

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision

Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

Chamber Ref: FTS/HPC/PF/22/1207 & FTS/HPC/PF/22/1765

Re: Property at 11 Barn Court, Newton Farm, Cambuslang, Glasgow, G72 6ZS (“the Property”)

Parties:

Mr Paul Christopher Smyth, 11 Barn Court, Newton Farm, Cambuslang, Glasgow, G72 6ZS (“the Applicant”)

Speirs Gumley, Redtree Magenta, 270 Glasgow Road, Rutherglen, G73 1UZ (“the Respondent”)

Tribunal Members:

Martin McAllister (Legal Member) and Helen Barclay (Ordinary Member) (the “tribunal”)

Decision

In relation to the application before it, the tribunal determined that the Respondent had complied with the Code and the property factor’s duties.

Background

1. This is an application by the Applicant in respect of the Property in relation to the Respondent’s acting as a property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). Because the matters complained about by the Applicant are about issues both prior and after 16th August 2021, the application before the tribunal comprises two application forms. One form deals with the 2012 version of the Code and the other deals with the 2021 version of the Code. Both forms also seek a finding that the Respondent has failed to comply with the property factor’s duties.

2. The application form under the 2012 Code alleges that the respondent has failed to comply with Paragraphs 1, 1.1a, 3.3,4.5,4.8,6.1,6.4 and 7.4 and has failed to comply with the property factor's duties.
3. The application form under the 2021 Code alleges that the respondent has failed to comply with Paragraphs 1.1,1.2,3.4,4.5,4.6,4.11.6.1 and 6.7 and has failed to comply with the property factor's duties. The applications were accompanied by a number of documents.
4. Although there are two application forms, for the purpose of the Hearing they are together referred to as "the application."
5. Both parties lodged numbered productions and written submissions.
6. A case management discussion was held by teleconference on 12th August 2022. The Applicant was asked to lodge written submissions in respect of obligations imposed on the Respondent as a consequence of conditions contained within the title. The Applicant said that he would lodge copies of any emails which he has in relation to complaints he had made about the standards of maintenance of the common areas within the development where the Property is situated.

The Hearing

7. A Hearing was held at Glasgow Tribunal Centre on 24th January 2023. The Applicant was present and was accompanied by his co-owner, Ms Tracey Smyth, who gave evidence. The Respondent was represented by Mr Bryan McManus, executive director and his colleagues, Joanne Knox and Kay Hendry.

Preliminary Matters

8. Prior to the Hearing, the Applicant submitted a copy of his title. He accepted that he had made no submissions in relation to obligations imposed on the Respondent by the title other than the Title Sheet referring to standards of maintenance.
9. On 12th January 2023, the Applicant emailed the Tribunal and said that he had no more evidence to submit in respect of the dates and times he had contacted the Respondent. He said that the documents which he had submitted should provide evidence of complaints over the years.

Matters not in dispute

10. The Property is a terraced property situated in a development for which the Respondent provides property factoring services.
11. The Applicant and Tracey Smyth, the co-owner, have owned the Property since 28th May 2010. They purchased the Property from Taylor Wimpey, the developer.
12. The Respondent has managed the estate since it was built.
13. Taylor Wimpey did not advise the Respondent that it had sold the Property to the Applicant and his co-owner.
14. The Respondent wrote to the Applicant and his co-owner in October 2015 advising that they were unaware that the Developer had sold the Property to them and enclosing an apportioned account from their date of entry which did not include management fees.
15. The Respondent raised a Simple Procedure Claim in Glasgow Sheriff Court for the sum of £902.95 in respect of factoring services and costs from 28th August 2017 to 28th August 2021.
16. The sum of £902.95 was paid to the Respondent by the Applicant in compliance with the finding made by the Sheriff and the Respondent acknowledged receipt on 20th May 2022.

The Issue

17. The issue is focused. The Applicant's belief is that the Respondent has not and is not properly managing the estate and the alleged breaches of the Code and failure to comply with property factor's duties flows from that together with communication issues in relation to matters raised by the Applicant in connection with such breaches and failure to comply.

The 2012 Code

18. *Section 1, 1.1a.* Mr Smyth conceded that this paragraph of the Code had been complied with since the written statement of services contained the elements required by the Code.

Section 3.3. Mr Smyth conceded that this paragraph of the Code had been complied with and that the Respondent did provide an itemised financial statement as required by the Code. He accepted that the quarterly factoring invoices provided financial statements to homeowners.

Section 4.5: You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

19. Mr Smyth's position was that he was unaware of the debt to the Respondent until he was written to in 2015. He said that it was not the case that he did not want to pay and that he was not presented with one until the correspondence in 2015.

20. Mr Smyth said that he had knowledge that maintenance work was being done in the development but thought that it was Taylor Wimpey who was doing the work. He said that the maintenance work was done from the start of his ownership to the date when the Respondent wrote to him in 2015 stating that it was the property factor but that it was done to a poor standard. When asked about his knowledge of factoring arrangements when he purchased the Property, he said that he could not remember. He said that he has memory problems.

21. Mr McManus said that the Respondent monitors payment and that it does issue written reminders to inform homeowners of amounts outstanding. He said that the Respondent had not been told by Taylor Wimpey that the Applicant had purchased the Property and that, when it became aware of the Applicant's ownership, appropriate correspondence had been sent to him regarding the sum due. He said that no management fee had been applied for the period where the Respondent was unaware of the ownership of the Property.

Section 4.8: You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

22. Mr Smyth said that he did not consider that the Respondent had taken reasonable steps to resolve the issues which he had. He said that he did not believe that he had a contractual obligation to pay the Respondent. He accepted that his argument had not been accepted by the Sheriff in the Simple Procedure application. He said that his belief that he did not have a contractual obligation to pay for factoring services was because he had not been contacted by a property factor within four weeks of his purchase of the Property and that

he had not paid a factoring float of £50. He said that he now knows that he was wrong.

23. Mr McManus said that the Respondent had engaged with the Applicant and had met with him to try and resolve matters.
24. Mr McManus referred to a letter which the Respondent had sent the Applicant on 17th June 2021 which he said referred to a meeting with the Applicant on site on 4th June 2021. The letter states that the Applicant left the meeting when the Respondent refused to cancel the debt owed to that date.
25. Mr Smyth said that he engaged with mediation services to try and resolve matters.
26. Mr McManus referred to emails sent by the Respondent to the Applicant in August and September 2016 which suggested meeting to try and resolve matters. He said that meetings did not take part at that time because the Applicant disputed that he had a contractual obligation to pay the Respondent.
27. Mr McManus said that attempts had been made by the Respondent to speak to the Applicant prior to the legal action being raised and that attempts were made to resolve the issue.

Section 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.

28. Mr Smyth said that Mr Bryson of the Respondent had advised him that his complaints would not be dealt with because he was not paying the factoring accounts. Mr McManus did not accept that this was the case.
29. Mr Smyth accepted that the Respondent does have procedures to allow owners to report matters which need attention. He said that his issue was that the Respondent did not respond adequately when such reports were made. He said that he had reported issues with areas of landscaping which were not properly maintained. He said that bushes were not trimmed, beds were not dug over and litter picking was not attended to. He said that a light near the Property had not worked for seven years.

30. Mr McManus said that there were no email records of the Applicant raising maintenance issues which were not dealt with. Ms Knox said that any issues raised by the Applicant were taken seriously. She said that there had been a grounds maintenance contractor who was not up to standard and that a new contractor had been appointed. She said that homeowners did not want the maintenance costs to increase and the difficulty was that the new contractor was having to provide the maintenance service at a rate less than was probably viable for it.
31. Ms Knox said that a proposal had been put to owners to replace shrubs and improve the landscaping but that it had not met with the necessary support. She said that a second proposal had been put to the owners and that, again, it had not met with the required level of support.

Section 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.

32. Mr McManus said that the level of maintenance agreed with homeowners was what he described as “fairly standard.” He said that the contractor is on site on a fortnightly basis in the summer months and on a monthly basis in the winter months. Mr McManus said that some streetlighting falls into management by the property factors and that other lighting is the responsibility of the local authority. He said that there are car park areas and pathways which require some maintenance.
33. Mr Smyth said that things were not attended to and that the property factor should carry out more inspections. He cited the light which had not been working for seven years. Mr McManus said that he was confident from checking the internal emails of the Respondent that it dealt with any repair issues raised by homeowners and Mr Smyth in particular. He said that the Respondents undertook ad hoc visits to the development.
34. Ms Hendry said that the Respondent’s website gave information on development news.

Section 7.4: You must retain (in either electronic or paper form) all correspondence relating to a homeowner’s complaint for three years as this information may be required by the homeowner housing panel.

35. Mr McManus said that relevant correspondence was retained by the Respondent and that nothing relevant was found in its records other than what had been lodged with the Tribunal. He said that he was confident that all relevant telephone conversations had been logged.

36. Mr Smyth said that he had not retained all records of correspondence which he had with the Respondent.

The 2021 Code

Section 1.1: A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2011 Act to the First-tier Tribunal for a determination, the First-tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of this Code.

Section 1.2: A property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners:

- *within 4 weeks of the property factor:-*

- o agreeing in writing to provide services to them; or*
- o the date of purchase of a property (the date of settlement) of which*

they maintain the common parts. If the property factor is not notified of the purchase in advance of the settlement date, the 4 week period is from the date that they receive notification of the purchase;

- o identifying that they have provided misleading or inaccurate information at the time of previous issue of the WSS*

- *at the earliest opportunity (in a period not exceeding 3 months) where:*
 - o substantial change is required to the terms of the WSS.*

Any changes must be clearly indicated on the revised WSS issued or separately noted in a 'summary of changes' document attached to the revised version;

37. Mr Smyth said that he and his co-owner bought the Property in 2010 and was not provided with a written statement of services. He said that the first he knew about the Respondent was when he had received a bill from it. Mr Smyth acknowledged that people were maintaining the common areas after he had

purchased the Property. Ms Smyth said that she thought that Taylor Wimpey was carrying out the maintenance. When questioned, Ms Smyth accepted that Taylor Wimpey was off the site a year or so after the Property had been sold.

38. Mr McManus said that the developer should have advised the Respondent of the change of ownership and that, when it became aware of it, contact was made with the Applicant who was given access to the written statement of services at that time.

39. Mr Smyth conceded, as he had previously done, that the Respondent provides detailed financial statements and he said that he was not pursuing his claim that the Respondent had failed to comply with Paragraph 3.4 of the 2021 Code.

Section 4.5: When dealing with customers in default or in arrears difficulties, a property factor should treat its customers fairly, with forbearance and due consideration to provide reasonable time for them to comply. The debt recovery procedure should include, at an appropriate point, advising the customer that free and impartial debt advice, support and information on debt solutions is available from not-for-profit debt advice bodies.

40. Mr Smyth said that, if the Respondent had been doing its job properly, it would not have needed to take him to court.

41. Mr McManus said that the Respondent has a debt recovery procedure which complies with the terms of the Code.

Section 4.6: A property factor must have systems in place to ensure the monitoring of payments due from homeowners and that payment information held on these systems is updated and maintained on a regular basis. A property factor must also issue timely written reminders to inform a homeowner of any amounts they owe.

42. Mr Smyth said that the Respondent had failed because it did not send him a bill until he had lived in the Property for five years.

43. Mr McManus said that the Respondent had not been advised of Mr Smyth's ownership of the Property by the developer. He said that, from investigations which had been made, no record could be found of a factoring float of £50 being paid. He said that, once the Respondent knew that Mr Smyth owned the Property, invoices were sent to him together with reminders where appropriate.

Section 4.11: A property factor must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice to the homeowner of its intention to raise legal action (see also section 4.7).

44. Mr Smyth said that he had previously covered this in relation to the 2012 version of the Code. He said that he tried to resolve matters and that he had met with Ms Hendry and John Bryson of the Respondent in 2020 "to bring up all my issues." He said that after he had met with John Bryson, he was told that no work would be done in relation to the matters which he had raised because he had not paid his factoring bills.

45. Mr McManus said that he did not accept what Mr Smyth had said about work not being done because he had not paid factoring accounts. He said that the Applicant wanted the shrubs near to his property improved but that proposals put to homeowners had not been supported. Reference was made to the letter from the Respondent dated 17th June 2021. It referred to Ms Smyth remaining in the meeting after Mr Smyth has left and that she agreed "it would be unfair to approach her fellow co-owners for monies to replace shrubs located close to her property, without ever having funded any of the works within the development itself." Mr McManus said that the replacement of shrubs which was referred to was not maintenance but an element of improvement.

46. Mr Smyth said that it was only when he was taken to court that he had been aware of the content of his title deeds. He said that he could not remember being made aware of this by his solicitor when he had bought the Property. He said that he suffers from bad memory loss.

Section 6.1: This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.

47. Mr Smyth said that work on the common areas was not carried out to a good standard. He referred the tribunal to photographs which he had lodged 19a and 19 b. He said that these were taken in April/May 2022.
48. Mr Smyth and Ms Smyth said that the standard of the maintenance work had improved a little since the new landscaping contractors had been engaged.
49. Mr McManus said that the photographs, which had been lodged by the Applicant, are undated. He said that the landscaping contractors had changed. He said that it is difficult to compare one development with another or a part of one development compared with another part of the same development. He said that one of Mr Smyth's complaints related to shrubs near the Property. He said that the initial planting had been undertaken by the developers and that proposals to improve the planted areas had not found favour with the necessary majority of homeowners.
50. Ms Smyth said that bushes need to be trimmed and that her new car sustained scratches from shrubs that needed cut. She said that she got her car a few months previously and that she had not reported the issue to the Respondent because she had been told that no action would be taken because the factoring accounts were not being paid.
51. Mr Smyth said that his factoring accounts were up to date and had been since May 2022 when the court action had been settled.
52. Mr McManus said that, in the growing season, there were fortnightly visits from the landscape contractors and that work was done on shrubs and litter picking. He said that there was a relatively small area of grass which required to be cut.
53. Mr Smyth referred to photograph 21a which he said was taken in December 2021 and which showed a dense area of shrubbery. He said that he had no further evidence to submit in relation to the condition of the landscaping and invited the tribunal to take all the photographs which had been lodged into account and to accept that they show the poor standard of work to the areas of landscaping.

54. Mr Smyth referred to an email sent to him by the Respondent on 11th August 2016 in which Charlotte Campbell, the property inspector, accepted that she agreed with him in relation to the maintenance and that she would take forward steps “with the shrubbery/beds and overall appearance of the development.”

Section 6.7: It is good practice for periodic property visits to be undertaken by suitable qualified / trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure that a property is maintained appropriately. If this service is agreed with homeowners, a property factor must ensure that people with appropriate professional expertise are involved in the development of the programme of works.

55. Mr Smyth said that the standard of work to the common areas demonstrated that the Respondent had not complied with this section of the Code.

56. Mr McManus disputed this. He said that the contractors were working within the budget allowed by homeowners but that there was always room for improvement and that the Respondent would be happy to promote any scheme by homeowners to improve the common areas. He said that two previous attempts at schemes of improvement had not received the support of homeowners. Mr Smyth was not sure if he had approved either or both of the schemes.

Property Factor's Duties

57. Mr Smyth said that it took the Respondent five years to contact him after he had bought the Property. He said that he had wanted the Respondent to carry out inspections of the development. He said that the paving stones needed attention and that lights had not been working for long periods.

58. Mr McManus said that the Respondent had been consistent in its approach to managing the development and had tried to deal with issues raised by Mr Smyth. He said that the Respondent could only deal with issues brought to its attention by homeowners and that it relies on reports being made to it. He said that many of the issues raised in the Hearing by Mr Smyth had not been previously reported to the Respondent by him.

59. Mr Smyth said that he knew that the title deeds of the properties in the development would allow homeowners to take steps to change the property factor and he said that, as far as he knew, no steps had been taken in this regard.

Submissions

60. Mr Smyth said that the Respondent has not complied with the Code or its duties in maintaining the development and that its property inspectors had not accepted how bad the standard of maintenance was. He asked the tribunal to consider the evidence before it, including the photographs which he had lodged. Mr Smyth said that he has shown that the Respondent had neglected beds, shrubs and weeding. He said that he had been asked to pay for a service which had not been provided to him. He said that the evidence which he had presented demonstrated that the Respondent and its contractor are not doing work to the common areas which should be done. He said that his application to the tribunal is about the Respondent failing to carry out maintenance. Mr Smyth asked the tribunal to consider all the documents and submissions which he had lodged.

61. Mr McManus said that a lot of the correspondence lodged by the Applicant does not relate to maintenance issues but to matters which were eventually determined in the Sheriff Court. He said that the Respondent has complied with both versions of the Code and the property factor's duties. He said that the Respondent had taken all reasonable steps to resolve issues with the Applicant. He said that the correspondence before the tribunal demonstrates that the Applicant's main concern was about his contractual liability for paying any factoring costs rather than issues of maintenance. Mr McManus asked the tribunal to have regard to the submissions which had been submitted.

62. Findings in Fact

62.1 The Applicant is the co-owner of the Property and has been since 28TH May 2010. The Property was purchased from the developer, Taylor Wimpey.

62.2 The Property is in a residential estate which has been managed by the Respondent since it was developed. The Respondent is responsible for arranging maintenance to common areas of the development including areas of shrubbery, hard landscaping and grass. The Respondent is also responsible for arranging maintenance to some lighting which has not been adopted by the local authority.

62.3 Taylor Wimpey did not advise the Respondent that the Applicant and his co-owner had purchased the Property.

62.4 The Respondent contacted the Applicant in October 2015 advising that it managed the residential estate and advising the Applicant that there were sums due in respect of the factoring services provided to owners of the development, including the Applicant.

62.5 The Applicant did not accept that he had a contractual obligation to pay for factoring services and the Respondent raised a Simple Procedure in Glasgow Sheriff Court. The Sheriff ordered the Applicant to pay the sum of £902.95 to the Respondent.

62.6 The Applicant has paid the sum of £902.95 to the Respondent.

62.7 The Applicant now accepts that he has a contractual obligation to pay for factoring services and is currently paying invoices rendered by the Respondent.

62.8 At various times from 2016 to 2022, the Applicant intimated to the Respondent that he did not consider that the common areas are being adequately maintained.

63. Findings in Fact and Law

63.1 In relation to the application submitted by the Applicant, the Respondent has complied with the 2012 version of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

63.2 In relation to the application submitted by the Applicant, the Respondent has complied with the 2021 version of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

63.3 In relation to the application submitted by the Applicant, the Respondent has complied with the property factor's duties in terms of the Property Factors (Scotland) Act 2011.

Reasons

64. In coming to its determination, the tribunal had regard to the oral evidence, the documents produced by the parties and their written submissions.

65. It was clear to the tribunal that there were two overarching issues in relation to the Applicant's concerns. The first related to his belief until early 2022 that he had no contractual obligation to pay for factoring charges and the second is in relation to the standard of works carried out to the common areas of the development in which the Property is situated.
66. The Applicant was candid in stating that he only accepted that he had such a contractual obligation during the course of the Simple Procedure court action. The question of whether the Applicant was liable for factoring charges was not a matter for the tribunal and had been determined in the Sheriff Court. The Applicant had paid the sum ordered by the Sheriff and was now paying the factoring accounts which were rendered to him.
67. The Applicant had submitted a considerable number of documents. The tribunal, by and large, disregarded the documentation relating to the court action.
68. The Applicant's oral evidence was at times unreliable. He said that he had memory issues. These seemed particularly to be around questions about what he knew about the involvement of a property factor, and the Respondent in particular, when he purchased the Property.
69. The photographs which were lodged by the Applicant were of limited assistance. Many were undated. Some did show areas of shrubbery or hard landscaping which seemed to demonstrate that there could be improvement but that did not mean that the Respondent, in relation to maintenance of the common areas, had failed to comply with the Codes or property factor's duties.
70. The tribunal accepted that the Respondent had, on two occasions, put a scheme of improvement to homeowners but had been unsuccessful in getting the necessary approval to proceed. The Applicant's evidence on whether he had approved was confused. It was not clear from the evidence of the Respondent that there was a positive or negative approach taken to obtaining approval and the tribunal, in its deliberations, took no account of whether or not the Applicant had approved or rejected either or both of the proposed schemes.
71. The documentation lodged by parties showed that the Respondent had reacted when issues were raised by the Applicant and had attempted to generate schemes to improve the development. It had also changed the landscaping contractor when it was found to be lacking.
72. The Applicant had, from 2016, raised issues about the condition of the common areas. It did not enhance his credibility that his position was that, prior to

October 2015, he considered that the work done was not up to standard but had made no complaint. The tribunal considered it reasonable to conclude that the fact that he had not complained during this period was not coincidental to the fact that he was not paying for factoring services.

73. The correspondence demonstrates that, running parallel with matters raised by the Applicant in connection with maintenance issues, he still maintained that he should not be paying for anything. His email to the Respondent dated 17th June 2019 summed up his position: *"Can u stop sending me emails with my account as it was decided through court proceedings that I don't owe any money as well as I did not pay the first £50 at the start proves that I never agreed to your contract so please stop sending me emails as I will have to take this further if it doesn't stop."*
74. The reference to court proceedings appears to be in relation to an earlier Simple Procedure action which was paused for settlement and then fell because of the Respondent's inactivity. The court had made no determination.
75. The tribunal considered it somewhat strange that the Applicant considered that it was reasonable for him to agitate for the standards of maintenance of the common areas to be improved whilst at the same time not being required to pay anything for the services provided because he considered that he did not have a contractual obligation to do so.
76. The evidence of Ms Smyth was not reliable in connection with the damage caused to her car. She said that the car was a few months old and said that she had not reported the matter to the Respondent because she thought that she could not do so while there were still outstanding invoices. This was contradicted by the evidence of Mr Smyth that there had been no outstanding sums due by him since May 2022.
77. The Applicant's case was not helped because he was unable to produce copies of the numerous emails which he said he had sent to the Respondent in connection with maintenance issues.
78. The tribunal preferred the oral evidence of the Respondent's witnesses and had regard to the documentation submitted by it.

79. The tribunal, on the balance of probability, found that, in relation to the matters before it, the Respondent had complied with both versions of the Code and the property factor's duties.

80. The tribunal had a little sympathy with the Applicant in as much as the normal smooth process of purchasing a new house seemed not to go as it should have. Normally, a factoring float would be added to the price of the house and passed to the property factor by the developer along with details of the new owner. Nevertheless, the Applicant was aware that factoring services were being provided and chose to do nothing to investigate when he was not being charged.

Decision

In relation to the application before it, the tribunal determined that the Respondent had complied with the Code and the property factor's duties.

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.

Martin J. McAllister
Legal Member
20th February 2023