

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Property Factor Enforcement Order (“PFEO”): Property Factors (Scotland) Act 2011 Section 19(3)

5 Hillpark Grove, Edinburgh, EH4 7AP (“the Property”)

The Parties:

Aylmer Millen, 5 Hillpark Grove, Edinburgh, EH4 7AP (“the Homeowner”)

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD (“the Property Factor”)

Tribunal Members:

Josephine Bonnar (Legal Member)

David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal’s Decision of 14 November 2023.

Decision

The Tribunal has decided that it should make a PFEO in the terms originally proposed by it under deletion of Part 2 of the proposed PFEO.

The decision of the Tribunal is unanimous.

Reasons for decision

In the Tribunal’s decision of 14 November 2023 , they proposed to make a PFEO in the following terms:-

- (1) The Tribunal order the Property Factor to provide the Homeowner with a response to his enquiries about how his liability for a share of the development debt was calculated, by reference to the Deeds of Conditions for the development, within 28 days of intimation of the PFEO.

- (2) The Tribunal order the Property Factor to amend the Written Statement of services for the development so that it accurately reflects the level of delegated authority for the development and provide a copy of the amended document to the Homeowner and the Tribunal, within 2 months of intimation of the PFEO.
- (3) The Tribunal order the Property Factor to pay to the Homeowner the sum of £500 for his time, effort, and inconvenience, within 28 days of intimation of the PFEO.

The Tribunal indicated that prior to making a PFEO, it would provide the parties with the opportunity to make representations under section 19(2)(b) of the Act.

The Tribunal received the following submissions from the parties:-

1. On 29 November 2023, the Homeowner made the following comments:-
 - (a) The proposed order focuses on the debt collection and WSS complaints rather than the storm drain and other resolved issues complaints.
 - (b) The compensation proposed will have limited impact.
 - (c) The order should include a specific requirement in relation to the complaints about storm drain area 1. The Tribunal could compel the Property Factor to instruct a review of the state of completion of the works which were carried out within a defined timescale and that the terms of the review be provided immediately.
 - (d) The order should compel the Property Factor to obtain a condition log of each manhole and a planned preventative maintenance schedule within a defined timescale.
 - (e) The order should compel the Property Factor to instigate a training programme with specific reference to compliance with the Code and property factor duties within a defined timescale.
 - (f) The proposed PFEO does not go far enough to address the findings of the Tribunal. The Property Factor has escaped censure for its substantive failures in management and completion of the storm drain maintenance contract and for the other breaches that were established.
2. On 20 December 2023, the Property Factor notified the Tribunal that a meeting of homeowners had been arranged for 10 January 2024 to discuss and seek approval for the remaining works on storm drain area 1. This was because access to private gardens was required, with possible disruption. They requested further time to allow the work to be approved, completed and a report provided. An extension of time was granted.

3. On 22 December 2023, the Homeowner sent an email stating that the meeting was unnecessary as the work had been approved and paid for. Access to gardens had never been an issue until the contractor turned up unannounced due to a failure in communication between the Factor and the contractor. The homeowners are aware of their obligations and have cooperated previously with contractors. If the meeting is not quorate, the Factor may use this as an excuse for delay or an inability to complete the works. Furthermore, the letter regarding the meeting makes no reference to planned preventative maintenance recommendations.
4. On 26 February 2024, the Property Factor sent a copy of a Manhole Survey Report from Will Rudd and notified the Tribunal that their contract with the development had terminated.
5. On 27 February 2024, the Homeowner submitted comments on the report. He said that the Property Factor should provide assurance that the owners of the properties who had not permitted access had been notified of the need for, and the timing of, the required access. He also said that the extent of the survey has been "truncated" to omit key information and that the Property Factor should explain why this important aspect of the survey was not investigated.
6. In response to a further enquiry from the Tribunal, both parties confirmed (on 11 and 13 March 2024) that the contract with the Factor terminated on 11 March 2024 and that the new factor is Myreside Property Management. Both parties confirmed that they had nothing to add to their previous submissions regarding the proposed PFEO. The Homeowner stated, "In my view the Factor initiated termination of their contract is not prejudicial to the determination of the Tribunal complaint."

The Tribunal is of the view that the termination of the factoring contract is relevant. It does not prevent the Tribunal from issuing an order, but the terms of that order require to be reviewed. Aside from certain transitional arrangements, the Property Factor has no ongoing contractual or statutory obligations to the development or the homeowner. Furthermore, they have no entitlement to instruct works. For this reason, the Tribunal is not persuaded that part 2 of the proposed order should be included in the PFEO. This required an amendment to the WSS because the Property Factor had altered the level of delegated authority without following the correct process. However, this is no longer required. On the other hand, the Tribunal sees no reason why the Property Factor should not be required to comply with Part 1 of the proposed order.

The Property Factor has made no representations regarding the proposed PFEO. They only submitted the manhole report and advised the Tribunal that the contract with the development had ceased.

The Tribunal make the following observations regarding the Homeowner's submissions:-

1. Point 1(a). As previously stated, the proposed order in relation to the WSS is to be removed. In relation to the debt collection issue, the Homeowner invited

the Tribunal to conclude that he had requested certain information, and this had not been provided. The Tribunal upheld this complaint and took the view that they should and could require the information to be provided. It is not clear why the Homeowner objects to this provision. If he does not require the information, why did he ask for it or make a complaint to the Tribunal when it was not provided.

2. Point 1(b). It is not completely clear from the submission, but it appears that the complaint is about the level of the sum being awarded. The Tribunal is not obliged to award a monetary penalty and there was no evidence of direct financial losses or consequences from the various breaches that were established. The sum proposed is based on the fact that delay and inconvenience have been experienced. This delay and inconvenience are due (in part) to the breaches which have occurred. The Tribunal is satisfied that the sum proposed is “reasonable” in the circumstances.
3. Point 1(c) and (d). A report has been submitted and passed to the new Property Factor for the development. The Tribunal is of the view that it would be inappropriate to require the Property Factor to take any further action regarding this matter.
4. Point 1(e). The Homeowner does not specify how a training programme would improve matters and the Tribunal did not conclude that lack of training was the reason for any breaches which occurred.
5. Point 1(f). This is a general statement. The Homeowner does not specify what additional measures (other than those mentioned already) should be put in place. The Tribunal does not accept the criticism. The decision with statement of reasons clearly specifies the Tribunal’s findings in relation to the breaches which were established. However, the Tribunal concluded (particularly in relation to certain aspects of the storm drain maintenance) that some of the delays and lack of progress were attributable to other factors.
6. Point 5 . The Tribunal is of the view that any issues with the report should be raised with the new Property Factor

The Tribunal is satisfied that the Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with OSP 2, 3, 4, 6 and 11 of the 2021 Code of Conduct for Property Factors. It has also failed to carry out its property factors duties to a reasonable standard in terms of Section 17(5) of the Act.

Section 19(3) of the 2011 Act states that if the Tribunal is satisfied that the Property Factor has failed to carry out its duties and/or comply with its section 14 duty, the Tribunal “must” make a PFE0.

Property Factor Enforcement Order

The First-tier Tribunal hereby makes the following PFEO:

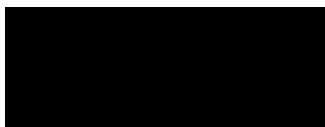
- (1) The Tribunal order the Property Factor to provide the Homeowner with a response to his enquiries about how his liability for a share of the development debt was calculated, by reference to the Deeds of Conditions for the development, and
- (2) The Tribunal order the Property Factor to pay to the Homeowner the sum of £500 for his time, effort, and inconvenience,

All within 28 days of intimation of the PFEO.

Under Section 24(1) of the Property Factors (Scotland) Act 2011, a person who, without reasonable excuse, fails to comply with a property factor enforcement order commits an offence.

Appeals

A homeowner or property factor aggrieved by a 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.



Josephine Bonnar, Legal Member

15 March 2024