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

STATEMENT OF DECISION: Property Factors (Scotland) Act 2011, section 19(1)(a)

Case Reference Number: FTS/HPC/PF/17/0297

The Property:

77 Tansay Drive, Chryston, Glasgow, G69 9FD

The Parties:-

Neil Devlin, 77 Tansay Drive, Chryston, Glasgow, G69 9FD

("the Homeowner")

and

Newton Property Management, 87 Port Dundas Road, Glasgow, G4 0HF

("the Factors")

Tribunal Members:

Adrian Stalker (Chairman) and Andrew Taylor (Ordinary Member)

Decision:

The First-tier tribunal for Scotland (Housing and Property Chamber) ("the Tribunal"), having made such enquiries as it saw fit for the purposes of determining whether the Factors had complied with the Code of Conduct for Property Factors ("the Code"), and with their duties as property factors, determined that the Factors had not failed to comply with the Code, or their duties as property factors.

Background

1. By an application to the Housing and Property Chamber received on 27 July 2017, the Homeowner sought a determination of whether the Factors had failed: (a) under section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act"), to comply with the Code; and (b) to perform the property factor duties, as defined in section 17(5) of the Act, in respect of their factoring of the property. On 6

September 2017, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a First-tier tribunal.

2. This application arises from an incident on 2 June 2017. The Factors engaged contractors, Keywest Landscaping Ltd, to carry out gardening maintenance work at the estate of which the property forms part. On that day, the Contractors parked their van over the end of the Homeowner's driveway. The van had a diesel leak. The diesel caused staining to the Homeowner's driveway. The area affected is owned entirely by the Homeowner. The Homeowner has been trying to arrange for a repair to be carried out. As at the date of the Tribunal hearing on 13 November 2017, the repair had still not been done. The Homeowner has sought the assistance of the Factors in resolving this issue. He is dissatisfied with their efforts in this regard. These points are not in dispute.

3. The Homeowner's application comprised a completed application form, together with copies of email correspondence between the parties. In his application, the Homeowner complains that the Factors have failed to comply with sections 2.5, 5.9, 6.1, 6.5 and 6.9 of the Code. He also complains that the Factors have failed to comply with their duties as property factors, stating:

> I feel that Newton have a duty of care to have my driveway fixed as I currently pay Newton my factor fees and not any third party company which caused damage to my land. I believe Newton should have disclosed liability insurance details to myself after the deadline came with no repair carried out to a good standard. Newton received the first email on the 4th of June and within our conversation I set out a time scale for the repair to be fixed by 21st July giving Newton around 7 weeks time to fix my driveway which I feel was more than enough time for this to be fixed.

Hearing

4. A hearing took place in respect of the application on 13 November 2017, at Wellington House, 134-136 Wellington Street, Glasgow. The Homeowner, Mr Devlin, was present. The Factors were represented by Derek MacDonald, one of their joint managing directors. Martin Henderson, one of their Executive directors, was also present. The Tribunal was advised by Mr MacDonald that the Factors had intended to be represented at the hearing by Mr Scott Cochrane, their Senior Property Manager and Tribunal Compliance Officer. However, Mr Cochrane was unwell. That was unfortunate, given that the Factors' correspondence and communication with the Homeowner in relation to this matter had been conducted almost entirely by Mr Cochrane. Nevertheless, Mr MacDonald advised the Tribunal that he proposed to conduct the hearing in Mr Cochrane's absence. No motion for an adjournment was made under rule 26 of the First-tier Tribunal

for Scotland Housing and Property Chamber Rules of Procedure 2016 ("the Tribunal Rules").

5. At the hearing the Tribunal took the parties through the various sections of the Code on which the Homeowner relied, taking their evidence and submissions on each of those sections, before considering the Homeowner's complaint that the Factors had failed to comply with their duties as property factors.

Preliminary issues

6. Mr MacDonald sought to raise two preliminary issues. Firstly, it was said that the Homeowner had failed to exhaust the Factors' Complaints Procedure before making his application. Therefore, it was argued, the application should not have been accepted by the Tribunal. Secondly, it was also submitted that the Tribunal's jurisdiction to hear the issue was in question, given that the parties' dispute arose from damage to the Homeowner's property by the contractors, and not through any act or omission on the part of the Factors in carrying out their own duties.

7. As regards the first point, the Tribunal notes that neither section 17 of the Act, nor part 7 of the Code ("Complaints Resolution") requires a factor's complaints procedure to be "exhausted" before an application can be made to the Tribunal. Rather, section 17(3)(b) of the Act provides that "No...application shall be made unless - the property factor has refused to resolve, *or unreasonably delayed in attempting to resolve*, the homeowner's concern." However, that is, in essence, the Homeowner's complaint in this case: that the Factor has unreasonably delayed in attempting to resolve his problem. Therefore, the Tribunal prefers to treat this issue as forming part of what the Tribunal must decide, in determining the merits of the application, rather than as a preliminary issue.

8. As regards the second issue, the Tribunal reached the same conclusion: the issue of what, if anything, the Factors had a duty to do for the Homeowner, in these circumstances, forms part of what the Tribunal must decide, in determining the merits of the application. It is not a preliminary issue. It is raised by the Homeowner himself in his application, as is evident from the quotation from his application at paragraph 3 above.

Code of Conduct: section 6.1, 6.5 and 6.9; property factor's duties

9. In the Tribunal's view, the Homeowner's complaint under part 6 of the Code, and his complaint that the Factors had failed to carry out their duties as property factors, raised the same fundamental issue: what, if anything, were the Factors obliged to do, as a result of the damage caused to the Homeowner's property by

the Contractor's van, on 2 June 2017? These complaints are accordingly considered together.

10. Part 6 of the Code is titled "Carrying out repairs and maintenance". The sections on which the Homeowner relies are as follows:

> 6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.
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> ...
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> 6.5 You must ensure that all contractors appointed by you have public liability insurance.
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> ...
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> 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.

11. The Tribunal invited the Homeowner to say why sections 6.1 and 6.9, in particular, were applicable. The Homeowner was also invited to explain why, in his view, the Factors had failed in their duties to him, in the circumstances of this case. In response, he essentially reiterated the points made in the quotation from his application at paragraph 3 above. Mr MacDonald maintained that, in the circumstances, these paragraphs were not applicable.

12. Where property factors engage contractors to carry out work, and those contractors, through negligence or otherwise, cause damage to the property of individual homeowners (or common property), liability to make good that damage lies with the contractors, as the party having caused the damage. There may also be circumstances in which liability to make good the damage also lies with the factors, particularly where they exercise control over the manner in which the work is being carried out. However, in the Tribunal's view, the circumstances of this particular case are not such as to indicate any liability or breach of any duty on the part of the Factors. They had no control over, or even knowledge of, the Contractors' decision to park their van across the Homeowner's driveway. Any fault for the damage lies entirely with the Contractors. The Factors were under no obligation to indemnify him for losses caused by the Contractors.

13. Sections 6.1 and 6.9 are not, in the view of the Tribunal, applicable to this case. Part 6 of the Code is concerned with the manner in which the Factors carry out their repair and maintenance duties, under their contractual arrangements with Homeowners. In this case, the Factors have no repair and maintenance duty in respect of the Homeowner's driveway. It is solely owned by him. Therefore, the

damage to the Homeowner's driveway is not a matter "requiring repair, maintenance or attention" by the Factors in paragraph 6.1. Nor was the damage caused by "inadequate work or service provided", in terms of section 6.9.

14. The Tribunal would wish to emphasise that the conclusions in paragraphs 12 and 13 follow from the particular circumstances of this case. They are not to be regarded as being generally applicable to other cases in which Contractors engaged by the Factors cause damage to Homeowners' property. Each case would have to be considered on its own facts and circumstances.

15. The Homeowner's application also relied upon section 6.5. However, it was accepted by the Homeowner that the details of the Contractors' public liability insurance had been provided to him, during the course of August 2017, albeit after some delay. This was really an aspect of his complaint under section 2.5 of the Code.

16. Accordingly, the Tribunal did not uphold the Homeowner's complaint under this heading.

Code of Conduct: section 2.5; whether the Homeowner was entitled to make an application to the Tribunal

17. Part 2 of the Code is headed: "Communication and Consultation"; section 2.5 states:

> 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...

18. The Factors were advised of the damage to the driveway on 2 June 2017, by the Homeowner's partner, Melanie Pollock. The Factors were able to clarify with the Contractors that the damage was due to a diesel leak from their van. Thereafter, it appears that the Contractors made an attempt to remove the staining by applying degreaser. The Homeowner was not satisfied that this had resolved the problem. By an email of 27 June, he set a deadline for the driveway to be repaired, by 21 July. As at 21 July, the staining was still evident (as was accepted by the Factor in Mr Cochrane's email to the Homeowner of 21 July). None of these points are in dispute.

19. By email dated 25 July, the Factor reported to the Homeowner that the Contractors had accepted that the damaged section of tarmac in the driveway would have to be uplifted and replaced; and that the Contractors were obtaining a

quote for the work to be done. Mr Cochrane had passed on the Homeowner's contact details to the Contractor's Mr Stewart, who had attempted to contact the Homeowner directly. That email recognised that the Homeowner might feel that Mr Cochrane had not addressed the matter to the Homeowner's satisfaction. Accordingly, attached to the email was a copy of the Factors' complaints procedure. By email dated 26 July, the Homeowner advised the Factors that he was dissatisfied with their attempts to resolve matters, and that he was going to initiate an application to the Tribunal. That email made no reference to the complaints procedure. The application was received by the Tribunal on 27 July. Again, the Tribunal did not understand any of these points to be in dispute.

20. The Tribunal invited the Homeowner to describe the basis for his complaint under section 2.5. The Homeowner cited two areas of concern. Firstly, Mr Cochrane's email to him of 26 July stated that Mr Cochrane had set Mr Stewart (of the Contractors) a deadline of 4 August to confirm when the damaged part of the driveway would be replaced. However, that deadline came and went, without Mr Cochrane contacting him. It was only when he renewed his complaint on 14 August that the Factors contacted him again. Secondly, the Homeowner received an email from Mr Cochrane on 22 August, in which Mr Cochrane described the current status of his efforts to have Mr Stewart address the outstanding repair. However, he did not thereafter hear from the Factors again until 6 October, when they received papers from the Tribunal.

21. Notably, both of these concerns relate to events which took place after the Homeowner's application had been submitted to the Tribunal on 27 July. The Tribunal did not understand the Homeowner to express dissatisfaction with the level of communication received from the Factors, to the point when the application was made.

22. In the Tribunal's view, the Factors would have been quite within their rights, in this particular case, to have dealt with the Homeowner's complaint by providing him with the Contractors' contact details, and inviting him to take up the matter with them, directly. That could have been done, within a few days of 2 June, when it was clear that the Contractor had accepted that the damage was their fault. The Factors would not, in the Tribunal's view, have been obliged to play any further role in the matter. That follows from the Tribunal's reasoning at paragraphs 12 and 13 above.

23. Instead, in the period from 2 June to 22 August, the Factors attempted to assist the Homeowner by contacting the Contractors, and asking them to address the problem, and reporting the Contractors' position to him. That was more than they were obliged to do.

24. Against that background, the Tribunal turns again to section 17(3)(b) of the Act, in terms of which, "No...application [to the Tribunal] may be made unless...(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern." In the Tribunal's view, that was not the case here. It reaches that conclusion for the following reasons.

25. Firstly, for the reasons already stated, the "homeowner's concern" in this case was not for the Factors to resolve. The only resolution that could have satisfied the Homeowner was the repair of his driveway. That was for the Contractors to resolve, rather than the Factors.

26. Secondly, as already described, the Factors had, as at the date of the Homeowner's application, done as much as (if not more than) they were obliged to do, in assisting him to achieve that resolution.

27. Thirdly, the Homeowner's position as regards his complaint under section 2.5 of Code indicated that he had no criticism to make of the Factors' responses to him, up to the date of his application, which was received by the Tribunal on 27 July.

28. Finally, given the sequence of events set out at paragraphs 18 and 19 above, the Tribunal considers that it was reasonable for the Factors to have appreciated, as at 25 July, that the Homeowner may be dissatisfied with them, in addition to his dissatisfaction with the Contractors. It was at this point that they directed him to their complaints procedure, presumably in order that any complaint against them could be made and considered by them. Rather than pursuing that procedure, the Homeowner immediately made his application to the Tribunal. That was, in the Tribunal's view, premature.

29. Consequently, the Tribunal finds that the application should not have been made by the Homeowner, because it was not the case, under section 17((3)(b) of the Act, that the Factors had "refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern".

30. It follows that the Tribunal cannot make any Order in respect of the alleged failure under section 2.5 of the Code, in the form of the delays described at paragraph 19 above. Even had the application been made to the Tribunal, say at the end of September 2017, it would not have been inclined to order more than nominal payment to the Homeowner by the Factors under section 20(1)(b) of the Act, in respect of those delays, given that the action taken by the Factors, overall, was more than they were obliged to take.

Code of Conduct: section 5.9

31. Reference was made to this section of the Code in the Homeowner's application. However, the Tribunal pointed out that, although this part of the Code concerns insurance, it does not relate to the issue of interest to the Homeowner, which was the insurance held by the contractors. The Homeowner accepted this point at the hearing, and the complaint under section 5.9 was not further pursued.

Disposal under section 19, appeal, etc

32. For the reasons stated, the Tribunal reached the conclusion that it could not find, in this case, that the Factors had failed to comply with the Code, or their duties as property factors.

33. The Tribunal's decision was unanimous.

34. Between the date of the hearing, and the issue of this decision, the Factors sought to make further representations to the Tribunal, by letter dated 16 November. The Tribunal did not consider those representations, as they were made after the hearing had been completed. The Tribunal members have not read the letter. The content of the letter has had no influence on this decision.

35. **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.**

36. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

Adrian Stalker

Signed

Date 5/12/17

Chairman