



Statement of Decision with Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and Rule 24 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Reference number: FTS/HPC/PF/23/1224

Property at Rowardennan Lodges, Rowardennan, Stirlingshire, G63 0AR (“the Property”)

The Parties:

Mr. Adrian McNally residing at 49, Academy Place, Bathgate, West Lothian, EH48 1AS (“the Homeowner”)

Blythswood Property Management, Munro House, Quarrywood Court, Livingston, EH54 6AX (“the Property Factor”) per their agents Davidson Chalmers Stewart LLP, 12, Hope Street, Edinburgh, EH2 4DB (“the Property Factor’s Agents”)

Tribunal Members

Karen Moore (Chairperson) Carol Jones (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor (i) 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 2012 at Financial Obligations at Section 3.6a and (ii) 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 Financial Obligations at Section 3.2.

The First-tier Tribunal proposed to make a Property Factor Enforcement Order.

Background :

1. By applications received between 2 April 2023 and 6 June 2023 (“the Applications”) the Homeowner applied to the First-tier Tribunal for Scotland

(Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2012 (“the 2012 Code”), the Code of Conduct for Property Factors 2021 (“the 2021 Code”) and had failed to comply with the Property Factor Duties.

2. The first application is an undated and unsigned application form on the First-tier Tribunal standard application form, Form “C1”, indicating that the part of the 2012 Code complained of is Section 3 Financial Obligations and that the Property Factor Duties complained of are protection of homeowners’ funds, clarity and transparency in all counting procedures and ability to make a clear distinction between the homeowners’ funds and a property factor’s fund.
3. The second application is an undated and unsigned application form on the First-tier Tribunal standard application form, Form “C2”, indicating that the part of the 2021 Code complained of is Section 2 Communications and Consultations and that the Property Factor Duties complained of are protection of homeowners’ funds, clarity and transparency in all accounting procedures and ability to make a clear distinction between the homeowners’ funds and a property factor’s fund.
4. The third application is a signed application form dated 18 April 2023 on the First-tier Tribunal standard application form, Form “C1”, indicating that the part of the 2012 Code complained of is Section 3 Financial Obligations and that the Property Factor Duties complained of are protection of homeowners’ funds, clarity and transparency in all accounting procedures and ability to make a clear distinction between the homeowners’ funds and a property factor’s fund.
5. The fourth application is an undated and unsigned application form on the First-tier Tribunal standard application form, Form “C2”, indicating that the parts of the 2021 Code complained of are Section 1 Written Statement of Services and Section 3 Financial Obligations and that the Property Factor Duties complained of are lodge owners are not made aware when there is going to be extraordinary expenditure.
6. As part of the Applications, the Homeowner submitted the following documents:
 - i) copy undated and unsigned letter in the First-tier Tribunal standard form in respect of the 2012 Code to the Property Factor complaining of breaches of Sections 3.3, 3.5 and 3.6 of that Code;
 - ii) copy undated and unsigned letter in the First-tier Tribunal standard form in respect of the 2021 Code to the Property Factor complaining of breaches of OSP2 and Section 3.2 of that Code;

- iii) copy undated and unsigned letter in the First-tier Tribunal standard form in respect of the Property Factor's Duties complaining of failings in respect of repair costs, details of estimates and specification of work proposed, statements showing actual expenditure, overarching standards of practice and financial obligations;
 - iv) copy undated and unsigned letter in the First-tier Tribunal standard form in respect of the Property Factor's Duties complaining of failings in respect of utility float charge, charging for work, debt recovery policy, extraordinary expenditure and management fee;
 - v) Copy of the Property Factor's Written Statement of Services;
 - vi) Copy correspondence between the Parties and
 - vii) Copy SEPA invoice.
7. The Applications were accepted by the tribunal chamber and a Case Management Discussion (CMD) was fixed for 15 September 2023 at 10.00 by telephone conference call. Prior to that CMD, both Parties submitted detailed written representations and further the Homeowner submitted productions. The CMD was postponed to a later date.

Case Management Discussion

8. The CMD took place on 24 November 2023 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Ms. C. Matthews of the Property Factor's Agents. Ms. Hales of the Property Factor was also present on the call.
9. The Tribunal advised the Parties that the purpose of the CMD was to identify if matters were disputed or could be resolved and if a Hearing on evidence is required. The Tribunal advised that the applications have been made in terms of the Section 17 of the Act which requires the Homeowner to give prior notification to the Property Factor. The Tribunal advised that although the Homeowner had lodged letters intimating complaints, the letters did not correspond to the Applications and that the detail of the Applications is not entirely clear.
10. The Tribunal noted the Property Factor's motion that the Applications should be dismissed and refused as they lack specification of the complaints. In respect of a claim by the Homeowner for a refund or repayment of charges. Ms. Matthews submitted that this claim has prescribed and so is time barred.
11. The Tribunal advised the Parties that it considered that, taken at its highest there is a sufficiency in respect of specification and prior notification.
12. The Tribunal adjourned the CMD to a Hearing and issued the following

Direction:

“The Homeowner is directed to: With regard to each Application on Form C1, to specify what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon by the Homeowner before 16 August 2021 with reference to each of the breaches of the specific sections of the 2012 Property Factor Code narrated in that Application;

With regard to each Application on Form C2, to specify what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon by the Homeowner after 16 August 2021 with reference to each of the breaches of the specific sections of the 2021 Property Factor Code narrated in that Application;

With regard to both applications to specify the Property Factor Duties which the Homeowner considers have been breached and to specify what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon in respect of the breaches of these duties;

With regard to the statutory prior notification to the Property Factor, to identify in what way and when the breaches complained of were notified to the Property Factor and

Submit a copy of his title to Chalet 17 which shows the basis of his obligation to make payment of maintenance costs of the surrounding amenity land;

The Homeowner is directed to comply with the above Direction by lodging his responses to the Tribunal and copying to the Property Factor in hard copy no later than TWENTY EIGHT DAYS before the date of the Hearing to be fixed and intimated to the Parties;

The Property Factor is directed to respond to the Homeowner’s compliance with the above Direction by lodging their responses to the Tribunal and copying to the Homeowner in hard copy no later than FOURTEEN DAYS before the date of the Hearing to be fixed and intimated to the Parties;

The Parties are directed to submit all documentary productions relevant to the Applications in accordance with Practice Direction No.3 and the “Guidance to Tribunal Administration and Parties Documentary Evidence”.

With regard to documentary productions already submitted and which are relevant to the Applications, the Parties are directed to re-submit these in accordance with Practice Direction No.3 and the “Guidance to Tribunal Administration and Parties Documentary Evidence”

12. The Parties complied with the Direction and lodged the majority of the evidence as required. The Tribunal noted that the Homeowner had not lodged a full copy of his title deed but took the view that the excerpt lodged was sufficient for the purpose of the Hearing.

Hearing

13. A Hearing was fixed for 15 March 2024 and was postponed.

14. The postponed Hearing took place on 5 July 2024 at 10.00 at the Glasgow Tribunal Centre. The Homeowner was present and was not represented. The Property Factor was not present and was not represented. The Tribunal was satisfied that the Property Factor had been notified on the Hearing date and venue and so proceeded in their absence.

Application Forms and Section 17 of the Act notification.

15. The Tribunal heard from Mr. McNally, the Homeowner, in respect of the Applications and the notification of the complaints to the Property Factor.

16. Following a discussion with the Tribunal with reference to his responses to the Direction and to the response lodged on behalf of the Property Factor, Mr. McNally advised that he wished to proceed with a Form C1 application in respect of a breach of Section 3.6a of the 2012 Code and a Form C2 application in respect of a breach of Section 3.2 of the 2021 Code. He advised that he no longer wished to pursue a complaint in respect of a failure to comply with Property Factor Duties and his complaint of double charging.

17. The Tribunal had regard to the representations lodged on behalf of the Property Factor in response to the Direction and in respect of those parts of Form C1 and Form C2 which Mr. McNally wished to pursue.

18. The Property Factor's position in respect of Form C1 and 3.6a of the 2012 Code was set out as follows: *"Applicant Directive (i) a. The Applicant has identified an alleged breach of section 3.6a of the 2012 Code and has indicated that he does not believe that he received evidence that a separate account has been opened. While the Applicant's position is not accepted by the Respondent, it is accepted that the Applicant has complied with Directive (i)."*

The Tribunal took the view that it had sufficient information to proceed with the Form C1 application and a breach of Section 3.6a of the 2012 Code.

19. The Property Factor's position in respect of Form C2 and 3.2 of the 2021 Code was set out as follows: *"Applicant Directive (ii) a. The Applicant has identified alleged breaches of sections 3.1, 3.2 and 6.9 of the 2021 Code. The*

Applicant has alleged that homeowners have not been informed of major expenses and that owners are due to be refunded. The Respondent submits that these allegations would breach section 3.1 and that no breaches of either section 3.2 or 6.9 have been identified by the Applicant.”

Mr. McNally stated he considered that he had provided sufficient information to prove a breach of the overriding objectives referred to in Section 3.2 of the 2021 Code.

20. The Tribunal had regard to the information before it and took the view that there was sufficient information in respect of Section 17 of the Act to proceed with the Applications.

Code breaches dealt with at the Hearing

21. Accordingly, the two complaints of breaches of Code dealt with by the Tribunal were:

- i) Section 3.6a of the 2012 Code which states: *“In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners.”*

And

- ii) Section 3.2 of the 2021 Code which states: *“The overriding objectives of this section are to ensure property factors: • protect homeowners’ funds; • provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; • make a clear distinction between homeowners’ funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor’s own funds and fee income.”*

Evidence of Mr. McNally

22. Mr. McNally advised that his complaints related to the same matters which began when the Property Factor was appointed in 2015 and has continued since. The matters are the way in which the Property holds funds and conducts its financial business,

23. With regards to holding funds, Mr. McNally stated that the Property Factor has held a fund of £4,000.00, being £100.00 per property in the Rowardennan development of 40 properties, since 2015. He stated that the Property Factor, in its letter to him of 6 June 2023, advised him that this fund is a *“float which is used as float to pay the suppliers of the utilities”* and that the float was held in a non-interest bearing account. In the letter, the Property Factor offered to show to Mr. McNally his *“float amount by going back to the beginning”* and assured him that the float is refundable on the sale of his lodge.

24. Mr. McNally stated that the Property Factor issued quarterly invoices to the lodge homeowners for an advance payment of approximately £400.00 to cover its expenditure. He stated that the Property Factor's accounting year ran from 1 August to 31 July and that the invoices were issued on 1 August, 1 November, 1 February and 1 May each year. He stated that following the year end, the advance payments of approximately £1,600.00 for each lodge was reconciled against the actual expenditure and that usually a total annual reimbursement of around £15,000 was apportioned and paid to the lodge owners. Mr. McNally's position was that, as the lodge owners were paying, and, in fact overpaying, for the Property Factor's expenditure in advance there was no need for a float and that the fund held by the Property Factor was not a float for monthly costs, but was a reserve fund.
25. Mr. McNally stated further that the Property Factor, at times, took an inordinately long time to reimburse the annual overpayments. With reference to the productions lodged, he gave an example of a reimbursement being delayed from July 2021 until February 2022. He stated that the reason which the Property Factor gave was that it was awaiting a SEPA invoice but the reconciliation account showed that the SEPA account had been received in September 2021.
26. With regard to its accounting practices and with reference to the productions, Mr. McNally stated that the Property Factor produced an annual reconciliation account which should be the expenditure listed by invoice and that he also received copies of the invoices. He said he used to receive copies of the invoices direct from the Property Factor because he had asked for them when he was on the owners' committee for the development. More recently, after stepping down from the committee, he has received them from the current committee. He thought that not all owners received copies of the invoices. Again with reference to the productions, Mr. McNally stated that the Property Factor produced a further account showing the funds collected from the owners for the past year against the expenditure for that year and showing the amounts to be reimbursed to the owners.
27. With further reference to the productions and the invoices, Mr. McNally pointed out that some of the invoices were addressed to the Rowardennan Hotel and stated that he had asked the Property Factor to explain why this was the case. As background, Mr. McNally explained that, historically the Rowardennan Hotel and ground on which the lodge development was built had been in the same title, but this has long since been separated and the hotel has been sold. He stated that the septic tank and the utility metering should relate only to the lodges and not to the hotel.

28. With further reference to the invoices and the supporting information which accompanied the Applications, Mr. McNally drew the Tribunal's attention to an email dated 15 December 2022 from Mr. Steven Allison, an owner of four of the lodges and of the amenity land serving the lodges which states:

“Hi Adrian, it has been decided that as the Land Owners we are no longer willing to entertain your frivolous requests to contact the electricity's supplier regarding your quest to have the VAT rate amended. At the last meeting there was unanimous support to not pursue this matter any further, I'm sure you recall this as you were in attendance. I hereby adjure you to dismiss this fruitless task once and for all as you are creating disharmony within the community and taking up a considerable amount of time and resources from Blythswood Property Management that would be better channelled into other aspects of the development. To reiterate, you have no authorisation to contact any supplier's or contractors for any reason whatsoever as you have been doing in past. I trust that this email puts this matter, (which you have kept trundling along for years now), to bed once and for all. Regards Steven Allison Proprietor of Rowardennan Lodge Park”.

29. Mr. McNally explained that prior to receiving this email, he had been in communication with the Property Factor regarding the wording of a letter which he, as a member of the owners' committee, had asked the Property Factor to send to an energy supplier. Following the email, the Property Factor did not send a letter to the energy supplier. With further reference to the Property Factor's letter to him of 6 June 2023, Mr. McNally drew the Tribunal attention to the Property Factor's statement that it invoices quarterly in advance on the instruction of the landowner. Mr. McNally's position was that the landowner has a bullying effect on the Property Factor which influenced and influences the way in which the Property Factor deals with financial matters.

30. Mr. McNally stated that he had no issues with paying in advance and fully understood that the Property Factor should not be out of pocket. However, he considered that the Property Factor's requests for advance payments were excessive and that the Property Factor did not pay sufficient care and attention to its management of the funds which it held both in terms of the Code and the Written Statement of Services. He saw no need for the Property Factor to hold onto the “float” and considered that this should be refunded.

Findings in Fact.

31. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;

- ii) The Property is a chalet or lodge in a holiday home development of 40 chalets or lodges known as “Rowardennan Lodges”
- iii) The land on which the holiday home development is built had formed part of the Rowardennan Hotel;
- iv) The holiday home development benefits from the use of amenity land which is in the ownership of a third party;
- v) The owners of the chalets or lodges pay a fee for this use and for the maintenance of the amenity land;
- vi) The Property Factor has been appointed as land manager and property factor for the amenity land;
- vii) The Property Factor was appointed by the owner of the amenity land;
- viii) The Homeowner pays a management fee to the Property Factor;
- ix) The Property Factor holds a fund of £4,000.00 being £100.00 per chalet or lodge;
- x) The Property Factor issues quarterly invoices to the Homeowner and the other chalet or lodge owners for advance payments of fees and charges which might arise for utility, maintenance and repairs costs in the coming year;
- xi) The Property Factor issues an annual statement of the sums collected in advance reconciled with the actual expenditure for the year;
- xii) Following the annual reconciliation, the Property Factor routinely reimburses the Homeowner and the other chalet or lodge owners in respect of overpayments;
- xiii) The Property Factor has not been out of pocket in respect of fees and charges for utility, maintenance and repairs costs;
- xiv) The Property Factor’s Written Statement of Services does not reflect its routine practices in respect of accounting procedures and in respect of quarterly reconciliations;
- xv) The Property Factor’s Written Statement of Services does not make mention of the fund of £4,000.00 which it holds;
- xvi) The Property Factor’s letter to the Homeowner of 6 June 2023 is incorrect in stating that the fund of £4,000.00 is a “float which is used as float to pay the suppliers of the utilities” as the Property Factor receives advance payments to cover these costs;
- xvii) The fund of £4,000.00 is a reserve fund which ought to be lodged in an interest-bearing account;
- xviii) The fund of £4,000.00 is not lodged in an interest-bearing account;
- xix) The Property Factor has regard to influence exerted by the owner of the amenity land;
- xx) The Property Factor makes payment of accounts addressed to a third party.

Issues for the Tribunal

32. The issues for the Tribunal were: did the Property Factor comply with the 2012 Code at Section 3.6a which states *“In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners”* and did the Property Factor comply with the 2021 Code at Section 3.2 which states *“The overriding objectives of this section are to ensure property factors: • protect homeowners’ funds; • provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; • make a clear distinction between homeowners’ funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor’s own funds and fee income.”*

Decision of the Tribunal with reasons

33. Having made Findings in Fact that the £4,000.00 is reserve fund and that it is not held in an interest bearing account, the Tribunal had no difficulty in finding that the Property Factor had failed to comply with the 2012 Code at Section 3.6a.
34. The Tribunal had regard to the overriding objectives set out in Section 3.2 of the 2021 Code and gave consideration to the representations lodged on behalf of the Property Factor in response to the Direction. The Tribunal accepted that the Homeowner had not explicitly referred the Property Factor to particular overriding objectives but took the view that a competent property factor acting diligently and in accordance with the overriding objectives would be aware that Homeowner’s complaint as notified in his intimation letter and earlier correspondence related to the ways in which the Property Factor dealt with funds, in general, in respect of providing clarity and transparency for homeowners in all accounting procedures and making a clear distinction between homeowners’ funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor’s own funds and fee income. The Homeowner specifically mentioned and criticised the Property Factor’s routine overcharging of advance payments, its delay in reimbursing overpayments and its connection to the landowner. Accordingly, the Tribunal found that the Property Factor had failed to comply with the 2021 Code at Section 3.2 with regard to these particular overriding objectives.
35. The Tribunal accepted the Property Factor’s position that the Homeowner had not notified or proved his case in respect of any other matters.

Property Factor Enforcement Order (PFEO)

36. 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, 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.”

37. The Tribunal’s view is that the Property Factor has not served the Homeowner well in its financial dealings with him. The Property Factor’s habit of routinely overcharging, the delays in reimbursing the Homeowner and the interventions of the third party landowner, strike at the heart of sound financial management and trust and give the Homeowner cause for concern. The Tribunal agrees with the Homeowner that, as the Property Factor is overpaid in advance, there is no reason why it should retain a reserve fund. Therefore, the Tribunal proposes to make a PFEO.

38. 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.”*

39. The Tribunal proposes to make a PFEO to order the Property Factor:

- a) to refund to the Homeowner his share of the reserve fund and in addition to pay to him, from its own funds the sum of £250.00 in lieu of interest and in compensation for the inconvenience which the Property Factor has caused him in regard to this aspect of his complaint and
- b) to send to the utility supplier the letter which it had previously agreed to send, and, before doing so, to consult with the Homeowner to ensure that the letter is worded in a way which satisfies the Homeowner’s concerns .

40. 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.”* 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.

41. The decision is unanimous.

Right of Appeal

42. In terms of Section 46 of the Tribunal (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.

Signed

Karen Moore, Chairperson

25 July 2024