Housing and Property Chamber
First-tier Tribunal for Scotland

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/23/2043

The Parties:

Mr David Philips, Flat 0/4, 53 Helenslee Road, Dumbarton G82 4BS ("the homeowner")

and

Speirs Gumley Property Management Limited, incorporated in Scotland under the Companies Acts (SC078921) and having their registered office at 270 Glasgow Road, Glasgow G73 1UZ ("the property factors")

Tribunal Members – George Clark (Legal Member/Chairman) and Mary Lyden (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 upheld the complaint that the property factors have failed to comply with their duties in terms of Section 2.6 of the Code of Conduct effective 16 August 2021, made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The complaint that the property factors have failed to carry out the Property Factor's duties was not upheld.

The Tribunal proposes to make a Property Factor Enforcement Order.

Introduction

1. 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, effective 16 August 2021, as "the Code of Conduct"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

2. The property factors are Registered Property Factors on the Scottish Property Factor Register (PF000160) and are, therefore, under a duty, in terms of Section 14(5) of the 2011 Act, to comply with the Code of Conduct.

3. The Tribunal had available to it and gave consideration to the application by the homeowner dated 23 June 2023, with supporting documentation, and written representations from the property factors, received by e-mail on 24 November 2023, again with supporting documentation.

Summary of Written Representations

By the homeowner

4. The following is a summary of the content of the homeowner's application to the Tribunal.

5. The homeowner's complaint was that the property factors had failed to comply with Section 2.6 of the Code of Conduct and had failed to carry out the property factor's duties. He stated that Helenslee Road comprises 84 residential properties, 12 within a communal block known as 53 Helenslee Road, the remainder being gardened properties, all set within a landscaped access road. The complaint was about the procedure adopted by the property factors to progress proposals for some additional planting to the landscaped gardens, which was to send letters to all 84 owners on 24 October 2022, explicitly requesting agreement. There was no evidence to suggest that any owners had in fact agreed, but there were a number who had lodged reasonable objections. The property factors, however, had confirmed, in a letter of 17 November 2022, that they had received 2 objections, therefore the majority of the co-owners did not object to the works proceeding. They stated that, once full funding had been received, they would be in a position to instruct the contractors to proceed. The residents of the 12 flats at 53 Helenslee Road had then written to the property factors, objecting to the proposal and suggesting a reduced scope of work. On 14 March 2023, the property factors wrote again to all the owners, letting them know of this suggestion and asking them to confirm whether they were happy

for the property factors to alter the specification. On 30 March 2023, in another letter to the owners, the property factors confirmed that 13 had agreed, 2 did not agree and 1 owner did not wish any work to be carried out. They stated that the majority of owners did not, therefore, agree to a reduction in costs/works, so the original specification and quotation would apply. They added that, as at that date, 34 owners had settled their shares of £51 each.

6. The homeowner had a fundamental issue with respect to what constitutes agreement. It seemed that the property factors operate on the principle that silence or no response prevails over reasonable objection. If this principle prevailed, no reasonable objection by a resident or collection of residents would ever be heard, as it would simply be quashed by the overwhelming weight of residents simply choosing not to respond. He did not believe that this constitutes agreement or consent.

By the property factors

7. The following is a summary of the written representations made by the property factors and received by the Tribunal on 24 November 2023.

8. They did not make specific submissions, but provided the Tribunal with copies of their initial and final responses to the homeowner's complaint and copies of emails that passed between the Parties. The first response was from an Associate Director on 28 April 2023. She contended that their letter of 24 October 2022 had advised that "unless there was a majority of objections, he [the author of the letter] would proceed to issue a separate common charges account requesting owners pay their share of the cost of the proposed works. Thereafter, the owners [sic] payment is taken as their agreement to the work proceeding." She added that, in their industry, "it is normal for significant apathy to exist amongst home owners who are busy and pre-occupied" and that it would not be feasible on every occasion, to place on hold routine maintenance proposals such as the replacement of shrubs, to request that a majority of owners contact them to agree the proposal. She accepted that it was not helpful for the property factors to have issued the revised letter asking owners to vote "on whether they wanted to proceed with the original planting proposal or reduce the budget". She added "Whilst I understand and appreciate your point of view that evidenced majority agreement should be obtained in advance, this is not how we operate as a business. We have a business policy of proposing these types of works, i.e. routine maintenance, on the basis of not receiving a majority of objections".

9. The final response to the complaint was sent by an Executive Director on 13 June 2023. He repeated that they "had legitimately sought majority objection from the co-owners to instruct replacement planting of dead or missing shrubs

throughout development common grounds…The view held by us is that owners will object if they are of the mind to do so…In this instance, the developent common works to replace dead or missing shrubs in the development common grounds, was supported by the majority of owners, who paid their share of the works being proposed, which subsequently proceeded to the instruction of the contractor, Green Belt Gardens, and completion of the works." He referred to the title deeds and confirmed that "major works" were those which exceeded a sum equal to £100 per flat. The replacement planting, therefore, did not constitute major works. Accordingly, the property factors did not uphold the homeowner's complaint.

Case Management Discussion

10. A Case Management Discussion took place by means of a telephone conference call on the morning of 18 December 2023. Neither Party attended or was represented. The Tribunal did not consider that the interests of justce required it to adjourn the Case Management Discussion to a later date, as the property factors had indicated in their written representations that they did not intend to attend a Case Management Discussion and the homeowner had decided not to attend either. Both Parties had made extensive written submissions and, although there was an important point of principle involved in the application, the sums of money at issue were very small.

Findings of Fact

11. The Tribunal makes the following findings of fact:

- The homeowner is a homeowner within a Development of 84 properties in Dumbarton, 12 of which are in a flatted block at 53 Helenslee Road.
- 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 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 23 June 2023 under Section 17(1) of the Act.

- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 24 October 2023, 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.
- On 24 October 2022, the property factors wrote to all 84 owners within the Development requesting their agreement to the replenishment of the shrub bed areas at 53 Helenslee Road, the installation of small grown shrubs and the planting of approximately 64 additional plants.
- On 17 November 2022, the property factors wrote again to all owners, stating that they had received 2 objections and that the majority of co-owners did not object to the work proceeding. The cost to each owner was to be £51, inclusive of VAT.
- On 14 March 2023, the property factors wrote again to all the owners, asking them to confirm whether they were happy for the property factors to have the cost reduced to £25 oer owner, inclusive of VAT. They stated that this would reduce the number of replacement plants within the common grounds.
- In terms of the title deeds and their Written Statement of Services ("WSS"), the property factors can carry out maintenance of the Development Common Parts as they shall consider necessary, provided always that in the case of a major work (defined in the case of a Block as work the cost of which is estimated by the property factors to exceed £100 per flat), certain procedures are followed in relation to meetings and votes. The property factors' core service includes organising and instructing maintenance of the common parts

Reasons for the Decision

12. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing.

13. **Section 2.6 of the Code of Conduct provides "A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of conditions or provisions of the agreed contract service, 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 there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an**

agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).”

14. The view of the Tribunal was that it was not necessary for the Tribunal to determine whether the particular works in this case could be said to be part of the core service. The fact that the property factors had sought approval in advance indicated that they did not consider this to be the case. Had they treated it as part of the core service, there would have been no need to seek authority in advance, given the modest cost involved. The title deeds do not state a threshold for works on the Development Common Parts, but, helpfully, in the same paragraph of the Deed of Conditions by Manor Kingdom (Scotland) Limited, registered on 28 March 2008, which authorises the property factors to carry out maintenance of the Development Common Parts and the Block Common Property as they shall consider necessary, there is reference to “major work”, which, although not defined in relation to Development Common Parts, is defined, in the case of major work to a Block, as being work the cost of which is estimated by the property factors to exceed £100 per flat. The WSS makes no mention of a cost threshold. The Tribunal noted that the property facrors’ Invoice of 24 November 2022 for £51 referred to its being for “Additional planting in common areas”.

15. The Tribunal held that, as the property factors had decided at the time not to treat the proposed work as falling within their core service, Section 2.6 of the Code of Conduct must apply. The property factors had, in their response ot the homeowner’s complaint, said that they regarded the works as falling within their core service, but this was not borne out by the manner in which they corresponded with owners at the time.

16. The Tribunal then considered the wording used in the property factors’ letter to the homeowners in the Development.

17. The original letter of 24 October 2022 clearly stated “In order to proceed with works of this nature we will require the agreement and funds from owners in advance” and added that it was their intention to invoice each owner’s share on the Common Charges account in November 2022. They said that they would monitor the feedback and issue an update on the number of objections raised. They did not advise owners that work would be instructed if they did not receive objections from a majority.

18. In their letter of 17 November 2022, they said that they had received 2 objections, but did not say how many owners had actively given approval. They simply added “Therefore, the majority of co-owners did not object to this work proceeding”.

19. In their letter of 14 March 2023, the property factors said in terms “Please confirm within the next 7 days…whether you are happy for me to alter this specification with Greenbelt Gardens of £25 inclusive of VAT per owner.” They did not ask owners to state a preference as between the two proposals and, again, did not state how they would deal with those who did not reply.

20. On 30 March 2023, they told the owners that 13 had agreed with a reduction in the cost and the scope of the works, 2 did not agree and 1 owner did not wish any work to be carried out. They concluded “The majority of owners of the development did not agree to a reduction in costs/works, therefore, the original quotation/specification applies”.

21. The Tribunal determined that the approaches to non-replies in the property factors’ letters of 17 November 2022 and 30 March 2023 were completely mutually contradictory. Both requests for responses (24 October 2022 and 14 March 2023) had asked owners to positively confirm agreement with a proposal, with neither saying what view would be taken of those who did not respond, but in the first case, the property factors treated a non-response as constituting agreement, whereas in the second instance they treated it as a failure to agree. The Tribunal accepted that it is not uncommon for owners to fail to reply to letters such as those of 24 October 2022 and 14 March 2023, but they are entitled to assume that the effect of their failure to comply will be treated in the same manner in all circumstances. If the property factors were going to treat a non-response to their letter of 24 October 2022 as signifying agreement, that should have been made clear in the letter itself. Equally, if they were going to treat those who failed to reply to their letter of 14 March 2023 as not agreeing to the more limited scope of work, that should have been expressly stated as well.

22. In their letter of 30 March 2023, the property factors said that 34 out of 84 owners had now paid £51. They added that they expected Avant Homes to pay within the next 7 days and that this would produce a majority who had paid, but the Tribunal noted that this meant that Avant Homes had not by then paid the Invoice of 22 November 2022.

23. The decision of the Tribunal was that the property factors did not properly secure the consent that they themselves said they required from owners to the proposal to carry out works that would cost them £51 each. They had, therefore, failed to comply with Section 2.6 of the Code of Practice. No specific evidence of failure to comply with the Property Factor’s Duties was provided by the homeowner, so this part of the application was not upheld.

24. The Tribunal was concerned that, in their responses to the homeowner’s complaint, an Associate Director had stated that their letter of 24 October 2022

said that, unless there was a majority of objections, the work would proceed. This was a complete misrepresentation of the wording of the letter, which sought positive agreement and did not used those words. Further, the response indicated that, in the letter of 14 March 2023, owners were being asked whether they wanted to proceed with the original planting proposal or reduce the budget. That again was incorrect. Owners were only being asked whether they were happy for the property factors to alter the specification to £25 insclusive of VAT.

Property Factor Enforcement Order

25. Having made its Decision on the merits, the Tribunal then considered whether to make a Property Factor Enforcement Order ("PFEO"). The view of the Tribunal was that the attempts by the property factors to retrospectively justify the decisions they took were reprehensible, when it must have been clear to them that they had treated non-replies to two letters in entirely contradictory ways. In acting in the manner they did, the property factors had denied the homeowner the opportunity to have more limited work carried out at a lesser cost. Accordingly, the Tribunal proposes to make a PFEO in accordance with the Section 19(1)(a) Notice attached to this Decision, requiring the property factors to pay to the homeowner by way of compensation a sum which is the equivalent of the difference between the two figures. The Tribunal would also encourage the property factors to review their WSS and/or their standard letters regarding repairs and maintenance, so that homeowners can be in no doubt as to the manner in which the property factors will treat their failure to respond to requests for approval of works.

26. The Tribunal's Decision was unanimous.

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.

[redacted]

Signature of Legal Chair ……. Date 18 December 2023