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

The Tribunal had available to it and gave consideration to the application by the homeowner received on 28 May 2019, with supporting documentation, including an Addendum dated 8 July 2019, and written representations from the property factors, received by e-mail dated 9 July 2019.

Summary of Written Representations

(a) By the homeowner

The following is a summary of the content of the homeowner’s application to the Tribunal. In the covering letter which accompanied the application to the Tribunal, he summarised them under four headings:-

- (1)The property factors had, in a letter of 3 January 2019, announced changes to their Written Statement of Services without regard to Consumer Rights legislation obligations to consult and/or allow the opportunity to withdraw from the contract.
- (2)There were excessive and unsupported service termination charges in the Written Statement of Services, which were in effect a penalty.
- (3)There had been a failure to obtain competitive quotes in tree pruning work in accordance with the Written Statement of Services and to communicate with homeowners in accordance with the Code of Conduct, connivance with a contractor in complying with the Deed of Conditions discretionary limit and ultimately a failure to comply with the Code of Conduct Complaints Section.
- (4)There had been a lack of communication and inordinate delay in advising homeowners of the storm drain maintenance arrangements and costs, misrepresentation of the obligations undertaken at a meeting of 25 October 2018, gross misrepresentation of the formal Minutes of a meeting of 25 October 2018 and ultimately breach of the Code of Conduct Complaints Section. This misrepresentation of agreements and undertakings was repeated in the Minutes of a meeting of 16 May 2019.

The homeowner contended that there was also a pernicious culture of defensiveness, conspiracy to distort and conceal in the property factors' recurrent breaches of the rules, often on the same or similar grounds. This behaviour was designed to mitigate and defuse the property factors' liability for their own acts and omissions and was not just time consuming but debilitating to trust. The homeowner was seeking a review of the property factors' registration.

The homeowner's complaint was that the property factors had failed to comply with Sections 1D, 2.1, 2.3, 2.4, 2.5, 3.3, 6.1, 6.3, 6.6, 7.1 and 7.2 of the Code of Conduct and had failed to carry out the property factor's duties.

(b) By the property factors

The following is a summary of the written representations made by the property factors and received by the Tribunal on 9 July 2019. These are summarised using the numbering of the homeowner in his letter of 25 May 2019:-

(1)The changes made to the Written Statement of Services were primarily in relation to Section 2.7 – Additional Services, potential charges that could be incurred for project works outwith the core services. As with all such works, any proposal would have to be accepted and authorised by homeowners after consultation at a quorate meeting. These charges could not be imposed if agreement and authorisation were not granted. The information provided the basis of their Property Teams' undertaking if required to project manage. If they outsourced the project management, again with agreement, the relevant fee structure of the third party would be communicated prior to seeking acceptance and instruction to engage their services.

(2)Termination Charges are common practice within the industry and this Section of the Written Statement of Services had not changed for some time. They attached a copy of the Written Statement of Services held on the homeowner's file from 2016 stating the same charges as referred to in the most recent version.

(3)Tree pruning had been discussed at previous meetings and the proposal had been put forward at a meeting on 6 December 2018. The proposed tree works were within the authority threshold granted to the property factors, so authority was not necessarily required, however with a desire to work with the development, this had been communicated and feedback had been welcomed. The only point raised at that time had been by the homeowner to ask about the tree outside his property which had not been noted. As it was at the entrance to the development, it had been overlooked and the property factors had agreed to have the tree surgeon look at and attend to it while on site. The property factors used a number of tree surgeons and had an awareness of how competitive their quotes were. With Borthwick Tree Services being the only non-VAT-registered tree surgeon on their approved contractors list, which had been mentioned at the meeting, it would be difficult to

obtain more competitive quotes. The work detailed had been fairly extensive for the costs quoted. The costs had not been questioned at the meeting and no-one had suggested or requested that further quotes be obtained.

(4)The points raised by the homeowner in relation to the storm drain maintenance had already been the subject of a case before the Tribunal, which had been referred to the Upper Tribunal for Scotland and, in those circumstances, the property factors did not feel it appropriate to comment further on these matters.

The Hearing

A hearing took place at George House, 126 George Street, Edinburgh on the morning of 12 August 2019. The homeowner was present at the hearing. The property factors were represented by Karen Jenkins and Sarah Wilson.

Summary of Oral Evidence

The chairman told the Parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. The evidence is summarised using the same numbering as that of the homeowner's letter to the Tribunal of 25 May 2019.

(1)The homeowner argued that the property factors should not unilaterally impose changes to the Written Statement of Services and, whilst he accepted that the group of homeowners had the ultimate sanction of changing factor, he asked if it was reasonable for the property factors to instigate these changes without any discussion with homeowners at all.

The response of the property factors was that the changes all referred to additional works, not core services and were intended to clarify what their charges could be if the group of homeowners agreed to appoint the property factors as project managers for additional work being undertaken on their behalf. There would have to be agreement from the owners at a Residents' Meeting before any work that fell into this category was carried out.

In his Summary of Complaint to the property factors dated 25 February 2019, a copy of which was amongst the documents which accompanied the application, the homeowner had raised a number of specific issues relating to charges which, taken together, he regarded as constituting a material change to the property factors' terms of business.

(i)The first of these was an abortive works fee, equivalent to 30% of the project management fee, subject to a minimum charge of £250 plus VAT. The property factors told the Tribunal that a lot of costs are incurred at the preliminary stage of projects and involve using third parties, who charge abortive works fees and

repeated that this provision only applied where the group of homeowners had asked the property factors to project manage works.

(ii) The charges included £250 per application for any local authority approval. The response of the property factors was that it was to cover their time, expense and resources if they had to apply for planning permission and, again, it only related to additional works outwith the core service.

(iii) An administration charge for providing replacement keys for parking permits. The property factors told the Tribunal that this provision did not apply to the homeowner, as there were no parking permits required for this particular development. The homeowner argued that it was the principle of change that he was complaining about, but the property factors said that it was not a change in their processes or policy, merely an attempt to make things more transparent.

(iv) A charge for the production of Minutes of Annual General Meetings. The response of the property factors was that this applied only if a residents' committee called a meeting and asked the property factors to produce the Minutes. They had not charged anything for the various meetings they had had at the development. The homeowner added that there was at present no committee, but they do have meetings which they look to the property factors to call, to deal with approvals of one-off projects or re-tendering of core services. He was concerned that the property factors might charge for these routine meetings. The property factors responded by saying that they had no intention of charging for such meetings and they presumed that if a committee was formed, it would want to take its own Minutes.

(v) Continued reliance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003. The homeowner was of the view that the Deed of Conditions for the development gave the necessary authority to the property factors, so references to the legislation were unnecessary.

(vi) An administration charge to landscape and cleaning contractors. The homeowner stated that this was not an additional sum but was a core sum. The property factors explained that this sum was paid by contractors to the property factors for prompting them to update their insurance and provide health and safety documentation. It was not a sum payable by the group of homeowners, but, for transparency, it had been included in the revised Written Statement of Services.

(2) The property factors told the Tribunal that the termination charges were in the 2016 version of the Written Statement of Services. The homeowner stated that it was the amount of the termination charge that he was disputing. It was not his experience that this was standard across the industry. The property factors, however, disputed this, saying that such charges were common practice within the industry although, of course, the amounts were all different. They did not impose a termination charge if it was their decision to terminate the factoring arrangement and if, on termination,

homeowners were unhappy about the charge, it could be referred to the Managing Director as a complaint.

(3) With regard to the tree works, the property factors told the Tribunal that they had appointed Borthwick Tree Services without obtaining competitive quotes as they knew that he was by far the best-priced tree surgeon on their list of approved contractors. The final bill had been £2,000. The homeowner challenged them on the figure, as in his view the estimate, when the additional work for the tree at his own house was included, would have exceeded £2,000. He implied that this was a form of collusion to keep the cost within the property factors' delegated authority and that there was a history of breaking work down into incremental parcels to keep the cost of each of them under £2,000. This was denied by the property factors.

(4) In relation to a meeting of the group of homeowners held on 25 October 2018, the homeowner told the Tribunal that a transcript of a recording of proceedings by another owner had been produced in November, but it had been some 5 months later that the Minutes taken by the property factors had been produced and they had not been specific with regard to a number of undertakings given at the meeting, so his complaint related both to the content of the Minutes and the delay in producing them. The property factors acknowledged that there had been a delay in producing the Minutes but expressed the view that the homeowner had not been prejudiced in any way. Minutes were not a transcript of everything said at a meeting. There had been items that the property factors wished to discuss at the meeting, but they required to obtain various pieces of information for the homeowners, including a revised quote, which had not been provided by the contractors till mid-March 2019. It had eventually been agreed at a meeting on 16 May.

The homeowner said that he was referring to what he called the communications blackout regarding the drainage works despite explicit assurances given at the October meeting, when the property factors had agreed to provide monthly progress reports. From 25 October 2018 to 27 March 2019, the group of homeowners were unaware of the status of the drainage project, a contract costing £50-£60,000. The homeowner referred to this having been considered by the Tribunal in a previous case. At the meeting on 16 May 2019, the Minutes of the previous meeting had not been formally approved, the owners having decided they did not want to get bogged down on the matter of the Minutes as they had extensive business to discuss.

The homeowner then addressed the Tribunal on the penultimate paragraph of his letter of 25 May 2019, in which he had contended that as well as the breaches of the Code of Conduct that he had illustrated, there was a pernicious and persistent culture of defensiveness, conspiracy to distort and conceal in the property factors' recurrent breaches of the rules, often on the same or similar grounds, this behaviour being designed to mitigate and defuse the property factors' liability for its own acts and omissions.

The Parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and all other documentation before them.

Findings of Fact

The Tribunal makes the following findings of fact:

- The homeowner is a homeowner within the Hillpark development.
- The property factors, in the course of their business, manage the common parts of the development. The property factors, therefore, fall within the definition of “property factor” set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 7 December 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland (“the Tribunal”) received on 28 May 2019 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
- On 18 June 2019, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

Section 1D of the Code of Conduct requires property factors to include in the written statement of services their in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the Tribunal if they remain dissatisfied following completion of the in-house complaints handling procedure, the timescales within which they will respond to enquiries and complaints and their procedures for response when dealing with telephone enquiries. The Tribunal did not uphold this ground of

complaint, as the written statement of services clearly sets out the timescales within which the property factors will endeavour to respond in relation to enquiries, including telephone messages, and signposts the homeowners to their formal Internal Complaints Procedure. It also clearly states that a homeowner who remains dissatisfied upon completion of the internal complaints procedure can make an application to the Tribunal and provides a link to the Tribunal's website.

Section 2.1 of the Code of Conduct states that property factors must not provide information that is misleading or false. The Tribunal found no evidence that any information referred to in the application was misleading or false and did not, therefore, uphold this ground of complaint.

Section 2.3 of the Code of Conduct requires property factors to provide homeowners with their contact details, including telephone number and that, if it is part of the service agreed with homeowners, property factors must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors. The homeowner led no evidence specific to this ground of complaint, so the Tribunal did not uphold it.

Section 2.4 of the Code of Conduct states that property factors must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where the property factors can show that they have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold. The Tribunal did not uphold this ground of complaint. There are clear procedures set out in the written statement of services in relation to additional services and an upper threshold of £2,000 on the cost of instructing works for the common parts of the development. The homeowner's complaint was that, taking the original estimate for the cost of tree works and adding on the amount for the tree work at his own property, the total would have exceeded £2,000. The view of the Tribunal was that if the property factors had negotiated with the contractors to reduce the estimated figure to £2,000, this had operated in the interests of the group of homeowners. No evidence was led which suggested that works were being broken down into chunks each costing less than the upper threshold in order to avoid the necessity of obtaining prior approval of the group of homeowners.

Section 2.5 of the Code of Conduct provides that property factors must respond to enquiries and complaints received by letter or email within prompt timescales. Overall their aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if they require additional time to respond. The homeowner's complaint was that the property factors had taken a long time to make available the Minutes of a meeting of 25 October 2018. The explanation provided by the property factors was that the delay was caused by the fact that they had agreed to obtain more precise

information for the group of homeowners. The Code of Conduct does not include a requirement to provide a timescale for the issuing of Minutes of meetings, so the Tribunal did not uphold this element of the complaint. The Tribunal did, however, decide that the delay until 2 May 2019 in responding to an e-mail from the homeowner of 9 April 2019 was a failure to comply with Section 2.5 of the Code of Conduct and upheld that element of the complaint. The written statement of services stated that the property factors would endeavour to respond to electronic and paper correspondence within five working days.

Section 3.3 of the Code of Conduct relates to the requirement to provide detailed annual statements to homeowners. The Tribunal had heard no evidence in relation to this ground of complaint, so did not uphold it.

Section 6.1 of the Code of Conduct requires property factors to inform homeowners of the progress of work, including estimated timescales for completion. The homeowner's complaint under this heading was his contention that an undertaking had been given at a Meeting on 25 October 2018 that monthly updates would be produced in relation to drainage works at the Development. The Tribunal made no finding on this, as complaints relating to the drainage works had already been determined at a previous Tribunal hearing and that determination had been appealed to the Upper Tribunal for Scotland. Further, the evidence led by the property factors had suggested that there had been no significant disquiet about the Minutes of the meeting of 25 October 2018 expressed at the further meeting of 16 May 2019.

Section 6.3 of the Code of Conduct provides that on request, property factors must be able to show how and why they appointed contractors, including cases where they decided not to carry out a competitive tendering exercise. The homeowner's complaint here related again to the contract for tree pruning and the Tribunal accepted the evidence of the property factors that they knew the selected contractor was cheaper than their other approved contractors, as the firm was not VAT-registered. Their decision was based on costings obtained by them in relation to other developments for which they provided factoring services and the Tribunal did not uphold this head of complaint, particularly as the property factors had then negotiated the total cost down to £2,000.

Section 6.6 of the Code of Conduct states that, if applicable, documentation relating to any tendering process should be available for inspection by homeowners on request. The "tender" to which the homeowner was referring in his written and oral evidence was the estimate for tree pruning, which he had seen, so the Tribunal did not uphold this ground of complaint.

Section 7.1 of the Code of Conduct provides that property factors must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement,

which they will follow. Section 7.2 of the Code of Conduct requires property factors, when confirming the final decision when the in-house complaints procedure has been exhausted, to provide details of how a homeowner may apply to the Tribunal. The Tribunal was satisfied that the property factors had complied with the requirement to have a clear written complaints resolution procedure, with a series of steps, as envisaged by Section 7.1 of the Code of Conduct. The Tribunal held, however, that the property factors had failed to comply with Section 7.2 of the Code of Conduct by failing to provide details of how the homeowner might apply to the Tribunal when they had stated in an e-mail of 26 April 2019 that there was nothing more they could add to their earlier response to the complaint. The Tribunal regarded this as the final decision, which exhausted the in-house complaints procedure, so reference to the Tribunal should have been made. The property factors had apologised for this omission in their e-mail of 2 May 2019, so accepted that they had not complied with Section 7.2 of the Code of Conduct.

The homeowner had also complained that the property factors had failed to comply with the property factor's duties. The homeowner did not provide any evidence specific to this element of the complaint, but the Tribunal was satisfied that all the matters complained of had been dealt with under the various Sections of the Code of Conduct, apart from the question of whether or not the property factors were entitled to make changes to the written statement of services without prior consultation with the group of homeowners. The view of the Tribunal was that property factors are entitled to update and amend their written statement of services, the group of homeowners having available to them the ultimate sanction of terminating the agreement. Accordingly, the Tribunal did not consider further the particular clauses of the written statement of services, numbered (i) to (vi) on Pages 4 and 5 of this Statement of Decision. The Tribunal also noted that the updates in the present case related mainly to clarification of charges in connection with Additional Works, which would require prior approval anyway. The homeowner had complained about the Termination Charges in the written statement of services, but the view of the Tribunal was that it is common to find such charges in written statements of services. More importantly, however, the Termination Charges in the present case had been unchanged, the figure of £40 per property having been in place since 2016 at latest.

Having determined that the property factors had failed to comply with the Code of Conduct, the Tribunal then considered whether to make a Property Factor Enforcement Order under Section 19(1)(b) of the 2011 Act.

The failure to comply with Section 2.5 of the Code of Conduct was a one-off failure within a protracted series of e-mail exchanges between the Parties and, as there was no remedial step that the Tribunal could order the property factors to make, the Tribunal did not think it appropriate to issue an Order for what amounted to a single omission within a significant volume of correspondence. The failure to comply with Section 7.2 of the Code of Conduct related to the property factors' not advising the homeowner of his right to refer the matter to the Tribunal, but it was clear to the

Tribunal that the homeowner was well aware of his right to do so, as he had already told the property factors he would be making an application and, in his response to their e-mail of 2 May 2019, said that he would be adding to his application complaints under Section 7 of the Code of Conduct. The homeowner had not been prejudiced in any way by the property factors' failure to comply and the Tribunal did not think it appropriate to require the property factor to make any payment to the homeowner in respect of the failures to comply with the Code of Conduct. Accordingly, having considered all the evidence before it, the Tribunal decided that it would not make a Property Factor Enforcement Order

Decision

The property factors have failed to comply with their duties in terms of Sections 2.5 and 7.2 of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The property factors have not failed to carry out the Property Factor's duties.

Property Factor Enforcement Order

The Tribunal does not propose to make a Property Factor Enforcement Order.

Appeals

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.

G Clark

Signature of Legal Chair

Date 12 August 2019