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

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

Chamber Ref: FTS/HPC/PF/22/3616

Parties:

Mr William McGibbon, Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP ("the Applicant")

Hacking & Paterson Residential Management Services, 103 East London Street, Edinburgh EH7 5BF ("the Respondents")

Tribunal Member:

Graham Harding (Legal Member)
Andrew Murray (Ordinary Member)

DECISION

This decision requires to be read along with the Tribunal's Review Decision of the same date.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 2.1 and the preamble of Section 3 of the Code

The decision is unanimous

Introduction

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 2017 are referred to as "the Rules"

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.

Background

1. By application dated 30 September 2022 the Applicant complained to the Tribunal that the Respondent was in breach of Sections 2.1, 3 (opening paragraphs), 6.3 and 6.6 of the Code. The Applicant submitted copies of correspondence with the Respondent together with additional documents in support of the application.

2. By Notice of Acceptance dated 18 October 2022 a legal member of the Tribunal accepted the application and a hearing was assigned.

3. By email dated 18 November 2022 the Respondents submitted written representations to the Tribunal and also advised that they did not wish to attend a hearing.

4. By email dated 18 November 2022 the Applicant submitted further written representations to the Tribunal and advised that his complaint insofar as it related to the charges levied by the Respondents for hot water had been resolved.

Hearing

5. A hearing was held by teleconference on 17 January 2023. The Applicant appeared in person supported by his sister Miss Margaret Simpson. The Respondents did not appear nor were they represented. The Tribunal determined to proceed in the absence of the Respondents given that they had previously indicated they did not wish to attend a hearing.

6. Following the hearing the Tribunal issued its decision on 26 January 2023 and found that the Respondents were not in breach of its duties under section 14(5) of the 2011 Act.

Post Hearing

7. By letter dated 7 February 2023 the Applicant submitted an application for a review of the Tribunal's decision.

8. Following consideration of the review request the Tribunal held a review hearing at George House Edinburgh on 25 May 2023 and determined to amend its original decision.

CCTV

9. The Applicant referred the Tribunal to his written representations with regards to his complaint in respect of the replacement of the CCTV system. The Applicant referred the Tribunal to the Respondent's written representations which he said accurately summed up the Respondents' position. The

Applicant went on to say that the Title Deeds of the development was the governing document and that any decision by a majority of owners to carry out maintenance at the development was restricted to the definition of maintenance contained in the Deed of Conditions by Yor Limited registered 20 August 2008. The Applicant referred the Tribunal to the definition of maintenance in contained in rule 1.5 of the Scheme contained in Part 2 of the Schedule to the Deed. This stated that:- *"maintenance includes repairs and replacement , cleaning, painting and other routine works, gardening, the day to day running of the site, and the reinstatement of a part (but not most) of the buildings, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance."* The Applicant went on to say that the replacement system was an upgrade as had been suggested by the Respondents in their initial correspondence to homeowners. He said it was not a like for like replacement as the system was upgraded from the previous black and white system to colour. The Applicant referred the Tribunal to his written submissions which set out his position with regards to the breaches of the Code in more detail together with his correspondence with the Respondents. The Applicant maintained that as the installation of the CCTV system was an upgrade rather than maintenance it was not a scheme decision only requiring a majority decision. The Applicant maintained that the installation of the system required unanimous consent of all the owners and as he and another owner had voted against the proposal there had been a procedural irregularity in terms of Rule 6 of the Scheme rules and he was not liable for any share of the cost of installation. At the subsequent review hearing the Applicant accepted having spoken to the contractor who installed the CCTV system that the new system was not an upgrade although he still maintained there had been inadequate communication on the part of the Respondents.

Communal Lighting Access Road

10. The Applicant again referred the Tribunal to his written submissions. The Applicant's complaint centred upon the Respondents instructing contractors to reconnect two street lights located on the development that had been inoperative for a number of years without first seeking any approval from homeowners. In his correspondence with the Respondents, he suggested that of 7 lights located on the road only three had ever been functional and that by connecting the additional two lights it was an alteration requiring the unanimous vote of the homeowners.

11. The Tribunal noted that the Applicant had made reference in his submissions to Burden 3 of the title Deeds which made reference to street lighting being installed conforming to the standards required by the Edinburgh Corporation and that the system was to be lit during such hours as agreed between the parties referred to in that agreement. The Tribunal queried the relevance of the burden other than to confirm that street lighting had been installed in 1974. The Applicant pointed out that since the original lighting had been installed additional lighting had been installed. The Applicant queried the necessity of having the original street lights at all.

12. The Tribunal noted from the written representations submitted by the Respondents and the copy correspondence submitted by the Applicant that the Respondents maintained that two lights on the road had never been connected and that no work had been done to them. They said that there was an issue with the first five lights tripping on a daily basis and this had been repaired. The Applicant maintained the Respondents position was incorrect and that connecting the additional two lights required the unanimous approval of the owners.

13. The Applicant made further submissions to the Tribunal at the review hearing on 25 May 2023.with regards to the access road lights. The Tribunal has dealt with these submissions in its Review decision.

Gritting Services

14. The Applicant referred the Tribunal once again to his written representations. He submitted that there had never been any discussion with homeowners as to whether or not they wished gritting to be carried out in bad weather. He also said that the Respondents had agreed that the owners should meet 33.3% of the cost of gritting organised by James Gibb although their use of the road was half that. He submitted that the Respondents had exceeded their authority by charging the owners for gritting. He submitted the Respondents ought to have sought feedback from owners having set out the legal position that there was no requirement to grit a private road.

15. The Tribunal noted from the Respondents written representations that up until about 2017 gritting at the Development had been carried out by Balfour Beattie at no cost to the homeowners. This service had been discontinued and the factor of the neighbouring development had arranged for gritting services to continue in respect of the shared access road when required. The Respondents considered the gritting of the road to be a maintenance requirement and the charge was properly levied.

16. The Applicant made further submissions with regards to the gritting of the access road in his application for a review and at the review hearing.

The Tribunal make the following findings in fact:

17. The Homeowner is the owner of Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP ("the Property")

18. The Property is a flat within the development at Ravelston Terrace, Edinburgh (hereinafter "the development").

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

20. The CCTV system originally installed at the development was defective and in need of repair. The cameras and cabling were replaced on the instructions of

the Respondents following approval by a majority of owners. The new system included additional upgraded colour rather than black and white monitoring.

21. The communal lighting on the access road at the development was reported to the Respondents as being faulty. The Respondents instructed Lothian Electrics to investigate and report.

22. The Respondents instructed Lothian Electrics to carry out repairs to the lighting without seeking authority from homeowners.

23. Gritting services to the private access road in winter months was provided to homeowners at the Development until 2017 by Balfour Beattie at no cost.

24. Since 2018 James Gibb, the factor of a neighbouring development has arranged for gritting services to be carried out on the access road and levied a charge to the Respondents which the Respondents have passed on to homeowners.

25. The Respondents did not seek approval from the homeowners to meet the cost of gritting the access road.

Reasons for Decision

26. The Tribunal was in no doubt that the title deeds govern the management of the development and that the Respondents must work in accordance with the rules set out in the schedule annexed to the Deed of Conditions contained in Burden 12 of title deeds.

CCTV

27. The Applicant sought to persuade the Tribunal that the Respondents were in breach of Section 2.1 of the Code by failing to communicate appropriately with owners regarding the upgrade from a black and white CCTV system to a colour system when there was potentially cheaper like for like systems available.

28. The Applicant also submitted that the Respondents were in breach of the opening paragraph of Section 3 of the Code as they had made an improper request for payment from the Applicant in respect of the installation cost of the CCTV system when the Applicant had not agreed to it.

29. The Applicant also claimed that the Respondents were in breach of Sections 6.3 and 6.6 of the Code as they had failed to carry out a competitive tendering exercise.

30. The Tribunal has to make a decision based upon the evidence before it. The Applicant submitted that cheaper alternatives were available but did not provide the Tribunal with any examples. The Respondents submitted that the system proposed by the contractor allowed for colour picture at all times

rather than just during the day and that this was a comparable replacement. The Respondents also explained that the monitor had not been replaced so presumably the existing monitor was in colour. On balance the Tribunal was satisfied that the replacement system although clearly an upgrade on the earlier installation in that it provided colour pictures at all times the upgrade was reasonably incidental to the maintenance of the system. For that reason, the Tribunal did not consider that the Respondents were in breach of Sections 2.1 or 3 of the code. The Tribunal did question whether in the circumstances the Respondents ought to have considered obtaining competitive quotes for the replacement system but again on balance and given the contractors familiarity with the system and the relatively low costs involved were satisfied on this occasion that the Respondents were justified in not putting the contract out to tender and were therefore not in breach of Sections 6.3 or 6.6 of the Code.

Communal Lighting Access Road

31. The Applicant submitted that by reconnecting the previously inoperative two lampposts the Respondents were exceeding their authority and in so doing were in breach of Sections 2.1, 3, 6.3 and 6.6 of the Code.

32. The Tribunal was satisfied from the written submissions provided by the Respondents that following a report of the lighting not operating an electrical contractor was instructed to report. The Tribunal considered the terms of the contractor's report dated 21 October 2021. It was apparent that the lighting was in a dangerous condition. The Tribunal was therefore satisfied that the Respondents had authority in these circumstances to instruct the contractors to proceed with the repair. It also appeared to the Tribunal that any additional work carried out to reconnect the two lights that were previously inoperative was justified. Although the Applicant had a belief that lights 4 and 5 on the title plan had previously been connected to the adjoining development's electric supply there was no evidence to support this theory. There is an obligation within the titles for the lights to be operational. The Tribunal was satisfied that the Respondents were not in breach of Sections 2.1, 3, 6.3 or 6.6 of the Code.

Gritting Services

33. It was not disputed that prior to 2018 gritting of the communal access road had been carried out by Balfour Beattie during the winter months at no charge to the homeowners. It was also accepted that the Respondents did not instruct gritting to be carried out but had agreed on behalf of owners to pay to the neighbouring factor a one third share of the cost incurred since 2018.

34. The Applicant argued that in so doing the Respondents were in breach of Sections 2.1, 2.2 and 3.2 of the Code. The application only relates to sections 2.1 and the preamble of section3 of the code and therefore the Tribunal cannot consider any alleged breaches of sections 2.2 or 3.2. It was the Applicant's position that as there was no legal obligation to grit the access road the Respondents ought to have obtained unanimous support for meeting

a share of the cost and this would not have been forthcoming as the Applicant would have voted against it.

35. The access road was constructed in terms of an agreement between Scottish Agricultural Industries Limited ("SAI") and Dove Conversions Limited ("Dove") and referred to in the title deeds under Burden 1. The cost of maintaining and keeping the access road was to be borne equally by Dove and SAI and their successors. It therefore appears that over time the access road is now owned by the owners in the Applicant's development and those in the development managed by James Gibb and another development. The owner's development's share of the cost of maintenance remains at 50% although it appears that a more informal agreement may be in place to share some costs differently with each development paying one third of the cost.

36. The Respondents did not instruct the access road to be gritted. Instructions came from James Gibb the neighbouring Factor. The Homeowners benefited as a result of the road being gritted. The issue that arises is whether firstly the gritting of the road is to be considered as maintenance. The definition in rule 1.5 includes "other routine work" and "the day to day running of the Site." The Tribunal considers that these terms are widely enough drawn to include the gritting of the access road in winter. Secondly the Tribunal took account of the fact that the Respondents were not responsible for instructing the gritting as this was instructed by James Gibb. Clause 9.6 of the Deed of conditions provides" that any costs for the maintenance of the site or properly incurred by the Manager in furtherance of his duties which are not allocated elsewhere in this deed shall be allocated on the same basis as the Scheme costs." On balance the Tribunal is satisfied that the gritting of the road in winter months would constitute maintenance and would therefore be properly incurred if approved by the majority of owners. The Respondents have indicated that as far as they are aware no other owners have raised concerns about meeting a share of the cost. That however is not the same as having a majority decision. For the reasons stated in the review decision the Tribunal is satisfied that the Respondents ought to have sought approval from homeowners before agreeing to the James Gibb request for reimbursement of a share of the cost of gritting the access road in winter. By failing to obtain majority approval the Respondents became liable to reimburse the owner for any gritting costs in terms of Rule 6.2 of the development rules. The Respondents were therefore in breach of Section2.1 of the Code and the preamble to Section 3 of the Code.

Proposed Property Factor Enforcement Order

37. The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

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

10 June 2023 Date