Housing and Property Chamber
First-tier Tribunal for Scotland

**FIRST-TIER TRIBUNAL FOR SCOTLAND (HOUSING AND PROPERTY CHAMBER)**

**STATEMENT OF DECISION**: in respect of an application under Section 17 of the Property Factors (Scotland) Act 2011 ("the Act") The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules")

**Chamber Ref: FTS/HPC/LM/22/1797**

**Re: Property at 28 Hillhouse Farm Gate, Lanark, ML11 9HT ("the Property")**

**Parties:**

**Mr William McAlpine, 28 Hillhouse Farm Gate, Lanark, ML11 9HT ("the Homeowner")**

**Hacking and Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the Property Factor")**

**Tribunal Member:**

**Karen Moore (Legal Member) and Elizabeth Dickson (Ordinary Member)**

**Decision**

The Tribunal determined as follows: The Property Factor did not fail to comply with the Section 14 of the Act in respect of compliance with the Code of Conduct for Property Factors 2021 in respect of Section 6.8 of the Code.

This Decision is unanimous.

**Background**

1. By application received between 1 June 2022 and 5 September 2022 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2021 ("the Code") and had failed to comply with the Property Factor Duties.

2. The Application comprised the following documents: -(i) application form in the First-tier Tribunal standard application form indicating that the parts of the Code complained of are Communications and Consultation at Section 2.4, Insurance at Section 6.5 and Carrying out repairs and maintenance at Section 6.3 and 6.9 and alleging a failure to comply with the property factor duties and (ii) copy correspondence between the Homeowner and Property Factor. The Homeowner subsequently amended the Application to restrict his complaint to Carrying out repairs and maintenance at Section 6.8. Following acceptance of the Application, a Case Management Discussion (CMD) was fixed for 23 November 2022 at 10.00 by telephone conference call.

3. Prior to the CMD, the Property Factor submitted written representations together with a copy of their Contractor Information Sheet.

**Case Management Discussion**

4. The CMD took place on 23 November 2022 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Mr. C. Cosgrove. The Tribunal adjourned the CMD to a Hearing by conference call, the date of which is to be intimated to the Parties and issued a Direction in terms of Rule 16 of the Rules.

5. Both Parties complied with the Direction. The Homeowner submitted a copy of the relevant pages of the Land Certificate for the Property and the Property Factor submitted the copy correspondence in respect of the pruning work. The Property Factor also submitted written representations outlining its position in respect of the Application.

**Hearing**

6. The Hearing took place on 23 January 2023 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Mr. C. Cosgrove, with Mr A. Leitch of the Property Factor attending in terms of Rule 11 of the Rules. Neither Party had any witnesses . As at the CMD, the Tribunal noted that the core issue is that a resident in the development of which the Property forms part ("the Development") instructed gardening work to be carried out on common ground and the Property Factor collected payment for that work.

7. The Homeowner confirmed to the Tribunal that his position is that an owner in the Development of which the Property forms part became a *de facto* agent or sub-contractor of the Property Factor and the Property Factor failed to make enquiries relating to the public liability insurance status of that *de facto* agent or the contractor engaged by their thus leaving the Homeowner, as co-owner of common ground on which work was undertaken, exposed to a possible civil liability claim in respect of that work. The Homeowner advised the Tribunal that his essential point is that work has been undertaken and no one can vouch that the contractor carrying out the work has proper liability insurance. The Homeowner has a further concern that the play area requires to have an annual safety certificate and he has no confidence that the Property Factor is acting correctly in that regard. The Homeowner stated that this method of paying for pruning work had occurred previously. The Homeowner cited the Property Factor's letter of 4 March 2022 as evidence of the Property Factor's admission of a breach of 6.8 of the Code and referred the Tribunal to the paragraph which states: "*Whilst we have delegated authority to instruct repairs on behalf of owners, we though(sic) it beneficial to advise owners of our intention"*. The Homeowner concluded that he is trying to establish that, when work is taking place, the Property Factor is ensuring that all work is carried out properly and the contractor is insured.

8. Mr Cosgrove of the Property Factor had no questions for the Homeowner.

9. In response to questions from the Tribunal, the Homeowner confirmed that the work in question had not been carried out on the play park and that there had been one previous similar occasion where an owner instructed work which the Property Factor collected funds for which occurred several years ago.

10. Mr Cosgrove of the Property Factor referred the Tribunal and the Homeowner to the

Property Factor's written submissions which state:
*"We have enclosed all relevant correspondence, file notes and telephone notes with the resident who instructed the garden works, redacting personal information…. There was no interaction whatsoever between HPMS and the contractor. We have enclosed a copy of our letter to the homeowner, Mr McAlpine, dated 4 March 2022 advising that unless we receive objections from a majority of homeowners within 5 working days, we will in include each homeowners apportioned share of the garden costs within a future quarterly invoice. As intimated at the Case Management Discussion, our position is clear. HPMS did not instruct the contractor, nor were we aware that an owner had instructed a contractor until works were complete. In this respect, it is a matter of fact that section 6.8 - the applicant's sole allegation of failure to comply with the code, cannot apply. We also strenuously deny the Applicant's allegation that "the resident became a de facto agent or subcontractor or the property factor". The definition of a sub-contractor would suggest that there is a formalised arrangement in place between the various parties. This was emphatically not the case. It is a matter of fact that HPMS did not of their own volition apportion the cost for the gardening works to the owners. Rather HPMS sought authority from the collective ownership in relation to the matter. Furthermore, we cannot have "allowed" these works as we were not aware of them until completion. Additionally, the Applicants allegation that we" facilitated" the works is also of concern given our complete lack of knowledge on the matter. Frankly, had the contractor been instructed directly by HPMS in advance of the works and the subsequent invoice passed directly to us and apportioned amongst the owners in the usual fashion, this would have negated the need to write out to the collective ownership seeking their authority. It is disappointing that the Housing Panel have interpreted the definitions "allowed" and "facilitated" as implying that the Applicant believes that a "contractual relationship" has been created. We would dispute that in undertaking the actions that we did; a contractual relationship was created. It is our understanding that for a contract to be in place, there must be an offer, acceptance, and certainty of terms. None of these apply and ultimately as factor we simply relayed to our customers the circumstances and background and sought their instruction or otherwise. There cannot have been certainty as the collective owners could have elected not to have paid for the works. This is a statement of fact. Additionally, we can confirm that there were 4 registered objections to the proposal. Accordingly, the monies were ingathered from the collective ownership and the customer who had instructed the works was passed the ingathered monies. We can further confirm that ultimately 20 out of 21 owners have paid their share with the only non-payer (the Applicant) being credited the equivalent sum of their share. We enclosed a copy of the homeowner's statement of accounts, showing the refund of this charge, and the letter issued to all homeowners, seeking their agreement to the works instructed by the applicants fellow homeowner."*

11. In cross-examination, the Homeowner asked Mr. Cosgrove to confirm that the Property Factor's view is that if the Property Factor has no direct contact with a contractor, then the Property Factor has no obligation under the Code. Mr Cosgrove replied that this is the case and stated that the Property Factor had been informed of the work after it had taken place. He stated that the Property Factor had acted as a post box and had no responsibility for the work carried out.

12. In response to questions from the Tribunal, Mr. Cosgrove stated that although the contractor, Ritchie Property Services Limited, had issued invoices to the Property Factor, the Property Factor had no contact with that company and had been made aware of the work after it had been carried out. Mr. Cosgrove confirmed that the Contractor Information Sheet lodged on behalf of the Property Factor was issued to all contractors employed by them. He confirmed that this was not issued to Ritchie Property Services Limited and that Ritchie Property Services Limited were not on the

Property Factor's list of approved contractors.

**Summing- up**

13. In summing-up, the Homeowner stated that as this is the second time on which the Property Factor and an owner have acted in this way, it is an ongoing issue. He stated that having gone through the process of preparing for the Hearing, he has discovered that the none of trees should ever have been pruned as they are restricted from cutting back. The Homeowner stated that his underlying concern is personal liability and joint and several liability with other owners should a tragic accident occur. His understanding is that although any claim would in the first instance be against the the owner who instructed the work, and thereafter against the Property Factor, the claim would ultimately fall to all of the owners jointly and severally. With reference to the Property Factor's written representations, the Homeowner noted that there had been four objections to the work being carried out but that the funds had been ingathered. He stated that he took a poor view of a company offering to settle by an ex gratia payment as the Property Factor had done and found the Property Factor's categorisation of himself and his wife as "non-payers" disrespectful as they had made payment but had the payment refunded.

14. In summing-up, Mr Cosgrove of the Property Factor referred the Tribunal to the Property Factor's written submissions and submitted that the Property Factor had not breached the Code as they had not instructed the work.

**Findings in Fact.**

15. The facts of the matter are largely not in dispute. What is in dispute is the effect of the interactions between the Property Factor, the owner who instructed the contractor, Ritchie Property Services Limited, and that contractor.

16. The Tribunal found the following facts established:
    i) The Parties are as set out in the Application;
    ii) The Homeowner is a homeowner in terms of the Act;
    iii) The Property Factor is a property factor in terms of the Act and is bound by Section 14 of the Act;
    iv) An owner of a property in the Development contacted the Property Factor on 2 March 2022 with two quotations from Ritchie Property Services Limited for £1,200.00 and £620.00 for tree work;
    v) The owner's email of 2 March 2022 also stated that they had paid £620.00 to Ritchie Property Services Limited;
    vi) The Ritchie Property Services Limited quotations were addressed to the Property Factor;
    vii) On 3 March 2022, the Property Factor wrote to the owner by email stating that the Property Factor "is happy to write out about these works and see if we gain a majority of objections from homeowners";
    viii) The Property Factor's email of 3 March 2022 went on to state that "I cannot pass over this money to you if I receive a majority of objections" and asked the owner to send photographs and confirm that the quotation for £1,200.00 did not include the quotation for £620.00;
    ix) On 3 March 2022, the owner sent a further email to the Property Factor with photographs of the tree work still required;
    x) On 4 March 2022, the Property Factor wrote to the owners of the Development including the Homeowner advising that the owner had instructed and paid for works at a cost of £620.00, which works had been

completed;

xi) The Property Factor's letter of 4 March 2022 went on to state that unless majority objected, the cost would be apportioned and included in the next common charges account;

xii) On 17 March 2022, the Property Factor wrote to the owner by email stating that "once our team have received payment/been placed on the invoice for this work. I will arrange for a credit cheque to be sent to you directly";

xiii) There was no direct contact between the Property Factor and Ritchie Property Services Limited;

xiv) Ritchie Property Services Limited are the contractor who carried out tree work at the Development;

xv) Payment to Ritchie Property Services Limited for that tree work was paid direct to them by the owner who instructed them;

xvi) The Property Factor has a procedure for making enquiries of contractors in respect of public liability insurance.

**Issue for Tribunal**

17. The issue for the Tribunal is: has the Property Factor breached Section 6.8 of the Code as complained of in the Application.

18. Section 6.8 of the Code states *"A property factor must take reasonable steps to appoint contractors who have public liability insurance"*. Therefore, the questions for the Tribunal are did the Property Factor appoint the contractor in this case, and if so, did the Property Factor take reasonable steps with regard to the contractor having public liability insurance. It follows that, if the Tribunal takes the view that the Property Factor did not appoint the contractor, the Property Factor was not under an obligation to take reasonable steps with regard to the contractor having public liability insurance.

19. The Homeowner, at the CMD and the Hearing accepted that his complaint is a narrow point and explained that his position is that, by collecting the gardening account for the owner who instructed the work, the Property Factor created a contractual relationship as the owner had become a *de facto* agent or sub-contractor of the Property Factor.

20. The Tribunal, firstly, considered the law of agency. The law of agency, in broad terms, is a relationship whereby one party, the principal, engages or authorises another party, the agent, to act on their behalf in a contractual matter. The authority need not be explicit: it can be implied by the actions of the principal and the agent. However, there must be an intention on the part of the principal, in particular, to engage or authorise the agent. In this Application, the facts of the case as narrated above are that the owner who instructed Ritchie Property Services Limited to carry out work, not only instructed the work before contacting the Property Factor, but had the work carried out, completed and paid for before contacting the Property Factor. Accordingly, there is no evidence of the Property Factor acting as a principal instructing the owner as agent to engage Ritchie Property Services Limited as a contractor.

21. The Tribunal, secondly, considered if the owner who instructed the work could be considered to be a sub-contractor who sub-contracted further with Ritchie Property

Services Limited. Again, the facts of the case are that the owner instructed the work, had the work carried out and paid for it before contacting the Property Factor. Further, the Property Factor Accordingly, there is no evidence that the Property Factor instructed or engaged the owner as a sub-contractor.

22. The Tribunal noted that the Homeowner stated that there had been a previous similar occasion but no evidence was led in this respect and so the Tribunal could not form the view that a continuing agency or sub-contracting relationship had been established.

23. The Tribunal notes and recognises the Homeowner's concerns in respect of potential liabilities arising from the matter and takes the view that it may not be best practise on the part of the Property Factor to engage with owners in the way in which the Property Factor engaged with the owner who instructed Ritchie Property Services Limited.

**Decision of the Tribunal and reasons for the decision**

24. The Tribunal, having found that the Property Factor did not appoint Ritchie Property Services Limited the contractor, determined that the Property Factor was not under an obligation to take reasonable steps with regard to that contractor having public liability insurance, and so did not breach Section 6.8 of the Code.

25. The decision is unanimous.

**Appeal**

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.

Karen Moore,

Chairperson 23 January 2023