Decision of the Homeowner Housing Committee
In an Application under section 17 of the Property Factors (Scotland) Act 2011
by

Aylmer Millen, 5 Hillpark Grove, Edinburgh EH4 7AP ("the Applicant")

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

Reference No: FTS/HPC/PF/18/0043

Re: Property at 5 Hillpark Grove, Edinburgh
("the Property")

Committee Members:

John McHugh (Chairman) and Andrew Murray (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to carry out its property factor's duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of 5 Hillpark Grove, Edinburgh EH4 7AP (hereinafter "the Property").
2 The Property is located within a mixed development of houses and flatted blocks and associated common areas known as Hillpark Grove (hereinafter "the Development")
3 A Deed of Conditions governs the arrangements for the sharing of costs relating to common property within the Development among the proprietors of the properties within the Development.
4 There are 156 individual residential units in the Development. 115 are houses and the remainder are flats.
5 The Respondent is the property factor responsible for the management of common areas within the Development.
6 The Respondent was appointed to the role of property factor by the developer of the Development.
7 The property factor's duties which apply to the Respondent arise from the Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
8 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.
9 The Applicant has, by his correspondence, including by his emails of 23 November and 29 December 2017, notified the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
10 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Riverside House, Edinburgh on 26 April 2018.

The Applicant was present at the hearing.

The Respondent was represented at the hearing by Karen Jenkins, who is employed by it in the role of Team Leader. No other witnesses were called by either party.

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 2017 Regulations".

The Respondent 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.

The Committee had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

The documents before us included a Deed of Conditions by MacTaggart & Mickel Limited recorded 4 April 2002, which we refer to as "the Deed of Conditions" and the Respondent's Written Statement of Services marked as dated June 2014 (but which we understand to be the version revised in November 2016) which we refer to as "the Written Statement of Services".

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Written Statement of Services and the Deed of Conditions are relied upon in the Application as a source of the property factor's duties.

The Code

The Applicant complains of failure to comply with the Code.

The Applicant complains of breaches of Sections: 2.1, 2.5, 3.3, 5.2, 6.4, 6.6, 6.9 and 7.1 and 7.2 of the Code.

The elements of the Code relied upon in the application provide:

*"...**SECTION 2: COMMUNICATION AND CONSULTATION***

2.1 You must not provide information which is misleading or false....

...2.5 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 (Section 1 refers)...

...SECTION3: FINANCIAL OBLIGATIONS

... 3.3 You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance...

...SECTION 5: INSURANCE...

...If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:
5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this...

...SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

This section of the Code covers the use of both in-house staff and external contractors...

...6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works...

...6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance...

...6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor...

...SECTION 7: COMPLAINTS RESOLUTION

7.1 You 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

you will follow. This procedure must include how you will handle complaints against contractors.

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 homeowner housing panel."

The Matters in Dispute

The Applicant complains in relation to the following issues:

(1) The Respondent departing from the voting requirements of the Deed of Conditions.
(2) The Respondent deciding to stop collecting contributions towards the contingency fund.
(3) The Respondent's actions in relation to service strips.
(4) The Respondent's handling of the tendering process for storm drain works.
(5) The Respondent's contractors tree maintenance.
(6) The Respondent's dealing with the Development insurance.
(7) the handling of the Applicant's complaint to the Respondent

We deal with these issues below.

(1) The Respondent departing from the voting requirements of the Deed of Conditions.

Clause 4 of the Deed of Conditions sets out the means by which a meeting of proprietors of properties within the Development may be called and decisions made in relation to the management of the Development. The Clause also details the voting procedure which will apply. That is, in brief, that any proprietor may himself attend or be represented by a mandatory appointed by written mandate. There is no provision for voting by other means, such as postal voting.

The Applicant was concerned that the Respondent has written to all proprietors on 12 July and 26 September 2017 asking them to "vote" on certain proposals.

Miss Jenkins advises that the Respondent is aware of, and complies with, the voting procedures as per the Deed of Conditions. She confirms that there has never been any decision reached by this method. She advises that the Respondent finds it helpful to send out letters asking proprietors to express a view on certain works. This is done only "to gauge the appetite" and is similar to conducting a survey of the owners. Miss Jenkins considers that this is consistent with good customer service.

While we understand the Applicant's concerns about the communications received which seemed to suggest that there was to be a departure from the decision making process contained in the Written Statement of Services, we accept that there is no evidence of any decision having been taken on the basis of these communications. We therefore do not find there to be a breach of property factor's duties or of the Code.

(2) The Respondent deciding to stop collecting contributions towards the contingency fund.

The Applicant complains that the Respondent intimated by its letter of 26 September 2017 that it would stop collecting contributions to the Development contingency fund.

The history of events was that the Respondent had originally proceeded with a single statement of services for the whole Development. It was recognised, following a previous hearing before the Tribunal, that this was inappropriate and the Respondent thereafter produced five different Written Statements. These would vary depending whether the property in question was one of the houses or was located within one of the four blocks of flats.

Miss Jenkins explained that the Respondent's computerised billing system had generated bills to house owners which described their share as 1/115 of Development costs, whereas they had previously been billed 1/156. No explanation was given and the Applicant found the bills misleading as it appeared that house owners were being asked to pay for Development costs when flat owners were not. Miss Jenkins explained that this was never the case. What has happened was that the shares of whole Development costs were prorated between house and flat owners in the first place. Flat owners would then receive a bill for their 1/156 share of whole Development costs plus a bill relating to costs for their own block. Because the flat owners' costs had been deducted from the outset, the house owners' bills then showed their share as 1/115 but that was only a 1/115 share of the whole Development costs with the flat owners' share already allowed for.

The Applicant accepts this explanation and that he and the other house owners are not out of pocket because of this.

Against this background, the Respondent's letter of 26 September 2017 begins by explaining the new arrangements involving five separate Statements of Services. It immediately follows this with the words: "As a result of this, no further payments will be collected towards the Additional Planting/Contingency Fund". The same wording was repeated in the Respondent's October 2017 Newsletter.

The Applicant could not see how that statement followed from what went before.

The Applicant explained that the fund had originally been a planting fund but that it had been decided that further funds for planting were not required and that a contribution should instead be made by owners to a contingency fund because it was thought that works to storm drains on the Development would be likely to be required.

Miss Jenkins explained that at the owners' meeting on 29 March 2017 the matter was discussed. The Minutes of the meeting record: "*Karen asked about ongoing contributions* [to the Contingency Fund] *being paid quarterly, the decision was made to continue with payments at the same level until October then reassess.*"

She considers that that meant by the time of the 26 September letter it was inappropriate to continue invoicing for contributions to the Contingency Fund. The October bills omitted such charges.

It was agreed by both parties that the next owners' meeting took place on 23 October 2017. At that meeting, the owners resolved not just to continue with requiring contributions to the Contingency Fund but also that the contribution should increase in amount.

The Applicant considers that by proceeding unilaterally to stop invoicing for contributions to the Contingency Fund, the Respondent was pre-empting the owners' decision and acting without authority.

We consider that the owners' decision in March 2017 was to continue billing owners for the Contingency Fund contributions until the matter was reviewed again in October (at the scheduled October meeting). There was, accordingly, in our view, no basis for the Respondent to take it upon itself to stop billing the contributions prior to the owners having had the opportunity to consider and vote upon the matter at their October meeting.

The Applicant complains that the Respondent's statement that the change of arrangements regarding the separate Statements of Services leads to the change of practice regarding the Contingency Fund contribution is false and misleading in breach of Code Section 2.1. We agree. There is no connection between the two matters. We find there to have been a breach of the Code.

He further complains that the Respondent's actions in changing the basis of charge is a breach of property factor's duties by reference to both the Statement of Services and the Deed of Conditions. He considers the Respondent to be in breach of its obligation as per Clause 2 of the Statement of Services to carry out and perform its duties "with reasonable skill and diligence in accordance with the principles of good estate management". We consider that the Respondent has failed in this respect. We identify no specific breach of the obligations contained in the Deed of Conditions.

(3) The Respondent's actions in relation to service strips.

The Applicant complains that the Respondent has proceeded on the erroneous assumption that certain service strips located within the Development would be adopted by the local authority. The Respondent has tendered for ground maintenance works excluding the service strips. When it has later transpired that the service strips were not to be adopted, the Respondent has had to obtain a separate contract for the maintenance of those areas.

The Respondent is concerned that there could be no meaningful competitive tendering exercise for the service strip maintenance. The contract was awarded to the contractor with the contract for the maintenance of the remainder of the Development on the basis that, by reason of holding that contract, it was uniquely well placed to deal with the service strip works.

Miss Jenkins explained that the Applicant thought that adoption of the service strips by the Council was just a formality and that it would happen. The Applicant complains that the Respondent had no basis to assume that the local authority would adopt the service strip.

Miss Jenkins explained that the service strips had been omitted from the common area maintenance contract intentionally and that some owners had been keen for that to happen to reduce cost. The Applicant is doubtful that that was the owners' position.

The Applicant considers that the Respondent should have kept the service strips within the tender process until it was certain that the local authority would adopt them. It could have done this by splitting the tender into two sections one being the service strips and one being the remaining remainder on the basis that service strips could subsequently be removed if they were, in fact, adopted.

Miss Jenkins advised that she was not present when the decision making process had been followed by the owners' committee but she understood that it was their wish to take out the service strips.

The Applicant believes that the true position is that this decision was taken by the Respondent alone. He was unaware of there being any pressure by the owners to proceed in this way. Miss Jenkins advised that this was "all documented somewhere" but she did not have any relevant papers with her and none had been lodged.

The Applicant observed that the incumbent ground maintenance contractor had specifically excluded the service strips. The Respondent had recommended accepting the incumbent contractor's quotation even though this was the case. Miss Jenkins explained that the incumbent had been the only contractor to specifically exclude the service strips because it was aware of their existence from its previous work on site. The other contractors who had tendered had made no mention of the service strips because they had no specific knowledge of them and had simply tendered on the same basis as all contractors i.e. on the basis of a plan provided to them all which had excluded be service strips. The Applicant disagrees entirely with this explanation and refutes it.

The Applicant complains that the Respondents' conduct in this respect constitutes a breach of Section 2.1 of the Code in that in its letter of 12 July 2017 the Respondent makes a false and misleading statement that adoption of the service strips by the local authority will take place.

The letter of 12 July 2017 enclosed a document headed Hillpark Brae – Service Strips. That document recorded that it was uncertain as to what stage the adoption process had reached. It also recorded what had been said at the owners meeting on 29 March 2017 to the effect that service strips not owned by individual owners were scheduled for adoption.

We find the picture to be confused however we do not consider there to be a breach of the Code in this respect.

The Applicant also complains by reference to the Deed of Conditions and, in particular, Clauses First, Fifth, Eighth and Eleventh. He has produced a document entitled "Service Strip Analysis – 31 July 2017" explaining their relevance. These Clauses of the Deed of Conditions refer to the owners' obligations to maintain common parts (including the service strips) and prohibitions upon owners from interfering with those areas.

We have been unable to identify a breach of the property factor's duties in terms of the Deed of Conditions.

The Written Statement of Services imposes upon the Respondent an obligation to tender for maintenance contracts. We consider that the Respondent's actions in relation to the exclusion of the service strips from the ground works maintenance tender on the basis that adoption by the local authority was anticipated constitute a failure by the Respondent to carry out the services "with reasonable skill and diligence in accordance with the principles of good estate management" as per clause 2 of its Written Statement of Services.

While it is the case that no loss can be demonstrated to have occurred because of the Respondent's actions, there appears to be no basis for the Respondent to have assumed that adoption would take place. By doing so, it exposed the owners to the potential risk of being unable to obtain competitive tenders for the service strips if, as in fact happened, the service strips were not adopted.

(4) The Respondent's handling of the tendering process for storm drain works

The Applicant complains about the actions of the Respondent in relation to the tendering process followed in respect of works to the storm drain which serves the Development.

The Applicant wished to know the tender procurement process which had been followed by the Respondent. He wished to be assured that contractors tendering understood their obligations.

Although the Applicant had asked for information concerning the tender process, it had not been provided.

Miss Jenkins explained that the company Enviroclean had conducted a survey in August 2016 which had identified some problems with the storm drain, so quotations had been obtained for cleaning and a carrying out a CCTV survey to identify what works were required to the drain.

Miss Jenkins says there is no reason why the Applicant could not have been provided with the tender documents. The Applicant observed that he had asked for the documents on 26 September 2017 but that these had not been provided.

The Applicant further complains that the Respondent has included a 10% charge for managing the storm drains works. Miss Jenkins originally advised that this was found within the Written Statement of Services but she was unable to locate any relevant wording.

The Applicant confirms that he finds it unobjectionable that the Respondent would charge an additional fee for monitoring contract works etc. and he can imagine what additional work

would be involved, but his point is that he asked what was included within that additional charge and received no answer.

The Applicant additionally complains that he was concerned as to what the works might mean for his own property. One drain runs through his property and he wanted to know what disruption there may be such as whether access would be required to his garden and whether fencing might be removed etc.

Miss Jenkins explained that the Applicant's property was not affected by stage one of the works. A letter had been written to those where affected to advise what to expect. The Applicant accepts that he did not receive a letter but that he was not directly affected by the works.

The Applicant complains in relation to the works at the northern section of the storm drain. He considers that the Respondent has taken no action to establish the full extent of the storm drain. It has asked for a maintenance charge of £5000 to £9000. It is not clear what that is based on. He had asked for further information to try to clarify the position but the Respondent has not answered.

Miss Jenkins said she understood that the plans have been taken to the owners meeting. She herself had not been present. The Applicant said that he had been present but that the plan had simply been held up by someone and there had been opportunity to inspect it.

Miss Jenkins explained that she had not realised that was the case. She confirmed that the contractors have been given the same information as was contained on the plan. She accepts that the plan had not been given to the Applicant despite his request.

The Applicant complains by reference to Code Sections 3.3 and 6.6. We consider the failure to provide the requested information re the storm drain works and the 10% management fee to constitute breaches of the Code.

We do not identify a breach of property factor's duties.

(5) The Respondent's contractor's tree maintenance

The Applicant complains that there has been inadequate management of trees in the common areas. The basis for this complaint is the report by Donald Rodger Associates dated August 2017. Young trees were staked and the report concludes that stakes and ties have remained in place when they should have been adjusted or removed, with the effect that there has been constriction on tree growth. The Applicant feels that the owners should not have to pay to replace trees which have remained staked and tied inappropriately. This should be the responsibility of the landscaping contractor employed by the Respondent. The Applicant feels that the Respondent had ignored his requests to have remedial works carried out.

Miss Jenkins confirmed that trees are included in the landscape garden contract. Miss Jenkins confirms that of the nine trees listed in the report as in need of replacement, she believed that some had been damaged by children, although she had no information as to how many. She accepts however that the contractor should have removed the stakes earlier.

The tree report of August 2017 in that while it refers to dead trees and to inappropriate staking it is not clear that the one is the result of the other.

The Applicant complains by reference to Section 6.9 of the Code and to the Respondent's failure to carry out its services under the Written Statement of Services to a reasonable standard. It is not apparent that there has been any failure to pursue the contractor re this issue and so we identify no breach of the Code. There has however been a failure to carry out the services as required by Clause 2 of the Written Statement of Services "with reasonable skill and diligence".

(6) The Respondent's dealings with the Development insurance

The Applicant confirmed that the matter of insurance has been dealt with by the Respondent to his satisfaction and he is not insisting in a complaint on this head.

(7) The Handling of the Applicant's Complaint to the Respondent

The Applicant is unhappy that the Respondent has failed to make any response to his communications and formal complaint, all in breach of the Respondent's Written Statement of Services Section 4 and in breach of Sections 2.5 and 7.1 of the Code.

The Applicant has highlighted his particular communications and the absence of any response by the Respondent. Miss Jenkins' response to this complaint is frank. She considers that "the general overview is a lack of response." She accepted that the Respondent had not followed its Complaints Procedure and could offer no explanation.

We consider the Respondent's complete failure to respond to the Applicant's correspondence to constitute a breach of Code Sections 2.5 and 7.1. It also constitutes a breach of property factor's duties in respect of the failure to respond to communications and complaints in terms of the Respondent's Written Statement of Services Clause 4.

Observations

The Applicant perceives that there has been a de-skilling of the property factor's role and that the Respondent's staff do not understand their role. Miss Jenkins explained the Respondent's new internal structure and that expertise remained available to deal with the management of the Development. It is not for the Tribunal to comment on this matter.

The Applicant thinks that the Respondent dismisses him as a "troublemaker" and that this explains the lack of response to his complaints. He says that he only takes an active interest in the Development. He would prefer an amicable approach and does not want to have to resort to the Tribunal but observes that he is left with little choice if the Respondent will not communicate with him in relation to his queries and complaints.

At the hearing both parties recognised the need to improve relations and indicated an intention to attempt to avoid matters escalating in the way that they have here.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

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.

JOHN M MCHUGH

CHAIRMAN

DATE: 21 May 2018