

Housing and Property Chamber First-tier Tribunal for Scotland



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

Decision: Property Factors (Scotland) 2011: Section 19(1) (a)

Chamber Ref: FTS/HPC/LM/17/0086

**5 Hillpark Grove, Edinburgh, EH4 7AP
Registered in the Land Register of Scotland under Title Number MID61536
("The House")**

The Parties:-

**Mr Aylmer Millen, residing at the House
("the homeowner")**

**Charles White Limited
65 Haymarket Terrace, Edinburgh, EH12 5HD
("the property factor")**

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") considered matters and determined that a property factor enforcement order should be made.

Members of the tribunal:

Martin J. McAllister, solicitor, legal member and Elizabeth Dickson, ordinary member.

Background:

The application was received by the tribunal on 7th March 2017. The homeowner is alleging that the property factor did not comply with sections 1A,1D,2.1,2.5,3 (overriding objectives and principles), 5.2 and 7.2 of the Code of Conduct for Property Factors. The homeowner also alleged that the property factor has failed to carry out the Property Factor's duties.

The homeowner, along with his wife, is proprietor of a detached house on the Hillpark Brae Development in Edinburgh.

On 20th March 2017, a legal member of the tribunal, acting as a Convener with delegated powers, referred the application to the tribunal to determine.

The Hearing

Mr Aylmer Millen was present. Miss Karen Jenkins, Team Leader with Charles White Limited was present. Both gave evidence.

Representations and documents lodged:

Various documents were lodged by the parties prior to the Hearing. The property factor lodged a Zurich Insurance policy document, an email exchange between the property factor and its insurance broker dated 27th October 2016, Zurich Insurance property schedule and Deacon Insurance Statement of Fact for Property Owners Liability Insurance. The property factor also lodged a copy of an internal email dated 15th December 2014 relating to ownership of retaining walls. The homeowner made representations indicating that, in relation to the application, he was happy to rely on his emails of 6th February 2017 in respect of Parts 1 and 2 of his complaints together with supporting correspondence and documentation.

The tribunal had before it the application which included copies of the correspondence between the homeowner and the property factor.

Preliminary Matters.

The homeowner helpfully set out his position in relation to the application. He said that he was not seeking the tribunal to determine any substantive matter with regard to ownership of retaining walls or to pre-empt future debate on that matter. He said that the matters raised in his application arose from two issues. The first was what he considered the property factor's failure in addressing questions he had raised about ownership of retaining walls in the development and the second was what he considered the unilateral action of the property factor in extending the common insurance policy for the development without authority of the proprietors in the development.

Background

The homeowner and property factor agreed certain matters. The House is situated in a development which is situated on a sloping site. As a consequence there are a number of retaining walls and some of them are of a considerable height and construction. The parties directed the tribunal to these walls by reference to the Title Plan attached to the Title Sheet.

Evidence

Mr Millen referred the tribunal to his email to the property factor dated 6th February 2017 which set out his position with regard to the property factor's treatment of the matters raised with it. This email referred to the specific alleged breaches of the Code of Conduct as referred to in the application. Mr Millen said that the email called

on the property factor to respond to the issues raised about information on ownership of the retaining walls and the extension of the insurance policy. He said that no substantive response had been given. Miss Jenkins said that she considered that the property factor had responded to the issue regarding ownership of the retaining walls and had passed on legal advice received. Mr Millen said that he has still not received a substantive response on the question of ownership of the retaining walls. He referred the tribunal to the contents of an email from the property factor dated 31st August 2016 which acknowledges that further information required to be obtained.

Mr Millen said that he had not received a response to his queries regarding ownership of the retaining walls but on the property factor's Written Statement of Services which had been amended in such a way to reflect a certain position with regard to ownership of these and setting out detail with regard to shares for repairs, Mr Millen had to assume a decision on ownership had been decided. Miss Jenkins said that the Written Statement of Services had been amended with input from the property factor's solicitor. Mr Millen said that, after he had received the amended Written Statement of Services, he had emailed Miss Jenkins on 2nd September 2016 again seeking clarification and he said that thereafter he pushed for a response but that none was forthcoming.

Miss Jenkins made the general point that the property factor was dealing with a number of complaints by the homeowner as well as other applications by the homeowner to the First-tier Tribunal and she conceded that Mr Millen had not received an adequate response.

In relation to the retaining walls Miss Jenkins said that no major works are in contemplation but that they would have to be maintained in the future. Both parties referred to a retaining wall at the site of blocks of flats and which they described as "large."

Miss Jenkins said that there had been a meeting of proprietors on 29th March 2016 where matters had been identified as areas of focus moving forward. She said that this meeting was an opportunity for residents to raise matters of concern and no matter was raised regarding the retaining walls.

The tribunal was referred to the email exchange between the homeowner and the property factor which commenced on 29th October 2016 and, in which, amongst other matters, the homeowner is seeking clarification on the reasons why the property factor had extended the insurance cover to include material damage to the retaining walls.

In evidence Mr Millen said that there had been a fourfold increase in the insurance premium. Miss Jenkins said that there was and is a block insurance policy in place and that the retaining walls had not been included in it. She said that this was rectified and that the property factor considered that cover for material damage should be included. Both Mr Millen and Miss Jenkins agreed that the Deed of Conditions provides for public liability insurance to be in place for the retaining walls. Mr Millen said that he did not believe that the title gave any authority for material damage to be covered in the insurance policy.

been updated to include the property factor's authority to act to be extended to allow for arranging insurance to cover material damage. Mr Millen said that public liability insurance for the playpark had also been introduced and he said that he had no issue with this.

Mr Millen said that he had no objection in principle to the extension of the insurance cover and he accepted that the increased contribution to be paid by him would be negligible but he did wonder why it would be considered appropriate. He said that his objection to the extension of insurance cover was because he did not believe that the property factor had acted within its authority and that the Title was silent on the matter. Miss Jenkins said that material damage cover would be standard for such policies and she disputed that this was done without the authority of homeowners. She said that homeowners had been told that the property factor was getting surveys done to assess the value so that the material damage increase could be determined. Mr Millen was clear in his evidence that he had been unaware of the extension of insurance cover and had not received correspondence on the matter and he said that the catalyst for him doing anything was the property factor issuing the amended Written Statement of Service. Miss Jenkins said that the property factor needed to extend the policy and she said that she could not be sure what had been communicated to Mr Millen.

Alleged failure to comply with Code of Conduct for Property Factors.

1A: Mr Millen conceded that the property factor had complied with the Code of Conduct in this regard.

1D: Mr Millen said that the property factor had technically complied with this section of the Code.

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

Mr Millen said his view is that, until the property factor resolves the issue regarding ownership of the retaining walls, the information provided by the property factor should be treated as being false and misleading. Miss Jenkins said that she did not accept that the property factor provided any information which was false or misleading.

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."

Mr Millen said that the property factor had still not given a definitive response to the issues he had raised. Miss Jenkins stated that she thought her predecessor who dealt with the file before her had responded and she stated that a number of matters with Mr Millen had been running in parallel and that it is entirely possible that responses had not been done.

The written statement of services has the following timescales:

1. To return telephone messages within one working day;

2. To acknowledge both electronic and paper correspondence within forty-eight hours;
3. To respond to both electronic any paper correspondence within five working days.

In relation to the complaints procedure the written statement of services states that

- a) Correspondence will be acknowledged within forty eight hours
- b) The property factor will seek to correct any problems to the homeowner's satisfaction within 28 business days and, if unsuccessful
- c) The line manager will act as a neutral party and will endeavour to resolve the complaint within 14 days. It states that, if more time is needed, an alternative timeframe for resolution will be proposed. If dissatisfaction remains the written statement for services states that an application can be made to The Housing and Property Chamber First Tier Tribunal.

3 ".....Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved."

Mr Millen stated that he considered that the property factor, in imposing the charges for the extension of the insurance cover, had breached this section of the Code.

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 at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."

Miss Jenkins said that the necessary information is shown on quarterly invoices and annual accounts provided to homeowners. She said that the written statement for services sets out what the share of premiums paid by homeowners is and that there are also regular newsletters. Mr Millen challenged that the information in relation to the increase in premium had been provided. He said that, had it been provided, he would not have had to ask for it. Miss Jenkins said that she did not know what information had been sent out to the homeowners in this regard. She said that the information sought by Mr Millen may have been in a newsletter. Mr Millen did not accept this.

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."

Mr Millen referred the tribunal to two emails both dated 6th February 2017. The terms of the emails clearly set out Mr Millen's complaints and the fact that he was looking for responses to his queries about the ownership of the retaining walls and also in relation

to the insurance arrangements. He said that he had earlier flagged a formal complaint on 17th October 2016.

Miss Jenkins said that she was unable to comment further on this matter. She said that the property factor had two/three cases going on at once with Mr Millen and that this was the reason why this matter appears not to have been properly dealt with. She said that it was possible that those dealing with the file had thought that the matter had been dealt with whereas it may have been in relation to one or more of the other files.

Discussion

The tribunal considered that the matters before it were focused. The homeowner considered that he had not had a significant response with regard to the query he had raised in connection with ownership of the retaining walls and the homeowner also disputed the authority of the property factor in extending the insurance cover for material damage to retaining walls.

There were few matters in dispute and those that there were amounted often to the homeowner stating that he had not received information and Miss Jenkins stating that she was sure information would have been sent. The tribunal considered it relevant that Miss Jenkins said that the property factor was dealing with a number of matters raised by the homeowner and she conceded that some responses to the homeowner may not have been sent because staff may have thought that the issues had been dealt with and that there was some confusion because of the number of files for the homeowner.

Breaches of the Code

Section 1

Mr Millen conceded that the property factor had technically complied with the requirements of the Code of Conduct.

Section 2.1

Mr Millen's position was clear. He stated that the fact that he had not been provided with the correct information meant that the information provided should be treated as misleading or false. The property factor did not accept this. The tribunal considered matters. It appeared to members of the tribunal that for the property factor to provide misleading information it would require some intent by the property factor. There was no evidence before the tribunal to support the view that there was any such intent. There was no evidence that false information had been given. The question of ownership of the retaining walls appeared not to be clear and it was certainly understandable that there might not be clarity but there was no evidence that false information had been given.

Section 2.5

The tribunal had no difficulty in accepting Mr Millen's evidence together with the supporting written evidence that the enquiries and complaints of Mr Millen had not been dealt with timeously and certainly not within the timescales set out in the written statement of services. Miss Jenkins accepted that it was possible that responses had not gone to the homeowner.

Section 3

The tribunal accepted that, in the narrow matter of the extension of insurance cover for the retaining walls, the property factor had not advised the homeowner of what he was paying for.

Section 5.2

Miss Jenkins was not able to produce any evidence that the homeowner had been given information showing the basis upon which the insurance premium had been calculated. The tribunal accepted the evidence of Mr Millen that he had not been provided with information on the insurance cover.

Section 7.2

The property factor produced no evidence to substantiate that it had complied with the requirements of Section 7.2 of the Code and conceded that the number of complaints it was dealing with in relation to Mr Millen may have led to confusion. The tribunal accepted that the property factor had breached this section of the Code.

Breach of property factor's duties.

The property factor maintained that it was appropriate to extend insurance cover on the retaining walls which formed part of the common parts of the development. Consideration of the title sheet relating to the House is clear that the proprietors are bound to concur with each other in effecting a common policy of insurance in respect of property owners' liability. The tribunal accepted that there is no provision in the title to compel proprietors to effect insurance for material damage in respect of any of the common parts and this would include the retaining walls. The property factor produced no evidence that proprietors in the Development had authorised it to extend the insurance cover as it had done.

Determination

The tribunal accepted that there had been breaches of the code of conduct for property factors and also a breach of the property factor's duties.

The two aspects outlined by Mr Millen at commencement of the Hearing were that he had not been provided with information on the ownership of the retaining walls in response to his queries and that the property factor had gone beyond its authority in arranging insurance cover for material damage for the retaining walls. The tribunal considered that Mr Millen was correct in his views on this. The tribunal accepted that these had consequential results on the breaches of the Code of Conduct and the breaches of property factor's duties as previously stated.

The tribunal determined that the homeowner should be compensated as a result of the property factor's failings and that the property factor should be required to confirm that it will, in future, act within its authority when arranging insurance in respect of the common parts of the development in which the House is situated. The tribunal proposes that a property factor enforcement order be made in the following terms:

1. The property factor will make a payment of £200 to the homeowner by way of compensation for breaches of the Code of Conduct for Property Factors and breach of the property factor's duties; such payment will be made within twenty eight days of service of the property factor enforcement order.
2. The property factor is to provide an undertaking to the tribunal that it will, in future, ensure that any insurance it places in relation to the common parts of the development is in accordance with the terms of the title obligations in respect of the house at 5 Hillpark Grove, Edinburgh, EH4 7AP and is within the authority granted by all the proprietors of the development. The undertaking is to be provided within twenty eight days of service of the property factor enforcement order.

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.

M McAllister

Martin J. McAllister, Legal member
2nd June 2017

Housing and Property Chamber First-tier Tribunal for Scotland



Decision: Section 19 Property Factors (Scotland) Act 2011 as amended by The First-tier Tribunal for Scotland (Transfer of Functions of the Homeowner Committees) Regulations 2016.

Notice of proposal to make a Property Factor Enforcement Order made under Section 19(2)(a) of the Property Factors (Scotland) Act 2011 as amended (“the 2011 Act”) following upon a Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (the tribunal) in an application under Section 17(1) of the 2011 Act.

Chamber Ref: FTS/HPC/LM/17/0086

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The Parties:-

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 (“the homeowner”)**

**Charles White Limited
65 Haymarket Terrace, Edinburgh, EH12 5HD
 (“the property factor”)**

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the tribunal”) considered matters and determined that a property factor enforcement order should be made.

This document should be read in conjunction with the tribunal’s Decision under Section 19(1) (a) of the 2011Act of the same date.

The tribunal proposes to make the following Property Factor Enforcement Order (“PFEO”):

- 1. The property factor will make a payment of £200 to the homeowner by way of compensation for breaches of the Code of Conduct for Property Factors and breach of the property factor’s duties; such payment will be made within twenty eight days of service of the property factor enforcement order.**
- 2. The property factor is to provide an undertaking to the tribunal that it will, in future, ensure that any insurance it places in relation to the common parts of the development is in accordance with the terms of the title obligations in**

respect of the house at 5 Hillpark Grove, Edinburgh, EH4 7AP and is within the authority granted by all the proprietors of the development. The undertaking is to be provided within twenty eight days of service of the property factor enforcement order.

Section 19 of the 2011 Act provides as follows:

“... (2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so...

- (a) give notice of the proposal to the property factor, and
- (b) allow the parties an opportunity to make representations to them.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor’s duties or, as the case may be, to comply with the section 14 duty, the tribunal must make a property factor enforcement order...”

Intimation of the tribunal’s Decision and this notice of proposal to make a PFEO to the parties should be taken as notice for the purposes of section 19(2) (a) of the 2011 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 tribunal’s office by no later than twenty one 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 property factor enforcement order may have serious consequences and may constitute an offence.

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.

M McAllister

Martin J. McAllister, solicitor,
legal member of the First-tier Tribunal for Scotland.

2nd June 2017