**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/LM/19/1004**

**Rumford Grange, Falkirk FK2 0EN ("the Property")**

**The Parties:-**

**Mr David Willson, 62 Craigs Crescent, Rumford Grange, Falkirk FK2 0EN ("the Homeowner")**

**Newton Property Management Limited, 87 Port Dundas Road, Glasgow G4 0HF ("the Factor")**

**Tribunal Members:**
**Graham Harding (Legal Member)**
**David Godfrey (Ordinary Member)**

**DECISION**

The Factor has not failed to carry out its property factor's duties.

The Factor has not failed to comply with its duties under section 14(5) of the 2011 Act.

The decision is unanimous

**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 is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 are referred to as "the Rules"

2. The Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

3. By application dated 26 February 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1.1a A, B, C, 2.1, 2.5, 6.3,

6.6, 6.9 and 71 of the code and also that the Factor had failed to carry out its Property Factor's Duties.

4. The Homeowner provided the Tribunal with copies of correspondence between the Homeowner and the Factor relating to the Homeowner's concerns together with a written statement of services provided by the Factor.

5. By Notice of Acceptance dated 16 May 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.

6. The Factor submitted their response to the Homeowner's complaint by way of written representations to the Tribunal in advance of the hearing on 5 June 2019. The Homeowner did not make any further written representations in advance of the hearing.

## Hearing

7. A hearing was held at Stirling on 3 July 2019. The Homeowner appeared personally. The Factor was represented by Mr Martin Henderson and Mr William Cowie.

## Summary of submissions

8. The Tribunal heard submissions from the Homeowner and the Factor on each alleged breach of the Code and Property Factors duties and these are detailed below.

9. Section 1 of the Code

It was the Homeowner's position that whilst he had been provided with a Written Statement of Services by the Factor, they had not adhered to it and they had never provided written notification of changes to the written statement. The Homeowner cited as an example of changes that billing had been reduced from quarterly to twice yearly and also that there were two scales of charges applied depending on whether homeowners had paper billing or online billing. The Homeowner explained that the Factor had introduced an additional charge under a green initiative.

Mr Henderson for the Factor confirmed that they had written out to homeowners to encourage the introduction of e-billing by introducing a reduced management fee. Homeowners did not have to incur an additional charge and there were exceptions for homeowners that did not have access to a computer. The additional funds recouped under the green initiative were passed on to a local charity assisting those in fuel poverty. The income was not retained by the Factor. Mr Henderson went on to say that as there had been changes to the written statement and whilst these had been intimated in

writing to all homeowners it was the Factor's intention to issue a revised statement of services in August which was within one year of the change and therefore compliant with the Code.

10. Section 2.1 of the Code

The Homeowner explained that when he purchased his property, he was provided with a plan of the estate by the Factor detailing the common ground that would be maintained by them. The Homeowner confirmed that he had been aware of the extent of the boundaries of his own property but no more than that. The Homeowner went on to say that subsequently the Factor produced another estate plan that indicated that the retaining/decorative wall and some additional ground was in fact included in the estate title. The Homeowner said that on being presented with this in 2017 he asked the Factor to provide clarity on the boundary position. The Homeowner felt that the Factor had not adequately addressed how the new plan had come to light. The Homeowner felt that by being given a different plan he had been provided with information that was misleading or false.

For the Factor, Mr Henderson explained that the original plan had been provided by the builders of the estate when they appointed them as Factors. The second plan had been provided by another homeowner and which had been attached to that owners Land Certificate. This had come about following discussions with homeowners about the condition of the wall at the entrance to the development. Mr Henderson said that the wall had been erected by the builders as a decorative entrance to the estate and did not serve any real purpose. The area beyond the wall had been undeveloped but over the years a self-build house had been erected on the ground behind the wall. Some homeowners had expressed concern about the condition of the wall and liability for its repair. Mr Henderson said that the Factors were currently engaged with the owners of the self-build to try to reach agreement over its repair.

There was some discussion over the role of the Residents Association. Mr Henderson indicated that the Factor had requested some information from the Association that had not been provided. The Homeowner explained that the Factor had been instructed in February 2019 to have the wall repaired. The Factor required to know that the Residents Association had the authority to instruct the repairs. The Homeowner explained that it was anticipated that the draft constitution of the Association would be approved at the next meeting to which the Factor would be invited.

Mr Henderson went on to say that the Factor had written out to homeowners with regards to the condition of the wall but as subsequently the Homeowner had raised the issue of ownership of the wall no further steps had been taken and the repairs had been put on hold.

The Homeowner explained that the chains on the swings at the children's play parks had been replaced at the homeowners' cost but the repairs had been defective and the following quarter homeowners had to pay an additional

charge for the installation of sleeves around the chains which the Homeowner thought should have been put on initially. The Homeowner also thought it may have been possible to have reused the original sleeves. The Homeowner felt it had been misleading to say that the swings had been defective. He also had understood from correspondence received from Mr McDonald of the Factor following his complaint that the issue was still active.

For the Factor, Mr Henderson referred the Tribunal to the Factor's written submissions and advised that as far as he was aware the issue was not active.

The Homeowner went on to explain that he had received conflicting information regarding the treatment of trees as to whether they should be removed or pruned. He explained that a willow tree adjacent to the Junior playpark had caused residents concern because of falling branches and a birch tree near the other play park had branches that were hitting an owner's house. The Homeowner said that quotes had been obtained but that the work had not been done over a lengthy period because the Factor had said that permission had to be obtained from the local council before the trees could be cut down. The Homeowner went on to say that another homeowner had been told by the council that no permission was required and that this information had been relayed to the Factor but they had still insisted in involving the council. The Homeowner also queried whether the cost of removing the trees should have been an additional charge or included in the ground maintenance charge.

For the Factor, Mr Henderson said that whilst he had been told by one of the proprietors that she had been advised by the council that there was no need for consent it was generally the Factor's procedure before cutting down trees to write to the council. Having done so there was then an email exchange with the council who had indicated their preference for having the trees pruned before eventually accepting they could be cut down. Mr Henderson submitted that the Factor did the right thing involving the council. With regards to the inclusion of the tree felling in the ground maintenance charge, Mr Henderson said that the specification referred to grass cutting and shrub pruning but did not include work involving tree surgeons. If on a previous occasion the removal of a tree had not been charged for it may have been done as a goodwill gesture but was not part of the usual ground maintenance charge.

11. Section 2.5 of the Code

The Homeowner said that he had sought clarity from the Factor regarding the boundary and this had been treated as a complaint that had been escalated to Mr Henderson who had asked him to re-submit his questions but he had still not received full and factual answers. Thereafter the issues had been addressed by the Factor's Mr McDonald before referring him to the Tribunal.

For the Factor, Mr Henderson said that they had tried to answer the Homeowner's queries. If they had trouble interpreting a query, they would ask for further information and it was the Factor's position that they want to be as

reasonable as they can but ultimately if a complaint cannot be resolved they would ultimately recommend a homeowner apply to the Tribunal.

12. Sections 6.3 and 6.6 of the Code

The Homeowner explained that it appeared that the Factor had contracted with a company, Active Playground to undertake additional work on the children's' playgrounds without putting it out to tender. He said that homeowners had been advised on one day that the cost of replacing the bark at the playgrounds was going out to tender but the very next day Active Playground carried out the work. The Homeowner said that he had requested quotes for additional work but had never been provided with them and had been told that the Factor had no record of being asked for this. The Homeowner also referred to an issue around the ground maintenance contractors carrying out fly tipping. This had been raised at a site visit on 31 October 2018. The Homeowner had asked the Factor subsequently if the practice had stopped and had been advised by way of response that the Factor had taken on board his comments.

For the Factor Mr Henderson suggested initially that the bark issue had previously been dealt with at a previous hearing of the Homeowner Housing Panel but it then transpired that the Homeowner was referring to a different occasion involving replacement bark but it was the Factor's position that quotes would have been obtained before Active Playground was instructed. Mr Henderson reiterated that there was no direct evidence that the Homeowner had requested copies of the quotes. The Factor had no record of any such request. If they had they would have been provided.

13. Section 6.9 of the Code

The Homeowner submitted that part of the ground maintenance charge included weeding borders and hard areas but despite repeated requests weeding had not been undertaken and the response from the Factor had been that weeds grow quickly.

For the Factor Mr Henderson confirmed that the property manager made a quarterly site visit. The contractors carried out weeding on a fortnightly basis in the summer. If the contractors were not doing a reasonable job, he would anticipate receiving complaints from other homeowners. That was not the case. If weeds were growing at the kerbsides that would be the responsibility of the local council as the roads and pavements had been adopted. If weeds were growing between proprietors' gardens and the pavements that would be the responsibility of individual proprietors. The contractors were responsible for maintaining the common areas.

14. Section 7.1 of the Code

The Homeowner confirmed that he had been provided with a copy of the complaints procedure by the Factor and also confirmed that reference to the complaints procedure was given in the Factor's written statement of service.

15. Breach of Property Factors Duties

The Homeowner submitted that if the wall at the entrance to the development was built on common land then why was the Factor not attending to the damage and arranging for the wall to be repaired? He also submitted that by taking so long for the trees to be felled the Factors had failed in their duties. He further submitted that the replacement of the chains on the swings should have been dealt with on the first occasion and not required a second visit to install the sleeves. By not complying with the Code the Factor was in breach of their duties and there was a potential for injury with homeowners being subjected to danger.

For the Factor, Mr Henderson said that the issues with the wall were in hand, there was discussion with the adjoining proprietor and for the reasons stated earlier matters had been placed on hold. He remained of the view that the Factor had been correct to liaise with the council over the removal of the trees as it had been clear from their emails that initially they had not wanted the trees removed. There had been a great deal of correspondence with the Homeowner and that led to inertia. Mr Henderson confirmed that the Factor had instructed the survey report in 2018 into the condition of the wall and confirmed that at that time it did not say that it constituted an imminent danger.

**The Tribunal make the following findings in fact:**

16. The Homeowner is the owner of 62 Craigs Crescent, Rumford Grange, Falkirk ("the Property")

17. The Property is within the Rumford Grange Development, Falkirk (hereinafter "the Development").

18. The Factor performed the role of the property factor of the Development.

19. The Factor provided the homeowner with a Written Statement of Services that complied with the Code.

20. The Factor has made a substantial change to its billing arrangement with effect from 28 February 2019 by reducing the number of bills from quarterly to six monthly.

21. The Factor imposes different charges for homeowners who require paper billing to those who have online billing.

22. There is some doubt as to ownership of the wall at the entrance to the Development.

23. A Residents Association at the Development is in the process of being established.

24. The wall at the entrance to the Development is in need of repair.

25. The chains on the swings at the Junior playpark were replaced in August 2017. Subsequently modifications were put on at an additional cost in total of £45.00 divided between all homeowners in the development.

26. Before arranging to have two trees cut down at the Development the Factor was in communication with the local council. This led to a delay between receiving agreement from homeowners to remove the trees and the trees being removed.

27. A resident at the Development had advised the Factor that council consent for the removal of the trees was not required.

28. The cost of felling trees at the Development is not included in the annual ground maintenance charge.

29. The Factor responded to the Homeowners enquiries and complaints within prompt timescales and in line with timescales contained in the written statement of services.

30. The Homeowner failed to produce any documentary evidence to support his contention that he had requested copies of quotes for the provision of bark at the children's playparks.

31. The Factor has a clear written complaints resolution procedure.

32. At the time of preparation of the report by Blue Stone Chartered Surveyors in 2018 the wall was not said to constitute an imminent danger.

**Reasons for Decision**

33. Section 1 of the Code

It is a requirement of the Code that the Factor provides new Homeowners with a written statement of serves within four weeks and existing homeowners within one year if there are any substantial changes to its services. The Homeowner did not suggest that he had not been provided with a copy of the written statement but rather that the Factor was not adhering to its terms. That however would not constitute a breach of Section 1 although it may be a breach of other sections of the Code. The Tribunal acknowledged that the Factor had started to charge Homeowners for paper bills as opposed to online bills as part of a green initiative but in the Tribunals view that would not constitute a substantial change to the Factor's Written Statement of Services.

However, a change from quarterly billing to six monthly billing would be a substantial change and this was accepted by the Factor who confirmed that it was their intention to issue homeowners with amended written statements in August this year which would be within one year of the change being implemented and therefore compliant with the Code. The Tribunal was therefore of the view that the Factor was not in breach of Section 1 of the Code.

34. Section 2.1 of the Code

The Tribunal found it strange that neither party had thought to seek legal advice as to the title position with regards to the boundary and the wall at the entrance to the Development. Clearly there might be costs involved in this and therefore the Factor would require clear instructions from a majority of homeowners before doing so. It did seem to the Tribunal that the Homeowner might well have thought it prudent to look at his own title deeds to see if that shed any light on the title position. The Tribunal found that matters were further complicated by the fact that although it appeared that the Factor had been given an instruction in February from the Residents Association to go ahead and have the wall repaired, the status of that organisation was in some doubt as its constitution had still to be formally ratified and the Homeowner had queried ownership of the wall. It did seem from the evidence at the hearing and the documents lodged that the Factor was doing its best to progress matters but that to some extent its hands were currently tied. The Factor had relied on the information provided to it by the builders of the Development, Redrow, and the site plan provided by them. It was significantly later that another homeowner had provided a copy of the Feu Master Layout attached to her title that appeared to indicate that the plan provided by the builders was inaccurate. The Tribunal was satisfied that the information supplied by the Factor with regard to the extent of the title was certainly not intentionally misleading or false and in the absence of sight of either a report or a professional opinion on the extent of the title and ownership of the wall or perhaps a copy of the self-build proprietors title the Tribunal was unable to determine whether or not the wall did form part of the Development. It therefore could not be said that as far as the wall was concerned the Factor had provided information which was false or misleading.

With regards to the swings and the replacement of the chains the Tribunal was unable to see where the Homeowner could say that the Factor had provided information that was misleading or false. The documentation submitted by the Homeowner with his application headed "AUGUST 2018 COMMON CHARGE ACCOUNTS" explains that a modification to the original repair was carried out at the request of another homeowner. The only charge was for the additional materials and not labour. It did not seem to the Tribunal that the Factor had provided any misleading or false information.

With regards to the tree felling whilst it may well have been the case that a homeowner had been advised that the council did not require to give consent for the trees in question to be felled, the Tribunal was of the view that the Factor could not be faulted for taking a prudent course of action by contacting

the council before instructing the trees to be felled. The Tribunal did not think by doing so and keeping homeowners aware of what they were doing they were providing misleading or false information.

In all the circumstances the Tribunal did not consider the Factor had been in breach of Section 2.1 of the Code.

35. Section 2.5 of the Code

It did not appear to the Tribunal that the Homeowner took issue with the Factor with regards to the timescales in which his complaints were dealt with nor was it suggested that these were not contained within the written statement of services. The Homeowner's complaint was rather that the Factor had not addressed the complaints adequately but of course that was why he had complained to the Tribunal.

The Tribunal was therefore not persuaded that the Factor had been in breach of Section 2.5 of the Code.

36. Sections 6.3 and 6.6 of the Code

The Homeowner provided the Tribunal with a significant number of documents to support his application however none of them addressed the specific complaints made at the hearing by the Homeowner regarding the alleged request for the quotes for providing replacement bark for the children's playparks or confirmation that there had been a tendering process. In the absence of such documentation or an acknowledgement on the part of the Factor that the requests had been made the Tribunal was unable to uphold that there had been a beach of these sections of the Code.

37. Section 6.9 of the Code

The Tribunal would have expected in a case where a homeowner was complaining about the standard of the ground maintenance being carried out to have been provided with photographs showing the condition of the areas in question before and after the contractors had been out and if weed killer had been used photographs taken some days after spraying. The Homeowner did not provide the Tribunal with any photographic or other evidence other than his own comments on the contractors. There appeared to be some confusion as to the actual areas where the weeds were growing and whether these were within the common areas or areas adopted by the council. From the information provided the Tribunal was unable to conclude that the Factor was in breach of this section of the Code.

38. Section 7.1 of the Code

The Tribunal was satisfied from the information provided by the parties that the Factor had a clear written complaints resolution procedure setting out the

steps and timescales that would be followed and that this had been included in the written statement of services.

The Tribunal was therefore satisfied that the Factor was not in breach of Section 7.1 of the Code.

39. Breach of Property Factors Duties

It was essentially the Homeowners position that the issues he had raised with the Tribunal with regards to the wall, the trees and the swings were all indicative of a failure on the part of the Factor to carry out its duties. However, it appeared to the Tribunal that the Factor was to some extent unable to make much progress with the repairs to the wall or settle the title question unless and until it had a clear mandate from either a properly constituted Residents Association or a majority of homeowners. It seemed quite probable that matters might be resolved in the relatively near future if as was being suggested the Residents Association constitution was approved at its next meeting but until then there appeared to be an impasse and indeed the Tribunal remains unclear as to who has liability for the maintenance of the wall in question. It also appeared that at least in 2018 the condition of the wall was not posing an immediate danger.

The Tribunal was of the view that the Factor could not be faulted for adopting a cautious approach when it came to felling the trees by approaching the council themselves rather than relying on the information provided by another homeowner. The Tribunal was satisfied that it was preferable for the Factor to have dialogue with the Council that ultimately got them to agree to the trees being felled than to have risked going ahead without council approval. The Tribunal was also satisfied that whatever might have been the case in the past, tree felling involving the instruction of tree surgeons would not fall within the normal ambit of the ground maintenance contract and would involve the Homeowners in an additional charge.

The Tribunal considered both the verbal submissions from the Homeowner and the documentary evidence regarding the swings and concluded that whilst it might have been preferable if the contractors had carried out a single repair to the swings, at the end of the day the Factor, following a request from another homeowner had dealt with a safety issue and arranged a repair for which the homeowners were only charged what they would have been had the work been carried out at the time of the original repair.

Having fully considered the submissions of both parties the Tribunal concluded that the Factor had not failed in its Property Factors Duties.

40. In reaching its decision the Tribunal carefully considered the verbal and written submissions of both parties and concluded that after taking everything into account it could not be said that the Factor was in breach of any of the sections of the Code or of the Property Factors 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.**

Graham Harding Legal Member and Chair

9 July 2019 Date