



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

Statement of Decision with Reasons under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and Rule 17 (4) of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Reference numbers: FTS/HPC/PF/23/0299 & FTS/HPC/PF/23/0302

Re: Property at 22 Villa Dean, Rosewell, EH24 9ES (“the Property”)

The Parties:

Mr Philip Purcell, Mrs Lesley Purcell, 22 Villa Dean, Rosewell, EH24 9ES (“the Applicants”)

Trinity Factoring Services Ltd, 209/211 Burntsfield Place, Edinburgh, EH10 4DH (“the Respondent”)

Tribunal Members Alison Kelly (Legal Member), David Godfrey (Ordinary Member)

Background

1. On 31st January 2023 the Applicants lodged two applications in terms of Section 17 of the Property Factors (Scotland) Act 2011 being applications by a homeowner to enforce the Property Factors Code of Practice.
2. The first application, on Form C1, was in relation to alleged breaches prior to 16th August 2021, and the 2012 Code applied.
3. The second application, on Form C2, was in relation to alleged breaches subsequent to 16th August 2021, and the 2021 Code applied.
4. Over the course of the next few months the Applicants were asked for, and submitted, more documentation to the Tribunal.
5. The case was accepted by the Tribunal on 29th September 2023.

6. A Case Management Discussion was fixed for 11th January 2024.
7. On 5th January 2024 the Respondent sent a short written response.

Case Management Discussion

8. The Case Management Discussion (“CMD”) took place by teleconference. The Applicants represented themselves. The Respondent were represented by Sharon Laird, Head of Property Management, Jacqueline Davidson, Property Manager and George McGuire, CEO.
9. The Chairperson made introductions and asked each side who was going to speak primarily. For the Applicants it was Mrs Purcell, and for the Respondent it was Ms Laird.
10. The Chairperson confirmed the purposes of a CMD in terms of Rule 17 of the Rules.

11. C1

The Tribunal addressed the application on Form C1 first, that being the application in relation to alleged breaches prior to 16th August 2021, and to be dealt with under the 2012 Code.

12. The first alleged breach was of paragraph 2.4 of the 2012 Code. Mrs Purcell said that the Respondent did not consult with or communicate with them. They gave no indication of what they were doing. She accepted that the Respondent does have a procedure in terms of the paragraph but her position was that they did not consult with homeowners individually. She could not provide specific examples at that moment.
13. The next alleged breaches were of paragraphs 2.6 and 2.7. The Chairperson pointed out that the 2012 Code did not have paragraphs 2.6 and 2.7. Mrs Purcell said that it was likely that she had been confused about the two codes and she was probably referring to the 2021 Code paragraphs. As the paragraphs do not exist in the Code these complaints were not relevant.
14. The final alleged breaches were in relation to paragraphs 3.1 and 3.4 of the Code. These paragraphs were read put to Mrs Purcell and she again said that it was likely that she had been confused about the two codes and she was probably referring to the 2021 Code paragraphs. She conceded that paragraphs 3.1 and 3.4 were not relevant.
15. The Applicants also alleged in form C1 that the respondent had breached the property factor duties. The property factor duties are separate from the Code of

Conduct. The Tribunal read out the non exhaustive list of examples from the Tribunal's website of what was likely to be a breach of the duties. Mrs Purcell said that the Respondent had failed to supervise the contractor, MIB. She felt that this was a breach of duties. She also said that the Respondent spent money on things outwith the burden of maintenance that was imposed in the title deeds and she felt this was a breach of duties. Finally she said that the Respondent had failed to act on the complaints made by the Applicants. They had not responded to a lot of the complaints and had not taken them on properly. She felt that this was a breach of duties.

16. Ms Laird confirmed that this discussion had made the Applicants' complaints slightly clearer.

17. C2

The Tribunal addressed the application on Form C2, being the application in relation to alleged breaches subsequent to 16th August 2021, and to be dealt with under the 2021 Code.

18. The first alleged breach was of paragraph 2.4. Mrs Purcell said that she had asked for information in 2019 and was still waiting for it. She had asked for a list of documents regarding the contractor. She had provided a list of the documents required and understood the list had been passed to Ms Davidson in 2021. The respondent said that there would be a charge for providing this information but the Applicant heard nothing further.

19. The next alleged breach was in relation to paragraph 2.6. Mrs Purcell said that the money paid to the contractor for fuel surcharges was out with what had been agreed in the contract. The Applicants had had no knowledge of the payment until after it was made. The contractor was paid the surcharge for periods when he had not attended to carry out work. The Respondents had also purchased a bench, and there had been no communication regarding that either. Mrs Purcell was aggrieved that a lot of the communication by the Owners Association was given via Facebook. She does not have Facebook and does not intend to subscribe, she feels that better communication is required. Mrs Purcell was asked by the Tribunal if she accepts in terms of the paragraph that there is a procedure in place. She said that she did not know.

20. The next alleged breach was of paragraph 2.7. Mrs Purcell said that response by the Respondent to complaints and enquires has been very poor. They either respond late, or do not respond at all. This happens frequently. The last example was in relation to the complaint sent on 20th June 2023. The Respondent did not comply with its own procedure.

21. The next alleged breach was of paragraph 3.1. Mrs Purcell said that the fuel surcharge paid to the contractor had come out of the blue. There had been other things on the bills which had not been clear, including a recent entry labelled "pest control". It was later learned that this was for getting rid of rats.

22. The next alleged breach was of paragraph 3.4. Mrs Purcell said that bills were provided but that they do not give a detailed description of activities and works are not properly detailed.
23. The final alleged breach was of paragraph 7.2. Mrs Purcell could not give an immediate example and agreed to the paragraph being struck out. However, on consideration the Tribunal decided that this alleged breach needed further exploration.
24. The Applicants also allege breaches of the property factor's duties. Mrs Purcell said that the breaches as far as she was concerned were failing to supervise the contractors and failure to give information in a timely manner and notify of future works.
25. Ms Laird confirmed that the discussion had made the position of the Applicants slightly clearer to her.
26. The Tribunal were of the view that more specification was needed, and documents to be referred to needed to be properly linked to each paragraph of the Codes allegedly breached. There also needed to be much more specification regarding the alleged breaches of the Property Factor's duties, which are separate from alleged breaches of the Code. This further specification is needed so that the Tribunal is clear in what it is being asked to decide, and so that the Respondent is able to answer the case being made against it.
27. The CMD was adjourned to a continued CMD, the date to be confirmed.

Subsequent Submissions

28. Subsequent to the CMD the Tribunal issued Directions to the parties.
29. On 13th February 2024 the Applicants lodged a very detailed submission outlining the Paragraphs of the Code they considered had been breached and linking documentation to support each claim. The applicants also indicated that they wished to withdraw Application C1 Point 2.4.
30. On 15th March 2024 the Respondents lodged a detailed submission in response to the one lodged by the Applicants.

Continued Case Management Discussion

31. The continued Case Management Discussion ("CMD") took place by teleconference. Mrs Purcell represented the Applicants. The Respondent was

represented by Sharon Laird, Head of Property Management and Jacqueline Davidson, Property Manager.

32. The Chairperson made introductions and confirmed the purposes of a CMD in terms of Rule 17 of the Rules. She sought clarity about what was still in issue. Mrs Purcell confirmed that the Applicants were withdrawing their C1 application and proceeding with complaints of breaches of points 2.4, 2.6, 2.7, 3.1, 3.4 and 7.2 of the 2021 Code of Conduct for Property Factors. She confirmed that she was not alleging any separate breaches of the Property Factors duties.

33. The Chairperson confirmed that the Tribunal were content to convert the CMD to a Hearing and to proceed on the basis of the written submission, unless either side wished to lead witnesses or lodge any further documents. Both Mrs Purcell and Miss Laird confirmed that they were agreeable to proceeding as outlined and neither had anything further to add to the written submissions. The Tribunal therefore adjourned to consider its decision.

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor:

has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2021 at OSP 2, Sections 2.4 and 2.7 and at OSP 7, section 7,2

Findings In Fact

- i. The Applicants own the property at 22 Villa Dean, Roswell, EH24 9ES;
- ii. The title deeds provide for an Owners Association to be established and that each Homeowner will automatically become a member;
- iii. The Owners Association employs the Respondent to factor the development;
- iv. The Deed of Conditions states that any charges incurred by the Owners Association for any work undertaken or services performed in terms of or in furtherance of provisions contained in the Deed of Conditions shall be payable by the proprietors within the Development whether consent is given or not.
- v. The Applicants requested documentation from the Respondent regarding the charges made by the contractor, MIB, on 30th September 2019;
- vi. Another request was made by the Applicants on 22nd February 2021;
- vii. The Respondent replied by email on 7th June 2022 asking for clarification of the extent of the invoices sought;
- viii. The Applicants emailed on 8th June 2022 to confirm;
- ix. The Respondents responded on 15th June 2022 to confirm they would do their best to get the required information in the coming weeks;
- x. On 23rd June 2022 the Respondents sent an email asking how the Applicants would like the information to be sent;
- xi. The Applicants responded on 23rd June 2022;

- xii. On 29th June 2022 the Respondents sent an email saying there would be costs involved and they would get back to the Applicants in due course.
- xiii. No further correspondence was received from the Respondents in relation to this matter.
- xiv. The Owners Association determine what the individual homeowners' contributions will be to the Residents Expenses Fund;
- xv. The increase was to provide a surplus in the fund for future expenses;
- xvi. No work over the amount of £5000 has been proposed or instructed at this time;
- xvii. The Respondent's Service Level Agreement states that they endeavour to give a full reply to all written correspondence within 7 working days;
- xviii. The Respondents have failed to respond in full to the Applicants' request for documents in relation to the contractor, MIB;
- xix. The Applicants' complaint of 20th June 2023 is framed in numbered paragraphs with sufficient detail to allow the Respondents to answer;
- xx. In dealing with the complaint the Respondent provided time scales for reply which they failed to meet and in one reply did not provide a time scale at all;
- xxi. The Respondent dealt with the Applicants' email request of 29th October 2022 correctly;
- xxii. Dealing with requests to amend the Minutes of the Owners Association are a matter for the Owners Association and not the Respondent;
- xxiii. It is for the Owners Association to determine the method of communication with the homeowners;
- xxiv. The Respondent answered the Applicant's query about the fuel surcharge the day after it was raised by the Applicants;
- xxv. If the Applicants have further queries regarding entries on the invoices they should contact the Respondent for an explanation;
- xxvi. Detailed financial statements have been provided by the Respondent to the Applicants at least once per year;

Reasons for Decision

- 34. Lodged with the applicants' application was a copy of the Land Certificate for the property at 22 Villa Dean, Rosewell, EH24 9ES, title number MID107353. The Burdens Section, at page D6, contains the Deed of Conditions registered 10th March 2003, by Taylor Woodrow Developments Limited. This Deed of Conditions applies to the estate in which the Applicants' property is situated.
- 35. The Deed of Conditions, at paragraph 1.11 defines the "Owners Association" and says that all proprietors will automatically become members. Paragraph 15 lays out how the OA shall be constituted, and paragraph 15.3 lays out the powers of the OA, from which it is clear that the Factor is employed by the OA rather than by the individual proprietors. Paragraph 15.3 (viii) (Two) declares that all expenses and charges incurred by the OA for any work undertaken or services performed in terms of or in furtherance of provisions contained in the Deed of Conditions shall be payable by the proprietors within the Development whether consent is given or not.
- 36. The Applicants' complaints of breaches of the Code follow:

2.4 Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is good reason not to.

37. The Applicants' position was that they had requested, by letter of 30th September 2019 documentation in relation to the landscaping contractor, MIB. They requested copies of all bills from MIB for maintenance to the Farm Meadow estate and the extra work from when they took over the maintenance contract. They also asked for a number of certificates held by MIB. They sent this request again on 22nd February 2021 and on another occasion. The Respondent replied by email on 7th June 2022 asking for clarification of the extent of the invoices sought. The Applicants emailed on 8th June 2022 to confirm. The Respondents responded on 15th June 2022 to confirm they would do their best to get the required information in the coming weeks. On 23rd June 2022 the Respondents sent an email on asking how they would like the information to be sent. The Applicants responded on 23rd June 2022. On 29th June 2022 the Respondents sent an email saying there would be costs involved and they would get back to the Applicants in due course. No further correspondence was received from the Respondents in relation to this matter.
38. The position of the Respondents was that the Applicants were making unreasonable demands. They stated that the contractor is appointed by the Owners Association ("OA") and is managed by them. Their view was that the Applicants were on a "fishing trip" because they did not agree with the OA's position.
39. The Tribunal decided that it could consider this alleged breach as it remained unanswered and the Applicants had to ask again after the 2021 Code came in to force. The Tribunal consider that the Applicants were entitled to ask for the invoices. It was up to the Respondent then to advise that they considered the request to be unreasonable, or to confirm there would be a charge and to provide details of that charge. The invoices are documents which the Respondents should be able to provide. They do not appear to have confirmed to the Applicants that they consider the request unreasonable and they will not be providing the invoices. They have said that there would be a cost, but they did not return to the Applicants with a note of the cost. The request was therefore not dealt with to the extent of bringing the matter to a conclusion. The Respondents have breached paragraph 2.4 of the Code. To be clear, the Tribunal considers that any issues that the Applicants had with the content of the invoices would need to be raised by the Applicants with the OA.

2.6 A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of condition or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner.

40. The Applicants' position was that there was no procedure in place to consult with homeowners to seek homeowners consent before providing work or services for costs over the £5,000 threshold contained in the Deed of Conditions. They said that Residents Association Expenses, at £5,528, are over the £5,000 threshold.
41. The position of the Respondents was that the Residents Association Expenses are determined by the OA, not the Factor, and that the OA had replied to the Applicants explaining the costs. They made reference to an email of 25th November 2022 sent by the Respondent to the Applicants and copying the response of the OA to them.
42. The use of the word "Expenses" may be causing confusion. As far as the Tribunal can see there is no proposal as yet to spend more than £5,000 on a major work and therefore no need as yet to consult with the Proprietors in terms of paragraph 17 of the Deed of Conditions. In any event that duty lies with the OA and not with the Respondent. The Tribunal do not consider the Respondent to be in breach of this paragraph of the Code.

2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

43. The Applicants allege four breaches of this paragraph of the Code.
44. Firstly the Applicants repeat their complaint under paragraph 2.4 of the Code as they have not provided the documentation requested.
45. The position of the Respondent is that the Applicants continue to raise matters with them which should be directed to the OA. It states that it is for the OA to determine if, and when, a response is issued.
46. The Tribunal noted that the Respondent's Service Level Agreement states that they endeavour to give a full reply to all written correspondence within 7 working

days. It appears that they have failed to respond in full to the Applicants' request for documents and therefore paragraph 2.7 of the Code has been breached.

47. Secondly, the Applicants complain that the Respondent has not responded within their timescales within the WSS and did not keep them informed if they were able to respond within the agreed timescales to a complaint made by the Applicants in writing on 20th June 2023 under the Respondent's Complaints Procedure.
48. The position of the Respondent is that they believe that they have replied to the Applicants in a timely manner. It further says that the Applicants are unhappy that the Respondent has not been able to provide information and responses from other parties and are holding the Respondent accountable for lack of information/response. It states that the Applicants did not engage with the Complaint Handler and the complaint is not well structured and takes a scatter gun approach.
49. The Tribunal noted that there had been correspondence between the parties after the complaint was received, with the Respondent either providing a time scale for reply which they failed to meet, or not providing a time scale at all, which culminated in the Respondent sending an email to the Applicants on 27th September 2023 pointing out that there were several historic issues in the complaint and asking for the Applicants to provide a revised letter. The Tribunal considered the letter of complaint of 20th June 2023. The Tribunal does not agree that the letter is not well structured. It consists of seventeen numbered heads of complaint. It would have been fairly easy for the Respondent to reply to each point and the Tribunal did not consider it reasonable for them to ask the Applicants to redraft it. The Respondent did not comply with their own procedure and the Tribunal considered them to be in breach of paragraph 2.7.
50. Thirdly, the Applicants repeat their complaint under paragraph 2.6
51. The position of the Respondent is that they do not answer for the OA.
52. The Tribunal noted that the initial email was sent to the Respondent on 29th October 2022, they acknowledged receipt on 31st October 2022 and said they would seek instructions from the OA, the Applicants sent a reminder on 24th November 2022 and the Respondent sent an email to the Applicants on 25th November 2022 with the response from the OA Committee. The Respondent did explain to the Applicants in the email of 31st October 2022 that the matter was for the OA to answer, and the final response was sent within one month. The Tribunal did not consider that paragraph 2.7 had been breached.
53. Fourthly, the Applicants complain that the Respondent has not dealt with their complaint regarding errors in Minutes of the OA.
54. The position of the Respondent was that these issues were not raised as part of the original application by the Applicants, and also that it was a matter for the OA about whether or not to amend Minutes.

55. The Tribunal agrees that the Minutes are a matter for the OA and not the Respondent and does not consider paragraph 2.7 to have been breached.

3.1 *While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.*

56. The Applicants said that they are not confident in what they are being asked to pay for and do not know how charges are being calculated. They said that they do not use Facebook, which is the method of communication used by the OA, and there are items on bills that they knew nothing about until after they have been paid and the yearly Budget Reconciliation Statement arrives. They feel that residents are being kept out of financial discussions/decisions being made by the Committee and Trinity. They do not agree with paying a fuel surcharge to the landscaper and were not consulted about it. They do not consider there is enough information on the Respondent's statements for them to be clear about what they are being charged for.

57. The position of the Respondent is charges noted were instructed by the Committee of the OA and minuted at the AGM. They state that the OA Committee run the meetings, the Facebook page and the website for the development, and that the OA arrange and agree the contract for ground maintenance, not them.

58. The Tribunal did not consider that this paragraph of the Code had been breached. The Respondent takes its instructions from the OA. It is for the OA to determine the method of communication with the homeowners, all of whom are automatically members of the OA. Should the Applicants have issues with the method of communication, or the decisions being made about what money should be spent on, they should take that up with the Committee of the OA. The Respondent answered the Applicant's query about the fuel surcharge the day after it was raised by the Applicants. If the Applicants have further queries regarding entries on the invoices they should contact the Respondent for an explanation. The Tribunal considered that the narrative on the entries was sufficient for the purpose of the Code and there was no bar to the Applicants requesting further information.

3.4 *A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial statement showing a breakdown of charges made and a detailed description of the activities and works carried out which are charged for.*

- 59. The Applicants state that there are no detailed descriptions of activities and works carried out on the Reconciliation Statements or Factoring levy.
- 60. The position of the Respondent is that the Committee of the OA agreed to the fuel surcharge.
- 61. The Tribunal do not consider this paragraph of the Code has been breached and detailed financial statements have been provided by the Respondent to the Applicants at least once per year.

7.2 When a property factor's in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing.

- 62. The Applicants complain that the Respondent has not resolved their complaint of June 2023.
- 63. The position of the Respondent is that they have tried to engage with the Applicants to narrow the scope of the complaint but that the Applicants have not engaged.
- 64. . The Respondent did not respond to the first and second stage complaints and at stage three only reissued documents from almost ten years ago without specifically addressing points raised in 2023. The Respondent also says that the Applicants did not engage but there is no mention of this in the paperwork submitted by the Respondent and in their email of 27th September 2023 there is no mention from the Respondent that the contents of the email was their last word on the matter. The Tribunal have already held that the complaint was well structured and could have been answered by the Respondent The Tribunal do consider the Respondent to be in breach of this paragraph of the Code.
- 65. ___ From the Tribunal's Findings in Fact, the Tribunal had no hesitation in finding that the Property Factor failed to comply with the 2021 Code and with the Property Factor Duties.
- 66. ___ .Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to comply with the Section 14 duty and has failed to carry out the property factor's duties, the Tribunal then proceeded to consider Section 19(1) (b) of the Act which states

“(1)The First-tier Tribunal must, in relation to a homeowner’s application referred to it ... decide ... whether to make a property factor enforcement order.”

- 67 The Property Factor's conduct has caused the Homeowner unnecessary frustration and both direct and indirect financial loss for which she ought to be compensated. Therefore, the Tribunal proposes to make a PFEO.
- 68 Section 20 of the Act states:
- “(1) A property factor enforcement order is an order requiring the property factor to (a) execute such action as the First-tier Tribunal considers necessary and (b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable.
- (2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made.
- (3) A property factor enforcement order may specify particular steps which the property factor must take.”
69. The Tribunal proposes to make a PFEO to order the Property Factor.
70. Section 19 (2) of the Act states: - “In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so (a) give notice of the proposal to the property factor, and (b) allow the parties an opportunity to make representations to it.”
71. The Tribunal, by separate notice intimates the PFEO it intends to make and allows the Parties fourteen days to make written representations on the proposed PFEO.
72. 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.



Alison Kelly
Chair of the Tribunal
24th May 2024