

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/LM/17/0037

5 Hillpark Grove, Edinburgh, EH4 7AP ('the Property')

The Parties:

Aylmer Millen residing at 5 Hillpark Grove, Edinburgh, EH4 7AP ('the Homeowner')

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

Committee members:

Jacqui Taylor (Chairperson) and Ahsan Khan (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has failed to comply with Section 7.2 of the Code of Conduct and has not failed to comply with the Property Factor's duties.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 7th December 2012.
2. The Homeowner purchased the Property 5 Hillpark Grove, Edinburgh, EH4 7AP on 22nd April 2004. The title of the Property is registered in the Land Register of Scotland under Title Number MID61536. Charles White Limited is the property factor of the Property.
2. By application dated 30th January 2017 the Homeowner applied to the Housing and Property Chamber for a determination that the Factor had failed to comply with the following section of the Property Factor Code of Conduct ('The Code') and also the Property Factor's duties.

- Section 1: Written Statement of Services.

Section 1

- Section 7: Complaints Resolution.

Section 7.2

3. The application had been notified to the Factor.

4. By Minute of Decision by a Convener of the Homeowner Housing Panel, dated 22nd February 2017, she intimated that she had decided to refer the application (which application paperwork comprises documents received in the period 1st February 2017 to 17th February 2017) to a Tribunal.

5. The Tribunal issued a Direction dated 17th April 2017 (hereinafter referred to as 'The Direction') which required the Factor to provide the Tribunal with a copy of the guidance they obtained from their solicitor regarding Area C and/ or the common parts of the development, referred to in their written representations. The Factor produced the letter from their solicitor dated 6th May 2016. The details are referred to in the written representations to follow.

6. An oral hearing took place in respect of the application on 25th April 2017 at George House, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on his own behalf. The Factor was represented by Karen Jenkins, a Team Leader employed by the Factor.

The Application:

The details of the application and the parties' written and oral representations are as follows:

General Background detailed in the Homeowner's application.

The Homeowners' application states:

'The Hillpark Brae Development, wherein the communal parts are managed by the Factor comprises 6.81 hectares (16.83 acres) of ground edged red in his title MID61536. It lies to the east of Corstorphine Hill with the south western boundary fronting onto Craigmack Road and abutting the earlier Hillpark Green development on the same road immediately to the south. This Craigmack Road portion of the site is defined as Area C and is more particularly shown in the Factor's reviewed Written Statement of Services Page 17.

Both Developments were built by the Developer, Mactaggart & Mickel, with Hillpark Brae comprising a mixed house and flat development of 156 households and Hillpark Green consisting of 23 households.

The issue in dispute arises from the Factor's exercise of legal judgement in acceptance and giving effect to a solicitor's opinion that the Householders of Hillpark Green Development have claim to a share of Area C which was formerly used for the siting of the Developer's site huts and was ultimately handed over to the Factor for communal maintenance in September / October 2016. This judgement is manifest in the Factor's reviewed Written Statement of Services and in the Factor's enactment in their quarterly invoice dated 9th January 2017 of the charge out of the costs for the ground maintenance of Area C in the proportion of 1/179, representing the aggregate total of 156 and 23 households.

Section1: Written Statement of Services.

The Code of Conduct for Property Factors ('The Code') requires the Factor to provide their written statement of services to the Homeowner within one year of initial registration as a property factor. However it must be supplied before that time if they are requested to do so by the Homeowner.

The Homeowner's complaint:

At the Hearing the Homeowner confirmed that the Factor had provided their Written Statement of Services, as required by the Code of Practice.

The Factor's response:

The Factor confirmed that they had provided the Homeowner with their Written Statement of Services.

The Tribunal's Decision:

The Tribunal determined that the Factor had not breached Section 1 of the Code.

7.2: When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the Housing and Property Tribunal.

The Homeowner's complaint:

The Homeowner explained that he first wrote to the Factor detailing his complaint on 25th July 2016. His email to the Factor stated:

'Thank you for your email of 19th July advising of your in house solicitor's opinion on the purported Title of the Hillpark Green Residents to the so called 'disputed' area. I understand that as a consequence of this solicitor's advice you have recommended to the caretaker of Hillpark Residents Association Committee that the cost of maintenance of this area be shared with Hillpark Green residents in the ration 1/179.

The recommendation raises a number of fundamental issues insofar as:

1. You have no authority to Act in the variation of the communal property maintenance charge out rate to Homeowners in departure from the structures in the Hillpark Brae Deed of Conditions, and any instructions' or other communications from the Caretaker Committee can have no effect in varying the Burdens of our own title deeds.

2. While your solicitors opinion is noted it has singular regard only to the Title Deeds of one of the parties and acknowledges only that the Developers intended to convey Area C ('the disputed' area) to the feuars of Hillpark Green and the feuars of the rest of the estate. The reality is that in the Title of Hillpark Brae this disputed area is unambiguously within the area conveyed to the residents of Hillpark Brae.

If the residents of Hillpark Green believe that they have a legal claim to this area it is open to them to pursue their claim in the courts. It is certainly no business of the Committee or yours to prejudice our Legal Title by any offer, however informal, to share the maintenance of this area however economically attractive this may be.

I have to place you on notice that if you pursue the course recommended to the caretaker Committee I will have little alternative but to raise a formal complaint.'

Fraser McIntosh, the Factor's Property Manager sent an email reply to the Homeowner dated 28th July 2016 advising that he had contacted their solicitor and would revert to him within 28 days.

On 19th September 2016 the Homeowner sent an email to Fraser McIntosh enquiring as to the position on a response to his email of 25th July 2016.

On 13th October 2016 he sent a further email to Fraser McIntosh (copied to Karen Jenkins and Stephanie Haig) advising that in the absence of any substantive response to his email of 25th July 2016 he raises a formal complaint in respect of their breach of the title deeds and advised that he was escalating the complaint to the Factor's team leader.

On 21st October Fraser McIntosh sent the Homeowner a substantive response but did not state that if he did not agree he could make an application to the Housing and Property Chamber First Tier Tribunal for a determination, as set out in the Factor's complaints procedure.

On 24th October 2016 the Homeowner sent the Factor an email which concluded that he did not consider the email from Fraser McIntosh dated 21st October to be a substantive reply to the issues in his complaint and by copying his email to Karen Jenkins he was escalating the complaint for a final response by senior management.

The Homeowner sent the Factor a prompt in his email of 5th December 2016 which explained that in the absence of a response to his email of 24th October he was escalating his complaint to the HOHP.

The Factor's complaints procedure had not been followed.

The Factor's response:

Karen Jenkins explained that she saw the Homeowner's email of 5th December 2016 but did not reply as she was absent from work due to a family bereavement. She returned to work on 13th December 2016 by which time the Homeowner had escalated his complaint. Karen Jenkins confirmed that she is Fraser McIntosh's manager.

The Tribunal's Decision:

The Tribunal determined that the Factor had breached Section 7.2 of the Code. The Homeowner had not received a response to his email dated 24th October. The last response he received was the email from Fraser McIntosh dated 21st October 2016 which did not clarify the Factor's final decision and did not provide details of how the Homeowner may apply to the Housing and Property Tribunal.

Alleged Breach of Property Factor Duties:

The Homeowner's complaint:

The Factor's authority to act stems from their Written Statement of Services and the Deed of Conditions.

The definition of Common Parts of the Development is the whole development under exception of the parts sold and therefore includes Area C.

The Homeowner acknowledges that common rights to Area C is also included in the title of the properties that form part of Hillpark Green.

He considers that the Factor has breached their duties by unilaterally adjudicating on title matters without reference to the Homeowners. By unilaterally determining that the Hillpark Green properties are jointly responsible for a share of the maintenance costs of Area C they have potentially prejudiced any claim to Area C by the owners of Hillpark Brae. The matter was not reported to the Residents' Association and no residents vote was taken.

Due to the title complexities the owners of Hillpark Brae may have a potential recourse to the Registers of Scotland and / or the Lands Tribunal to have the title position clarified. As far as he is aware none of the owners of either developments have made such an application. He suspects that there is not an appetite to make such an application.

The Factor's response:

Karen Jenkins advised that the Factor obtained advice from their solicitor regarding this matter. She provided a letter from their solicitor dated 6th May 2016, which was produced to the Tribunal.

The last paragraph of that letter states:

'It seems fairly clear therefore even without the plan, that the proprietors in Hillpark Green have a shared liability for the area which was the question you originally asked.'

She explained that the builders handed over maintenance of Area C to the Factor in October 2016. The area is grassland and has no development value. She did not attend the hand over meeting but suspects that Mactaggart and Mickel advised that Hillpark Green would be liable for a share of the maintenance costs at that meeting. As far as she is aware it is intended that the local authority will adopt the area at some point in the future.

A revised Written Statement of Services was issued in November 2016. Specific mention was made of the maintenance of Area C. On page 10 of the Written Statement of Services it states:

'NB The area shown approximately coloured lilac and marked 'Area C' on the plan is shown as a Common Area of the Development on plans attached to the Deeds on Conditions relative to the development and the adjacent Hillpark Green development. This Area was used by the developers, McTaggart & Mickel Homes Limited for a site office and storage of material until such time as the whole development was completed. In terms of the Deed of Conditions which the developers executed in relation to Hillpark Green (recorded 1st September 1981) it was their stated intention that, on completion of the development this area would be landscaped by the developers and then conveyed to the feuars (owners) of the whole Hillpark estate comprising 25.134 acres. The owners within the Hillpark Green development have an explicit common right to this area within their titles and the owners in the Hillpark Brae development have a common right to this area by reference to and incorporation of the 2002 Deed of Conditions into the titles and therefore both developments share liability for the maintenance thereof. As there are 179 properties in the combined phases, we will apportion charges based on a 1/179 share per property in the absence of evidence that any owners within any other phases of Hillpark Estate have similar common rights.'

She explained that the Factor arranges garden maintenance contracts for the communal areas and Area C was identified as a separate area in the garden maintenance tender. Following the advice of their solicitor the maintenance cost of Area C was divided equally between the owners of both Hillpark Green and Hillpark

Brae developments. This was reflected in the amended Written Statement of Services and resulted in a cost saving to the Hillpark Brae owners of £1.41 per annum.

She confirmed that there was no prior consultation with the owners regarding the apportionment of the maintenance costs of Area C. However she explained that she had chaired the Residents Association AGM at the end of March 2017. The meeting was quorate and the liability for maintenance of Area C was not raised at all.

The Tribunal's Decision:

The Tribunal acknowledged that the Factor acts as agent for the Homeowners. Their authority is derived from common law, the Deed of Conditions and the Written Statement of Services.

The Tribunal is mindful that property factors make a range of decisions on behalf of property owners in the management of common property. These decisions range from straight forward decisions to complex decisions. At some point along this spectrum there is a requirement for the Factor to obtain the prior authority from the homeowners.

The Deed of Conditions sheds some light on this. At clause Sixth (4) (iv) page D12 the Factor must obtain the prior approval of the owners before instructing major work which has a value exceeding £2000.

The Homeowner is of the view that the decision made by the Factor to include the owners of Hillpark Green in the maintenance of Area C was a complex matter which has a bearing on any future application which may be made to the Lands Tribunal and/ or the Registers of Scotland regarding ownership of this area and consequently the prior consent of the owners of Hillpark Brae should have been obtained.

However the Tribunal heard evidence, which they accepted, that Area C has no development value, the total annual maintenance charges are low and it is intended that the maintenance of Area C will be taken over by the local authority. Consequently the Tribunal concludes that in reality the area is a maintenance burden as opposed to a communal asset.

Most significantly the Tribunal noted that (i) the matter was not raised at the recent AGM, even although all the homeowners were aware of the matter as the revised Written Statement of Services explained the changes that would be made by the Factor and it is understood that the homeowners had been invoiced for a share of the maintenance costs of Area C (albeit that copies of the invoices had not been produced) and (2) no application has been made to the Lands Tribunal or the Registers of Scotland regarding ownership of Area C as in the words of the Homeowner 'there is no appetite' for this.

Taking all of these matters into account the Tribunal decided that on balance the maintenance liability of Area C was not a major commercial matter or indeed a major works decision (as described in the Deed of Conditions) and consequently the Factor was entitled to rely on the advice given by its solicitor on this matter and had not breached the property factor duties.

Comment

In light of the terms of the Homeowners' application the Tribunal is surprised that neither the Homeowner nor the Factor raised this matter at the Residents AGM in March as ultimately it is for a majority of the homeowners to determine this matter.

Property Factor Enforcement Order.

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Section 7.2 of the Code of Conduct.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

The Factor is directed to provide the Tribunal with written confirmation that they have reviewed their complaints handling procedure to ensure that it complies with their Written Statement of Services.

The said written confirmation to be provided to the Tribunal by 9th June 2017.

The Tribunal considered whether to make an award of compensation to the Homeowner but determined that no award of compensation should be made as the Homeowner was not prejudiced by the failure of the Factor to strictly follow their complaints procedure.

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.

Signed  Date 15th May 2017

Chairperson

Housing and Property Chamber

First-tier Tribunal for Scotland



Notice of Proposal of the First-tier Tribunal for Scotland (Housing and Property Chamber) Under section 19(2)(a) of the Property Factors (Scotland) Act 2011

Chamber Ref:FTS/HPC/LM/17/0037

5 Hillpark Grove, Edinburgh, EH4 7AP ('the Property')

The Parties:

Aylmer Millen residing at 5 Hillpark Grove, Edinburgh, EH4 7AP ('the Homeowner')

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

Committee members:

Jacqui Taylor (Chairperson) and Ahsan Khan (Ordinary Member).

NOTICE TO THE PARTIES

Whereas in terms of their decision dated 15th May 2017, the Tribunal decided that the Factor had failed to comply with section 7.2 of the Code of Conduct, all as stated in the said decision. The Tribunal proposes to make a property factor enforcement order in the following terms:

The Factor is directed to provide the Tribunal with written confirmation that they have reviewed their complaints handling procedure to ensure that it complies with their Written Statement of Services.

The said details and evidence to be provided to the Tribunal by 9th June 2017.

This intimation of the Tribunal's Decision and this Notice to make a Property Factor Enforcement Order to the parties should be taken as notice for the purposes of section 19(2)(a) of the Act and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) of the Act reach the Housing and Property Chamber's office by no later than 14 days after the date that the Decision and this notice is intimated to them. If no representations are received within that timescale then the Tribunal is likely to proceed to make a Property Factor Enforcement Order (PFEO) without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and constitute an offence.

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.

Signed ...

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Chairperson Date: 15th May 2017