

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/23/1712

Bowmont Terrace, Dunbar ("the Property")

Parties:

Derek Welsh, 18 Comrie Avenue, Dunbar, EH 42 1ZN ("the Applicant")

Ross and Liddell, 60 St Enoch Street, Glasgow, G1 4AW ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member)

Leslie Forrest (Ordinary Member)

DECISION

The Tribunal determined that the Property Factor has not failed to carry out its property factor duties.

The decision of the Tribunal is unanimous.

Background

- 1.** The Applicant lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application comprises documents received by the Tribunal between 30 May and 9 August 2023 and states that the Respondent has failed to carry out its property factor duties. Documents were lodged in support of the application including a copy of the Respondent's written statement of services (WSS), a copy of a Land Certificate for the property and correspondence between the parties.
- 2.** A Legal Member of the Tribunal with delegated powers of the President referred the applications to the Tribunal. The parties were notified that a case management discussion ("CMD") would take place on 22 November 2023 at 10am by telephone conference call. This was postponed at the request of the Applicant, as was a further CMD scheduled for 14 February 2024. The CMD

took place by telephone conference call on 22 April 2024 at 2pm. Prior to the CMD, both parties lodged submissions and documents. The Applicant participated in the CMD. The Respondent was represented by Mr Doig, solicitor, and Ms Johnstone.

Summary of discussion at CMD

3. The Tribunal noted at the start of the CMD that the Applicant's complaint is that the Respondent has been charging a full management fee but is not managing all the common areas. They only manage the play park, which is about 5% of the common areas within the development. The remainder of the common areas have not yet been handed over by the developers.
4. Mr Welsh told the Tribunal that he purchased the property in June 2018, from the developer. He raised his complaint last year and went through the Respondent's Complaints Procedure. He did not complain at an earlier stage because the Respondent only starting issuing invoices on 1 May 2022. This invoice was incorrect. The Respondent was appointed by the developer in the Deed of Conditions (DOC).
5. Ms Johnstone told the Tribunal that the developer handed over the playpark in November 2021. She said that there have been no further handovers since then. However, all the units in the development have been sold, the last one in 2021. She stated that the failure to handover all areas is perhaps unusual and normally there is a full handover when all units have been sold. Ms Johnstone stated that the playpark is about 5% to 10% of the common ground.
6. Mr Welsh told the Tribunal that the Respondent was appointed in 2016. However, they did not provide any services until the handover of the playpark. He has repeatedly requested a copy of the documentation relating to the handover, but they have failed to provide it. He stated that they have now taken over other parts of the development, or at least he assumes this must be the case, as they have started to invoice for additional areas. He stated that the first invoice he received was for the period 12 November 2021 to 15 March 2022. However, he was later notified that this had been an error as the start date should have been February 2022 and a credit note was issued. Since 1 June 2023, they have been invoicing for £312.50 per month.
7. Ms Johnstone told the Tribunal that her earlier statement had been incorrect. She had now checked the system and established that there had been a further partial handover of the Robertson Homes parcel on 29 November 2023. This means that about 40% of the common areas have been handed over. She said that the Applicant's share of the maintenance costs is 1/180.
8. The Tribunal noted that the Applicant had lodged a document entitled "Summary of Services covered in our management fee". Mr Welsh said that he wasn't sure where he got it – maybe it was in the initial correspondence from the Respondent when he purchased the property. Ms Johnstone said the information is in the schedule of management but that the document itself was created when the Respondent tendered for the contract. It's not part of the

WSS. The schedule of management was issued on 8 March 2022. The Tribunal noted that the Applicant had lodged a copy of this letter.

9. Mr Doig referred the Tribunal to his written submissions. He said that it doesn't matter whether the Respondent is currently managing 5% or 100% of the common areas. They are entitled to a full management fee, and this will not change when the whole development has been handed over. In response to questions from the Tribunal about whether the homeowners had been notified of the further handover, Mr Doig said that it's on the invoices. They can see that additional work is being carried out and this is reflected in the increased charges. Ms Johnstone told the Tribunal that the homeowners are usually notified when a handover takes place. Mr Welsh said that he had not been notified. He also said that the Respondent took over the play park in February 2022. The Robertson parcel was on 1 June 2023. Ms Johnstone said that this was correct. When she referred earlier to November 2023, that is when the plan was uploaded to the system. The handover was in May 2023, and they started providing services in June 2023. She also told the Tribunal that she cannot locate a letter to the homeowners on the system. This might mean that a letter was not sent although that would be unusual.
10. In response to questions from the Tribunal, Mr Welsh confirmed that he believes that the homeowners should only be paying a proportion of the management fee. He said that he accepted that the sums involved are miniscule. However, there have been a number of issues with the Respondent failing to communicate properly and adhere to the Code. He said that the cost of maintaining the play park was £880 but that a management fee of £7000 had been charged. Its disproportionate. He was not able to direct the Tribunal to a provision in the DOC or WSS which specifically supported his argument. However, he is not satisfied that they are carrying out all the services they have undertaken to provide. For example, competitive tendering. The work they are doing is not commensurate with the fees.
11. Mr Doig concluded by stating that the only issue before the Tribunal is whether the Respondent has failed to comply with Section 17(1)(a) of the Act by charging a full management fee. The other matters raised by Mr Welsh are not relevant. Mr Welsh said that he had nothing to add to what had already been said. He stated that the DOC is confusing. He added that clause 4.8 of the DOC gives homeowners a right to inspect any document that relates to the management of the development. The Respondent appears to be disputing that. The sums in question may be small but there have been many failures by the Respondent.

Findings in Fact.

12. The Applicant is the joint owner of the property and purchased it from the developer in 2018.

13. There are 180 properties in the development. The Applicant's share of the cost of maintenance and repair is 1/180.
14. The Respondent was appointed as property factor for the development in 2016 by the developer.
15. The property factor duties which apply are contained in the deed of conditions for the development and the written statement of services and development schedule.
16. The Respondent did not provide factoring services to the development until February 2022, following the handover of the play park in November 2021.
17. In June 2023, a further parcel of land was handed over by the developer. The homeowners in the development were issued with invoices from this date which included common charges for the additional land but were not notified of the handover.
18. The Applicant's annual management fee is £42.40 plus VAT.

Reasons for Decision

19. It became apparent during the CMD, that the Applicant has other concerns regarding the services being provided by the Respondent and compliance with the Code of Conduct. Some of these concerns have arisen since the application was submitted to the Tribunal in May 2023. Although the application was accepted in August 2023, two previously arranged CMDs were postponed at the Applicant's request, with the result that the Tribunal did not consider the application until almost a year had elapsed. The Applicant did not seek to amend the application during that period and the Tribunal is satisfied that only the complaint specified in the application can be considered. That is – is the Respondent failing to carry out its property factor duties by changing a full management fee when it is only managing part of the development common areas.
20. During the CMD, it also emerged that the factual position has changed since the application was lodged. Since June 2023, the Respondent has been managing more of the development. About 40% has now been handed over. It appears also that they failed to notify the homeowners of this development so that they did not become aware of the position until the next invoice was issued. The Tribunal notes the following:-
 - (a) The Respondent cannot provide a management service in relation to areas of ground which have not been handed over by the developer.
 - (b) The delay in handing over the remainder of the development appears to be the developer's fault. There was no suggestion that the Respondent has been

unwilling to assume responsibility for the whole development.

- (c) The homeowners do not pay for the maintenance of areas which have not yet been handed over. These are maintained by the developers at their own expense.
- (d) The Respondent did not increase their management fee in June 2023 when they adopted a further section of the development.
- (e) The Respondent does not intend to increase their management fee once they are responsible for the whole development.
- (f) There is no provision in the deed of conditions that requires the Respondent to modify or reduce their management fee while they are only responsible for part of the development.
- (g) There is no provision in the WSS which requires the respondent modify or reduce their management fee while they are only responsible for part of the development.
- (h) The development schedule issued on 8 March 2023 does not state that the Respondent will modify or reduce their management fee while they are only responsible for part of the development.

21. In their complaint response dated 6 January 2023 the Respondent lists the services that they provide. These include – implementing a landscape maintenance contract for the common areas currently adopted, ensuring that contractor invoices are checked and paid, issuing accounts to homeowners, and ingathering funds, arranging play park and property owners' insurance, arranging play park maintenance, and carrying out inspections. It does not appear to the Tribunal that the size of the area of the development currently adopted is in any way relevant to the management fee being charged. The Respondent has to provide all of these services regardless of the size of the piece of land in question. Furthermore, it might be argued that the play park is the most significant part of the Respondent's remit since it requires insurance cover and careful monitoring of the equipment for health and safety reasons.

22. In the circumstances the Tribunal is not persuaded that the Applicant has established a failure to carry out property factor duties in relation to the management fee that is charged.

Appeals

A homeowner or property factor 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.

Josephine Bonnar, Legal Member
28 April 2024