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

Decision and Review Decision together with Statement of Reasons on Homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/LM/22/3876 and FTS/HPC/PF/23/0003

The Parties: -

Alan Slater, 67 Eastwoodmains Road, Glasgow, G76 7HQ ("the Homeowner")

Trinity Factoring Services Ltd, 209-211 Bruntsfield Place, Edinburgh, EH10 4DH ("the Property Factor")

The Tribunal: -
Melanie Barbour (Legal Member)
John Blackwood (Ordinary Member)

DECISION

The Tribunal refuses to Review Issue 1 of the Homeowner's review request; upholds Review Issues 2 and 3 in part; and having considered the representations made in response to the PPFEO and the review request thereafter amends the proposed Property Factor Enforcement Order; and issues it in the amended terms. This decision is unanimous.

BACKGROUND

1. By the first application (C1) dated 23 October 2022, the Homeowner complained to the Tribunal that the Property Factor was in breach of Sections 3 general and 3.3 and 4.5 of the 2012 Code of Conduct; and had failed to carry out its Property Factor duties as set out in section 7B of the application form, in summary, it had failed since 2007 to apportion the common area charges correctly in the development. The Property Factor admitted that failure in writing. The debtor had admitted that they had not paid the correct charges and had apologised. The Homeowner's complaint was that it had been two and a half years since the matter was discovered, but the debt remains uncalculated and uncollected.

2. By the second application (C2) dated 28 December 2022, the Homeowner complained to the Tribunal that the Property Factor was in breach of Sections 3.1, 3.2, 4.1 and 4.9 of the 2021 Code of Conduct and had failed to carry out its Property Factor's duties as set out in section 7B of the application form, in summary, it had failed since 2007 to apportion the common area charges correctly in the development. The Property Factor admitted that in writing. The debtor had admitted that they had not paid the correct charges and had apologised. The Homeowner's complaint was that it had been two and a half years since the matter was discovered but the debt remains uncalculated and uncollected.

3. By Notices of Acceptance dated 9 January 2023 and 15 February 2023, legal members of the Tribunal with delegated powers accepted both applications and a case management discussion was assigned to take place on 17 March 2023. Both parties submitted written representations in response to a direction issued. The applications proceeded to a hearing which took place on 15 June 2023 and was continued until 16 February 2024. Both the Homeowner and Property Factor attended the case management discussion and hearing. Calum Seale and George McGuire appeared for the Property Factor. The Homeowner made a further written submission prior to the continued hearing on 16 February 2024.

4. The tribunal made a decision and issued a Proposed Property Factor Enforcement Notice on 15 April 2024.

5. On 2 May 2024, the Homeowner sent an email to the tribunal apologising for the delayed response but advising that he had very difficult family circumstances. He advised that he

had considered appealing the decision. He had queries and requested clarification from the tribunal on the three points before taking further action.

6. The tribunal is subject to the tribunal procedural rules. It has considered the email of 2 May 2024. It has decided to treat this request for clarification as a review of its decision, this is because the Homeowner has sought clarification on the tribunals' decision (1) of the terms of the title deeds, and (2) other matters raised sought to amend the terms of the PPFEO.

7. The tribunal issued a direction seeking comment from the Property Factor on 20 June 2024 to this review request. Reference is made to the terms of the Direction.

8. The Property Factor responded on 28 June 2024. The Homeowner responded on 28 June 2024.

Review of a decision

39.—*(1) The First-tier Tribunal may either at its own instance or at the request of a party review a decision made by it except in relation to applications listed in rule 37(3)(b) to (j)(**1**), where it is necessary in the interests of justice to do so.*

(2) An application for review under section 43(2)(b) of the Tribunals Act must—

(a)be made in writing and copied to the other parties.

(b)be made within 14 days of the date on which the decision is made or within 14 days of the date that the written reasons (if any) were sent to the parties; and

(c)set out why a review of the decision is necessary.

(3) If the First-tier Tribunal considers that the application is wholly without merit, the First-tier Tribunal must refuse the application and inform the parties of the reasons for refusal.

(4) Except where paragraph (3) applies, the First-tier Tribunal must notify the parties in writing—

(a)setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing; and

(b)may at the discretion of the First-tier Tribunal, set out the First-tier Tribunal's provisional views on the application.

(5) In accordance with rule 18, the decision may be reviewed without a hearing.

(6) Where practicable, the review must be undertaken by one or more of the members of the First-tier Tribunal who made the decision to which the review relates.

(7) Where the First-tier Tribunal proposes to review a decision at its own instance, it must inform the parties of the reasons why the decision is being reviewed and the decision will be reviewed in accordance with paragraph (4) (as if an application had been made and not refused).

(8) A review by the First-tier Tribunal in terms of paragraph (1) does not affect the time limit of 30 days in regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016(2) for making an application for permission to appeal.

9. The First-tier Tribunal considers that the Homeowner's email on 2 May 204 should be treated as a review request. The review was made in writing. It was not copied to the other parties the tribunal has sent a copy to the other party. The request was not made within 14 days of the date on which the decision was made. The Property Factor has objected to the review being allowed as it is outwith the 14-day period. The tribunal finds that the review request is outwith the 14-day period. We understand that the Homeowner has experienced difficult personal circumstances. We consider that the request is sent just outside the 14-day period. Given the terms of the review request, we are prepared to undertake the review. We are entitled to do so at our own instance where we consider it is in the interests of justice to do so.

10. We consider that the request sets out why the review of the decision is necessary.

11. The tribunal does not require that a further hearing is required to determine the review. We have before us the decision, the review request and the further comments from both parties to the direction of 20 June 2024.

REVIEW ISSUE 1

12. Paragraph 74 of the tribunal's decision is as follows: - *It was put to us that the Factor had also erred in billing for the common parts and had billed each block of flats separately rather than the whole development excluding the Lauriston Street Block. We have considered the terms of the Deed of Conditions; we do not agree with the Homeowner on this point. We*

considered the definition of Block of Flats and Clause Third "maintenance of common parts". Our reading of this Clause is that each Block of Flats would be separately billed for work to the common parts of that block, and not that all blocks would pay collectively.

13. The homeowner asks for the tribunal's detailed reasoning behind their reading of Clause Third *'that each block of flats would be billed separately for the work to the common parts of that block, and not that all blocks would pay collectively. This has been the subject of debate before and in my mind never satisfactorily answered. The tribunal response seems definitive and therefore the reasoning behind it would help me fully understand it, which up until now has not been so."*

14. In response, the tribunal would advise as follows: The tribunal considered the Deed of Conditions by Tulloch Homes (Tollcross) Limited re: Princes Court, Tollcross, Edinburgh registered in the General Register of Scotland for the Country of Midlothian 6 November 1998.

15. The preamble states that they are about to erect "*blocks of flatted dwellinghouses"*

16. Clause First then sets out definitions.

"Block of Flats" is defined as follows: - means the building, containing Flatted Dwellinghouses the solum of which is owned jointly by the Proprietors of the Flatted Dwellinghouses within the Block of Flats but excluding, for the avoidance of doubt, the Lauriston Street Block.

17. We consider that this refers to the *building* singular, not the *buildings* containing flatted dwellinghouses. We have given the word it's plain meaning in assessing this matter.

"Common Parts" is defined in relation to the Block of Flats means those parts and pertinents of the Block of Flats which do not pertain to any Flatted Dwellinghouse including without prejudice to the foregoing, (i) the <u>solum</u> on which the Block of Flats is erected; the foundations, all structural parts, outside walls, gables, roof and roof space and hatch or

hatches leading thereto and any chimney vents and stalks of the Block of Flats and any party or internal division walls between any Flatted Dwwellinghouse(s) and any of the other Common Parts, the structure and means of support of the whole Block of Flats …"

18. Again, the reference here is to singular matters, for example the solum on which the Block of Flats *is* erected. We have given the word its plain and usual meaning.

19. As the tribunal reads the deed of conditions, it appears to us that "Block of Flats" is singular and relates to each block of flats in the Development (excluding the Lauriston Street Block).

20. There is an index at the end of the Deed of Conditions, Clause Third appears to deal with Common Parts Ownership. Clause Fourth appears to us to be different and relates to more general matters affecting the owners of the Development (but not necessarily the owners of Lauriston Street block).

21. Clause THIRD provides that "*so far as regards each Flatted Dwellinghouse and the Block of Flats of which it forms part: - …"* it then goes on to describe amongst other issues Maintenance of Common Parts.

22. Under reference to *Maintenance of Common Parts* it provides "*Each Flatted Dwellinghouse shall be held by the Proprietor thereof in all time coming under the obligation jointly with the other Proprietors of Flatted Dwellinghouses in the Block of Flats of upholding and maintaining in good order and repair and from time to time renewing and restoring the Common Parts and of cleaning, repainting and decorating the said Common Parts subject to the provisions of sub-clause (1) of Clause FOURTH of this Deed. …"*

23. *Clause FOURTH provides "Colour Scheme and Repairing (1) The Proprietors shall be bound to adhere to a common colour scheme in respect of the exterior parts of the Flatted Dwellinghouses while repainting the said Flatted Dwellinghouses and the Block of Flats …"*

24. The definition section provides a definition for "Proprietor", and it means the owner for the time being of any Flatted Dwellinghouse.

25. As the tribunal reads these clauses, the reference to the *other Proprietors of Flatted Dwellinghouses in the Block of Flats* have to uphold the Common Parts in good order and repair, however, their right to do so is qualified and subject to Clause Fourth where they intend to repaint and decorate, there the *Proprietors* are bound to adhere to a common colour scheme, we consider that that would relate to the whole Development. The tribunal considers that this supports the proposition that the reference to Block of Flats refers to singular blocks of flats. Clause THIRD is specifically qualified when it comes to external painting and all proprietors of "any flatted dwellinghouse" are bound to follow a common colour scheme.

26. Maintenance of Flats in Clause THIRD (5) reserves to each Proprietor of a Flatted Dwellinghouse … a heritable and irredeemable servitude right of access over other Flatted Dwellinghouses in the Block of Flats of which the Flatted Dwellinghouse form's part for the purpose of maintenance, repair, …"

27. The tribunal does not consider that this Clause would make sense unless it referred to a specific block of flats.

28. As the tribunal reads the deed of conditions, we would confirm that we find that each Block of Flats would be billed separately for work to the common parts of that bock and not that all the blocks would pay collectively. We do not therefore uphold this part of the Homeowner's review.

29. We would observe the following two points: -

30. There are parts of the title deeds which lack clarity on this question for example Clause Second and the reference under No Alterations (1) to "the Block of Flats shall be used solely for the purpose of erecting thereon of buildings of Flatted Dwellinghouses …" However,

residing the whole Deed of Conditions, on balance we consider our determination of the meaning of Block of Flats makes sense and is correct.

31. This Tribunal has preferred the position of the Property Factor as set out in paragraph 74 of its decision. The tribunal does not have jurisdiction to determine the meaning of the title deeds where parties are in dispute. Where owners are in dispute over such questions then jurisdiction for such matters lies with the sheriff court or the Lands Tribunal of Scotland. (see Title Conditions (Scotland) Order 2003 (Development Management Scheme) Order 2009/729) We also note that the title deeds make provision for matters in dispute to be referred for arbitration. This tribunal's jurisdiction is set by the statutory provisions of the Property Factors (Scotland) Act 2011.

REVIEW ISSUE 2

32. Accordingly, we intend to make a Property Factor Enforcement Order in the following terms: - a. We will instruct the Property Factor to calculate and reissue statements of account and invoices for 5 years to the date of the Order.

33. The Homeowner seeks a review as this period of 5 years, he considers that this restricted period does not address the periods in question which he raises, i.e. financial years 2010/11 through 2019/2020 for the common area complaints or the 2007/8 through to 2019/20 for the common parts and accounting failures. He says that the proposed order would only address the financial year 2019/2020 as the factor changed their procedure at this point and corrected their procedures such that there are no failings from 2020/21 going forward.

34. The Homeowner does not agree with this time period and asks the tribunal to make the Property Factor recalculate and reissue statements of account and invoices back to 2010 and 2007 failing which 5 years from the Factor being notified that the charging was incorrect. The Homeowner advises that the factor has all the invoices for the 5 years prior to being notified.

35. It is a finding in fact that the Property Factor admitted on 6 April 2020 that they had not ensured that the Lauriston Street Block had been charged their share of the communal area expenses over the years.

36. It was also a finding in fact that there had been discussion between the owners and Factor about what may be due by the Lauriston Street Block for historic common area charges which they had not been asked to pay for. There had been no agreement about what any appropriate amount to be repaid should be.

37. In section 20 of the 2011 Act a property factor enforcement order "is an order requiring the property factor to execute such action as the tribunal considers necessary."

38. The tribunal has found that the Property Factor had failed to issue correct invoices, this was accepted by the Property Factor. The Property Factor has already taken steps to resolve this issue.

39. The Homeowner seeks historic accounts to be recalculated and reissued. He says it is necessary because: He wants the PFEO proposed time period to be from "*5 years prior to the complaint being raised by the Homeowner to Trinity"*. He brought the issue to the Property Factor's attention on 28 February 2020. The Factor accepted that there had been accounting errors and put corrections into effect from 30 April 2020. From that point the accounts were correct. The Homeowner accepts that the period he seeks an order for is out with the prescriptive period and that the Lauriston Street Block would be under no legal obligation to pay outstanding invoices for the period outwith the prescriptive period. He wants the owners of the Lauriston Street Block to be given the opportunity to pay the outstanding invoices. He considers it is important for the residential owners to understand the true scale of the financial mismanagement the Property Factors' have made. Recalculated invoices outwith the prescriptive period would assist in this understanding. The Property Factors have already prepared an account (subject to some further amendment) for this period. He considers it would not involve much work for the Factor to now issue it. It would be a reasonable outcome.

40. The Property Factor considers that the 5-year prescriptive period should apply. They consider that there would be no benefit or purpose to extending the period further than the prescriptive period.

41. The tribunal considers that it is necessary to issue correct accounts for the period of the previous 5 years from the date of the order, as this would provide a basis on which to bring an action for payment if the Homeowner wished to do so. We note that the Homeowner has confirmed that from April 2020 the Factor had issued correct accounts. Accordingly, the Homeowner is not looking for accounts to be reissued from April 2020.

42. Extending the period further than the 5-year prescriptive period, the Tribunal has to be satisfied that that would be necessary. We have considered this matter further taking into account the comments by the parties and our original decision. We note that there has been discussion between the owners and Factor about what may be due by the Lauriston Street Block for historic common area charges which they had not been asked to pay. There has been no agreement about what the appropriate amount should be. We are told that these discussions are still ongoing. We are prepared to accept that it may be helpful to have corrected accounts prepared for a further period as this may assist owners and the Factor in their discussions about any further payments that the Lauriston Street Block may decide to make. We note that the Homeowner asserts that the Property Factor has all the information in order to allow accounts to be prepared.

43. We will amend the PFEO and order that accounts be recalculated and reissued for the period from 2015-2020. We note that the Homeowner is now only seeking reissued accounts from 2015.

REVIEW ISSUE 3

44. The Homeowner requested that the outcome tribunal's decision and PFEO be communicated to the owners by the Property Factor. He considers that this is important and is very easy for the property factor who has electronic communication channels for all the

owners, and by not including this the Homeowner will have to do it, and he considers that this is a labour which could be better handled by the factor.

45. In response to the Direction, the Homeowner advises that a link to the published decision would be appropriate, so long as the notification contains a summary detail as to what the link is about. He also considers that the link should be issued soonest and not delayed until the next meeting or the resident's association.

46. The Property Factor advises that all decisions are available on the Tribunal website. The application was made by the Applicant and does not include any other homeowner.

47. The Tribunal has reviewed its decision and the PPFEO, and the parties' comments. It is prepared to amend the PPFEO to include the further provision that the Property Factor will issue a link to the published tribunal decision in the papers provided to owners prior to the next Residents Association following the decision being published.

48. The reasons why we have made this decision is that there was evidence that the owners in the Development and the Factor were in discussions about possible payment relating to historic errors in the common area charges. There are matters set out in the decision which may be relevant to those discussions about billing of the common parts and common area charges. In addition, it is noted that while the tribunal considers that the common parts should be charged on a block-by-block basis, this question appears to have been the subject of some discussion and debate between owners. Accordingly, we consider that there are issues in the decision which may have relevance to other issues under discussion at the Residents Association. We do not consider that it is necessary to order the Property Factor to issue a summary of the decision, the name of the case should be provided with the link. The application was not made on behalf of other owners, and the purpose of ordering the link to be given is to assist discussion at the next resident's meeting. We consider that as long as the link and name of the case is notified to other owners and that can be done when notifying them of the next meeting and providing the agenda, that would be sufficient to provide notice of this decision.

DECISION

49. The tribunal refuses to uphold Issue 1 of the Homeowner's review request. The tribunal upholds Issues 2 and 3 in part.

50. The tribunal having considered the representations made in response to the PPFEO; now amends the proposed Property Factor Enforcement Order and thereafter issues it in the amended terms.

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.

Melanie Barbour Legal Member and Chair

6 August 2024 Date