

Housing and Property Chamber

First-tier Tribunal for Scotland



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 17 (4) of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Chamber Ref: FTS/HPC/PF/23/4235

Re: Property at 25 Waterfront Avenue, Edinburgh, EH5 1RT (“the Property”)

Parties:

Mr Daniel Castro, 25 Waterfront Avenue, Edinburgh, EH5 1RT (“the Homeowner”)

Residential Management Group Scotland Limited, Unit 6, 95 Morrison Street, Glasgow (“the Property Factor”)

Tribunal Members:

Fiona Watson (Legal Member)

Frances Wood (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with parts 2 and 3 of the Overarching Standards of Practice and sections 1.1 and 1.5 of the Property Factor Code of Conduct 2021.

Background

1. By application received between 28 November 2023 and 13 December 2023 (“the Application”) the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Code of Conduct for Property Factors (“the Code”) and the Overarching Standards of Practice (“OSP”).

2. The Application comprised the following documents: -
 - (i) application form in the First-tier Tribunal standard application form indicating that the parts of the Code complained of are OSP 2, 3 and 4 and 1.1, 1.2, 1.5, 2.5, 2.6 and 5.1
 - (ii) copy correspondence between the Homeowner and Property Factor;
 - (iii) a copy of Title Sheet MIS115233 which pertains to the overall development title
 - (iv) a copy of the Property Factor's written statements of services (WSoS)

3. On 13 December 2023, a legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion ("CMD") was fixed for 18 March 2024 at 10.00 by telephone conference call.

Case Management Discussion

4. The CMD took place on 18 March 2024 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Ms Piper, and who was accompanied by Ms Tarluci and Ms Harrison, all employees of the Property Factor.

5. 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.

6. The Homeowner submitted that the Property actor has failed to provide a clear and specific statement of services to owners. There has been an ongoing pattern of negligent or purposefully misleading poor communications to owners and the Property Factor has not been honest, open, transparent or fair in their communications and dealings with the owners. There is a dispute regarding who owns the roof over the row of townhouses of which the Property forms part, and whether this is jointly

owned. There is a dispute as to who is responsible for maintenance of the roof and how charges should be apportioned.

7. The Homeowner submitted that he was not entirely sure of the legal position regarding the roof ownership and liability for maintenance and charges. There had been individual work done on one roof but all had paid. He had been told by the Property Factor that the townhouses shared one roof but this could not be the case as the two rows of townhouses were separated by a 7 storey block of flats. The Property Factor has been apportioning charges for any works on the townhouses roofs between all townhouse properties in the development, as opposed to just between the townhouses in the same block.
8. The Homeowner submitted that the guttering on the roof of the row of townhouses of which his Property forms part has never been cleaned by a contractor instructed by the Property Factor. The only gutter or roof cleaning which has been carried out has been instructed and paid for personally by the owners. It was submitted that it is only now at the CMD that explanations have been provided by the Property Factor to questions previously asked regarding the treatment of the roof as being common, and that this shows a lack of transparency and clarity in communications from the Property Factor over time. This was particularly pertinent in respect of the explanation of there being one flat roof because it has been formed with single ply membrane. The owners have requested meetings with the Property Factor and which requests have been ignored. It was submitted that the Written Statement of Services is unclear, and requiring reference separately to Title Deeds and Deed of Conditions means that it is difficult to follow and lacks specification.
9. Ms Piper on behalf of the Property Factor submitted that usually they would expect townhouses in a development to each own and have responsibility for maintaining their own roof as it pertains to each individual property, but because the roof runs the whole length of the row of townhouses and is a single-ply membrane flat roof, then it is classed as one roof which is common to the row of townhouses. It was submitted

that they had made an error in charging costs between the two rows of townhouses when these should only be apportioned between each row insofar as any works carried out relates to that particular row but they also said that all owners in the two rows of townhouses had received the same works. There are 101 properties in total in the development, which includes one row of 18 townhouses at the back (Upper Strand Walk) and one row of 15 townhouses at the front on Waterfront Avenue (of which front row the Property forms part.) There is a 7 storey block of flats which sits between and is joined to the two blocks of townhouses which sit in an L shape.

10. It was submitted that apportionment of roof costs had been made in line with the method of apportionment which had been used as regards the communal insurance policy. It was submitted that the Property Factor considered the roof over the row of townhouses to be commonly owned and reference was made to Rules 10, 11 and 12 of the Deed of Conditions as being the basis of this.
11. It was submitted that the claims made regarding poor communications to homeowners was denied, and that the position as set out in the Property Factor's written response to the application should be referred to.
12. Following a short adjournment, the Tribunal advised that a Hearing would be fixed for evidence to be heard, and which Hearing would take place in-person. The Tribunal issued a Direction requiring both parties to lodge a written submission setting out (i) the legal basis of the ownership of the roof of the Property and the roof of the row of townhouses of which the Property forms part (ii) the legal basis on which the owner of the Property is liable for costs of repairs and maintenance of the roof of the Property and (if applicable) the roof over the row of townhouses and the apportionment of same between owners (iii) and to reference specifically the relevant sections of the Titles Deeds and Deed of Conditions pertaining to the Property to evidence their position, and to do so within 28 days.

The Hearing

13. A Hearing took place in person on 19 July 2024. The Homeowner was present and represented himself. The Property Factor was not represented in person, an email having been received by the Tribunal administration in advance of the Hearing to advise that their representative was unable to attend in person due to injury. Instead, Ms Piper (Regional Manager) and Ms Harrison (Finance Administrator), as employees and representatives of the Property Factor, attended by conference call.
14. The Tribunal noted that whilst the Homeowner had adhered to the Tribunal's Direction, the Property Factor had not done so. The Property Factor indicated that they had understood that they had responded to the Direction in writing, however upon checking, advised that the e-mail did not appear to have been sent to the Tribunal administration.
15. The Tribunal gave the Homeowner the opportunity to consider whether or not he wished to adjourn the Hearing in order for the Property Factor's response to be submitted and for the Homeowner to have time to consider same. Alternatively, the Tribunal indicated that the Hearing could proceed without the response from the Property Factor, which it determined in the interest of fairness could not be permitted to be lodged at this short notice. The Homeowner considered the position and indicated that he wished to proceed with the Hearing and did not wish to adjourn to a further date.

The Homeowner

16. The Homeowner submitted that the WSoS is not set out in a simple, structured way setting out the services which the Property Factor provides to the development. It was submitted that the WSoS is a "boilerplate" document sent out to lots of developments and is not specific to this development, so it is difficult for owners to understand what the Property Factor is contracted to do in the development. It was

submitted that the Property Factor repeatedly acts as though the homeowners are tenants.

17. It was submitted that the Property Factor asks the homeowners to refer to the deeds themselves and that the WSoS itself refers to homeowners checking their deeds. It was submitted that by telling homeowners to look at the deeds to find out information, the Property Factor is not laying out in a simple structured way what they are doing for the homeowners.
18. It was submitted that the Property Factor does not know what they are responsible for i.e. roof cleaning or who maintains the sprinkler system. There are no clear answers from the Property Factor as to who is responsible for roof cleaning and maintenance, and who is responsible for maintenance of the district heating system and that the Property Factor itself don't know where their obligations start and end.
19. It was submitted that the Property Factor doesn't know who should be maintaining the sprinkler system insofar as it is contained within each individual house. It was submitted that the Property Factor had said that they were not sure who was responsible for it and that the insurance policy is communal across the development. Each property has an individual sprinkler system contained within it but it is referred to in the development insurance policy.
20. It was submitted that the Property Factor does not have any effective way of communicating with the homeowners regarding finding answers to their questions.
21. It was submitted that the Property Factor has cleaned a single homeowner's roof and billed all of the townhouse owners for it. The Homeowner submitted that this made no sense.
22. The Homeowner submitted that in relation to Section 2.6 of the Code, it is impossible to know what the additional services are because the homeowners don't know what the normal services are. The homeowners

have no idea if roof cleaning should be consulted on because this is not clear in the WSoS. The WSoS is not simple or clear, and it is not clear what services there are and what the costs and apportionment is. It was submitted that the WSoS should set out in detail all services to be provided to homeowners within the development and that there should not be a schedule of services attached that says that some of those services “may” be provided. There is a lack of clarity in the schedule of services which has led to the issue of who owns the roof of the townhouses and who is obligated to maintain them. The question is are the townhouse roofs communal or privately owned and how should costs be apportioned. It was submitted that these questions also relate to issues in relation to communication with the Property Factor and lack of consultation by them.

23. It was submitted that the Property Factor had conducted cleaning on one roof at 36 Upper Strand Walk and had proceeded to invoice all of the townhouses for that work. This had been discussed at the CMD and it had been agreed that all townhouse owners should not have paid for that work but that this charge has still not been removed from the Homeowner’s account. It was submitted that the Property Factor has still not provided a specific legal basis as to why a single ply membrane roof is relevant. It was submitted that the Property Factor has made no moves to change the apportionment for billing for these kind of services and that the homeowners don’t know whether the Property Factors should be providing these services in the first place.

24. It was submitted that the Property Factor has repeatedly told the homeowners that their house is private and that communal ownership only applies to flats in the development and not houses. The two rows of townhouses are entirely separate buildings.

25. It was submitted that the Property Factor has documentation from their handover from Places for People (the developer) which shows that the roofs require to be cleaned regularly because of the internal guttering and drainage. It was submitted that the homeowners want the roof

cleaned and maintained.

26. It was submitted that either the roofs are privately owned and the Property Factor needs to consult with homeowners on looking after the roofs, or that the Waterfront Avenue roof is a single roof and the Property Factor has been negligent in their responsibilities regarding maintenance of same over the last five years.
27. It was submitted that the design of the roof requires them to be cleaned regularly because the guttering is internal and so they need to keep the drains clear to prevent any damage. The Homeowner submitted that each house has a drain at the front which is individual to their property.
28. The Homeowner submitted that the Property Factor has not been transparent or clear in its tendering process. It was submitted that the Homeowner had regularly asked the Property Factor to provide tendering documentation for the insurance and this was eventually provided after over a year of asking.
29. The Homeowner submitted that he faced the same issue with roofing contractors and that he had wanted to know who was providing the services and why they were chosen, but that the Property Factor has fought against providing that information to him.
30. The Homeowner submitted that in five years, the Property Factor has failed to provide the full insurance policy wording and has persistently only provided a policy overview document, despite being asked on multiple occasions for a copy of the full policy document. This was first asked for in 2019 and has still not been provided by the Property Factor. The Property Factor has sent the wrong document multiple times and it was submitted that this shows a lack of care and a lack of ability to provide easily accessible information to homeowners.
31. It was submitted that there has been one meeting between homeowners and the Property Factor in the six years that the Homeowner has resided

there and in five years of asking for meetings. It was submitted that this was unacceptable.

32. It was submitted that the Property Factor is contracted to act in the best interests of the homeowners and to provide information to them. The Property Factor has not been acting in the Homeowners' best interests. There was finally a meeting between the homeowners and the Property Factor four weeks, and only after speaking to their local MP was this meeting organised. It was submitted that the Property Factor was not communicating in an honest or transparent way. It was submitted that the residents association represents 50% of the homeowners and it has repeatedly asked for meetings and been ignored. It was submitted that it is good practise to meet with the homeowners and that many problems could have been solved years ago if the homeowners could have had meetings with the Property Factor and discuss things with them. The Property Factor has repeatedly emailed individual homeowners on issues, rather than sitting down and meeting everybody to discuss together.

33. The Homeowner submitted that the Property Factor had failed to comply with the code. Firstly, in relation to the WSoS, the Property Factor has repeatedly failed to provide a clear, transparent and open WSoS specific to the development. Secondly, as regards the roof, the Property Factor has interpreted the deeds as the roofs being common but have failed to provide an argument as to the basis of this. Thirdly, there has been a lack of transparency overall in communications by the Property Factor, and this has been exemplified by the failure to provide the insurance policy as requested on a number of occasions, the failure to provide information and clarification on the Property Factor's tendering process, their failure to arrange meetings when requested, and the tone and content of emails issued to homeowners.

34. It was submitted that the process has caused considerable stress and anxiety to the Homeowner and that trying to get straight answers has taken a lot of time and cost to the Homeowner. The Homeowner referred to getting information from the Property Factor as being like "trying to

pull teeth". It was submitted that the Property Factor's clarity and understanding of their own rules is lacking. It was submitted that the Homeowner wants to work with the Property Factor rather than against them. The Homeowner wants the roof cleaned and just wants the Property Factor to do their job. It was submitted that the homeowners employ the Property Factor to manage and maintain the shared parts, and not to interpret deeds without proper consultation or communication. It was submitted that the Homeowner is unhappy with the service given and that the Property Factor has failed to comply with the code.

The Property Factor

35. Ms Piper on behalf of the Property Factor submitted that the WSoS refers to everyday repairs, routine repairs and major works. There is a schedule to the WSoS for the development which provides further details of development works and apportionment of costs.

36. It was submitted that the main issue is regarding the roof and the Property Factor referred to aerial photographs of the roof which had been submitted to the Tribunal. It was submitted that there are two blocks of townhouses, one block being Waterfront Avenue and the other being Upper Strand Walk. It was submitted that there is not a separate drain for each property in Waterfront Avenue as suggested by the Homeowner and that there are continuous gullies. It was submitted that one roof covers each of these Waterfront Avenue townhouses and there are no visible breaks or divisions in that roof which would allow for individual responsibility of homeowners for repairs and maintenance.. If it needs repaired, it is one roof over the whole building and the deeds refer to shared common parts. The Property Factor referred to the written submissions which set out in detail what the roof is made of.

37. The Property Factor submitted that they had made an error regarding the apportionment of charges relating to the works at Upper Strand Walk and that they would credit the accounts for the homeowners at Waterfront Avenue for the charges which had been rendered to them. It was submitted that whilst this had been discussed at the CMD this had

not yet been done. It was submitted that they have an apportionment set up in their system for the insurance policy which is between all owners in the development, and when the property manager set up the invoice for Upper Strand Walk, it was erroneously charged to all of the townhouses in the development, when it should have only been charged to those townhouses relating to that single roof.

38. It was submitted that there are three roofs within the development which sit in a triangle shape, one for the row of townhouses at Waterfront Avenue, one for the row of townhouses at Upper Strand Walk and one for the flats which are contained in a building which sits in between the two townhouse rows. It was submitted that it is unusual for a townhouse to be included in a common policy but that this is provided for in the Deed of Conditions at sections 10 and 11.

39. It was submitted that in relation to the sprinkler system, the Property Factor only deals with communal areas. The sprinklers are contained within each private dwelling and are private to each property, but they're all fed from the mains water. There is a communal district heating system up to the point that it enters each property, at which point the pipes become private to each homeowner insofar as they are internal to that property.

40. The Property Factor submitted that in relation to the insurance documentation, there has been communication with the Homeowner regarding the Property Factor using a broker to obtain the insurance. It was accepted that there had been a request by the Homeowner for the full wording of the policy and it was submitted that this had been provided in November 2023.

41. It was submitted that there had recently been a meeting with the Homeowners and a number of letters sent regarding the grounds maintenance contract, asking owners what works they would like to be put in place. It was submitted that the Property Factor has been communicating with the homeowners on what works need done within

the development and asking for their decisions on that.

42. It was submitted that the Property Factor has answered all of the Homeowner's points, that they have not deliberately misled the Homeowner, and have given the information to the Homeowner which they believe is in the deeds. It was submitted that the Property Factor is sorry if the Homeowner feels that he has not been given answers, but that the Property Factor has not intentionally tried to mislead. The Property Factor has tried to work with what is in the Deed of Conditions and in the WSoS. The Property Factor has tried to provide as much information as they can to the Homeowner.

43. The Property Factor submitted that the row of townhouses at Waterfront Avenue has one shared roof and that this is based on the deeds and information provided by the developer regarding it being a single ply membrane across the whole row. It was submitted that the roof over Upper Strand Walk does have some breaks, it being on a hill, and could be treated differently. It was submitted that if there was damage to a part of the roof over one property, this could cause damage to other properties due to the construction of the roof and the way that the drainage has been designed. The gutters are continuous and they need to clear the whole gully because you can't clear just one part over one townhouse. It was submitted that the roof is common and the whole thing needs to be cleared, not just part thereof. It was submitted that if there is a leak over one property, it could be coming from a part of the roof over another property because water can move laterally, and it is a complicated situation.

44. The Property Factor submitted that they believe that they have not intentionally misled homeowners nor given false information. They have worked as well as they can within the terms of the Deed of Conditions. It was submitted that the WSoS gives all the information needed regarding maintenance and repairs and it sets out a development schedule which contains the Property Factor's contractual obligations. The Property Factor is trying to work within the terms of the Deed of Conditions and for the best of all owners within the development.

Findings in Fact.

45. The Tribunal had regard to the Application and written representations in full, and to the submissions made at the CMD and Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.
46. The Tribunal found the following facts established:
- i) The Parties are as set out in the Application;
 - ii) The Property forms part of a row of townhouses known as Waterfront Avenue, over which row there is one continuous roof and which contains an internal guttering system which runs along the length of the row;
 - iii) The townhouses known as Waterfront Avenue are entirely separate to the row of townhouses known as Upper Strand Walk;
 - iv) The roof which runs over the townhouses known as Upper Strand Walk is entirely separate to the roof over the townhouses known as Waterfront Avenue;
 - v) The Homeowner is not liable for payment of any works carried out to the roof pertaining to those townhouses at Upper Strand Walk and vice versa;
 - vi) The Property Factor has carried out works to the roof at Upper Strand Walk and erroneously apportioned part of those charges against the homeowners at Waterfront Avenue;
 - vii) The Property falls within the definition of a “house” contained within the Deed of Conditions (“DoC”) and which states that “*House*” means *any terraced or detached dwellinghouse with any offices, outhouses or garage, parking areas or other buildings or premises pertaining thereto situated on a Plot*”;
 - viii) “Plot” means “*any heritable property within the Development which is designed to be held in separate ownership and on which a House, whether for sale or rent, or is to be, erected and includes any Parking space and/or garage (if any), private garden ground and fencing which pertains to that House*”
 - ix) The DoC specifies that a “Block” means Block A and/or Block B and

which contain 38 and 30 flats respectively being 5 Waterfront Avenue and 25 Kingsburgh Court and defines the “*Block Common Parts*” as being “*in respect of a Block: the solum on which the Block is erected.....the roof, any rafter or other structure supporting the roof, and any hatchways leading to the roof (If any)....*”;

- x) The Block Common Part does not relate to the owners of a “House” within the Development;
- xi) Rule 11 of Burden 8 of the DoC is headed “*Shared Common Property of Plots*” and states: “*this rule applies to any: building; driveway; path; landscaped area, phone, pipe, conductor and cable and Common Satellite System or aerial fitting and ancillary cabling relative thereto; and shared common part or service, which is owned, or part of which is owned, by the Plot Proprietors of two or more Plots as shared common property but which is not Common Ground.*”
- xii) The roof over the row of townhouses which forms Waterfront Avenue is not broken, staggered or delineated in anyway, and it contains an integral, continuous guttering system which runs the length of the row; the roof and guttering system can accordingly be construed as being a shared common part between the owners of the row of townhouses at Waterfront Avenue.

Decision of the Tribunal with reasons

47. From the Tribunal’s Findings in Fact, the Tribunal found that the Property Factor has failed to comply with sections 1.1 and 1.5 of the 2021 Code and parts 2 and 3 of the OSP.

48. With regard to the specific parts of the Overarching Standards of Practice and the 2021 Code referred to in the Application and the information before it, the Tribunal made the following findings:-

- (i) OSP 2
“*You must be honest, open, transparent and fair in your dealings with homeowners.*” The Tribunal was satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with

this part of the Overarching Standards of Practice. Despite agreeing at the CMD that it had wrongly apportioned charges to the Homeowner for works carried out at Upper Strand Walk and for which works the Homeowner was not liable to pay towards, the Property Factor had still not removed these erroneous charges from the Homeowner's account some four months on. The Tribunal found that the Property Factor had not acted fairly in this regard.

(ii) OSP3

"You must provide information in a clear and easily accessible way."

The Tribunal was satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with this part of the Overarching Standards of Practice. There had been conflicting communications issued by the Property Factor to the Homeowner regarding the question of whether or not the townhouse roofs were common either between the homeowners in each row or between all townhouses owners within the development, and how charges should be apportioned. The Property Factor had previously communicated with the homeowners as regards costs being apportioned between all townhouses in the development, and thereafter communicated with homeowners that costs should only be apportioned between the individual rows of townhouses depending on the type of work carried out. The Tribunal considered that this was unclear and therefore a breach of this part of the Overarching Standards of Practice.

(iii) OSP4

"You must not provide information that is deliberately or negligently misleading or false."

The Tribunal was not satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with this part of the Overarching Standards of Practice. The Tribunal was not satisfied that there was evidence that there had been a deliberate action on the part of the Property Factor to provide information which was misleading or false. The Tribunal was also not satisfied on the basis of the evidence before it that there was

negligence, albeit the Tribunal was satisfied that there appeared to be significant confusion within the Property Factor as an organisation as regards how the townhouse roofs should be classified and how bills should be apportioned.

(iv) 2021 Code at Section 1.1

“A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2011 Act to the First-tier Tribunal for a determination, the First-tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of this Code.” The Tribunal was satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with this part of the Code. The WSoS does set out in a structured way the service levels and arrangements for the development. However, the Tribunal notes that in some areas this is quite unspecific. For example, under Section 3 which details routine maintenance, it states “roof inspections, gutter cleaning etc will be provided, where applicable, specific to your scheme.” There did not appear to thereafter be any further specific information as to whether or not these works were indeed applicable to this particular development. It was unclear to the Tribunal how a homeowner would identify that information from the terms of the WSoS.

(v) 2021 Code at Section 1.2

“A property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners:

- *within 4 weeks of the property factor:-*
 - *agreeing in writing to provide services to them; or*
 - *the date of purchase of a property (the date of settlement) of which they maintain the common parts. If the property factor is not notified of the purchase in advance of the settlement date, the 4 week period is from the date that*

response to requests from homeowners for both routine and emergency repairs and the frequency of property visits (if part of the core service);

(5) the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a 'menu' of services) and how these fees and charges are calculated and notified to homeowners.

C. Financial and Charging Arrangements

(6) the management fee charged by the property factor, including any fee structure and also the property factor's policy for reviewing and increasing or decreasing this management fee;

(7) what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services that each homeowner is responsible for. This is likely to be set out in the title deeds for the property. If management fees are charged at a flat rate rather than as a proportion, then this should be clearly stated;

(8) any arrangements relating to payment by homeowners towards a deposit, float or floating fund, confirming the amount, payment process and repayment policy (at change of ownership or where the service is terminated by homeowners or by the property factor) (see section 3 of the Code: Financial Obligations);

(9) any arrangements for collecting payment from homeowners for sinking or reserve funds, specific projects or cyclical maintenance, confirming amounts and payment process;

(10) the timing and frequency of billing and by what method homeowners will receive their bills;

(11) how the property factor will collect payments, including timescales and methods (clearly stating the payment methods available to homeowners). Any charges relating to late payment must clearly state the period of time after which these charges would be applicable (see Section 4 of the Code: Debt Recovery);

(12) the property factor's debt recovery procedure which must be made available on request (see section 4 of the Code: Debt Recovery).

D. Communication and Consultation

(13) how homeowners can access information, documents and policies/procedures that they may need to understand the operation of the property factor;

(14) procedures and timescales for responding to enquiries and communications received from homeowners in writing and by telephone (including details of the property factor's standard working hours);

(15) the property factor's complaints handling procedure;

(16) the property factor's privacy notice and their registration details with the Information Commissioner's Office's Data Protection Public Register.

E. Declaration of Interest

(17) a declaration of any financial or other interests which the property factor has in the common parts of property and land to be managed or maintained, for example as a homeowner (including where the property factor is an owner or acting as a landlord but not where it is undertaking letting agency work in respect of a property). If no interest is declared, then this must be clearly stated.

F. Information about the 2011 Act and the duties it places on property factors.

(18) this will include the duty to Register, the use of a Property Factor Registered Number and the duty to comply with the Code.

G. How to End the Arrangement

(19) clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code. This information should also state any charges for early termination/administration costs;

(20) clear information that homeowners may (by collective or majority agreement or as set out in their title deeds) terminate or change the service arrangement including signposting to any relevant legislation, for example the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. This information should include any

"cooling off" period or period of notice;

(21) a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared.

G (20) and (21) do not apply to situations where homeowners do not own factored land."

The Tribunal was satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with this part of the Code, insofar as failing to provide clear and specific information as regards how roof repairs, cleaning and general maintenance will be dealt with in the development, taking into account the differing types of properties and how such charges would be apportioned.

(vii) 2021 Code at Section 2.5

"A property factor must provide a homeowner with their contact details, including full postal address with post code, telephone number, contact e-mail address (if they have an e-mail address) and any other relevant mechanism for reporting issues or making enquiries. If it is part of the service agreed with homeowners, a property factor must also provide details of arrangements for dealing with out-of-hours emergencies including how a homeowner can contact out-of-hours contractors."

The Tribunal noted at the Hearing, that the Homeowner indicated that he no longer intended to found on this part of the Code.

(viii) 2021 Code at Section 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.”

The Tribunal was not satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with this part of the Code. The Tribunal was satisfied that this has been satisfactorily covered in the WSoS under major works and emergency repairs.

(ix) 2021 Code at Section 5.1

“A property factor must have, and maintain, an adequate professional indemnity insurance policy, and ensure that it is appropriate for its level of income and type of services offered. This applies to a property factor that is a local authority or housing association unless it is able to arrange equivalent protections through another route. Details of the policy (including name of provider, policy number and summary) or equivalent protections must be made available if requested by a homeowner who wishes to verify the policy is in place.”

The Tribunal was not satisfied on the basis of the evidence before it, that the Property Factor had failed to comply with this part of the Code. The Tribunal notes that this part of the Code requires the Property Factor to provide details of the policy and to include the name of the provider, policy number and a summary. This part of the Code does not require the Property Factor to provide a full policy

document, albeit the Tribunal does not consider that there are reasonable grounds for a Property Factor failing to provide a full insurance policy document where requested by a homeowner. The Tribunal was satisfied on the basis of the evidence of the homeowner that despite numerous requests to the Property Factor for a copy of the full policy document, this was not provided to him. No adequate explanation was provided by the Property Factor in this regard. It was noted that the Homeowner had in fact obtained a copy of the full policy via another source, and therefore had obtained the information he required. However unsatisfactory the Property Factor's position here may be, the Tribunal does not consider that this constituted a breach of this part of the code.

Property Factor Enforcement Order (PFEO)

49. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to comply with sections 1.1 and 1.5 of the 2021 Code and parts 2 and 3 of the OSP, 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”* and the Tribunal proposes to make a PFEO.

50. 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.”*

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

- (i) make reasonable payment to the Homeowner to compensate them for inconvenience, frustration and time spent. There being

no direct evidence of financial loss, the Tribunal considers that a sum of £250.00 is reasonable in all the circumstances;

- (ii) refund all erroneous charges issues to the Homeowner, and to all other homeowners in Waterfront Avenue, insofar as they relate to roof repairs/cleaning to the townhouse roofs in Upper Strand Walk.

52. 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.”*

53. 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.

54. 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.



Legal Member/Chairperson

2 September 2024