



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/23/1724 ("the Application")

Re: 2F1, Chilton, Gracefield Court, Musselburgh, EH21 6LL (“the Property”) (“the Application”).

The Parties:

Mrs. Jane Calder residing at Pyat Shaws Cottage, Longyester, Near Gifford, EH41 4PL (“the Homeowner”) per her representative, Mr. Garry Calder, of the same address.

Charles White Limited, having a place of business at Citypoint, 65 Haymarket Terrace Edinburgh EH12 5HD (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) and David Godfrey (Surveyor and Ordinary Member)

Decision

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

- (i) failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2021 at OSP 2, 4 and 5 and Section 2, Communications and Consultation, at Section 2.1.

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

Background

1. 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 2021 Code of Conduct for Property Factors (“the “2021

Code”). The application comprised the following documents received on 31 May 2023: - (i) undated First-tier Tribunal standard application form, Form “C2” (ii) copy statutory intimation letter to the Property Factor in respect of the 2021 Code dated 11 May 2023, (iii) copy correspondence between the Parties and (iv) a copy of the Property Factor’s Written Statement of Services.

2. The Application complained of the following breaches of the 2021 Code:- OSP at OSP 2,4,5,6,11 and 12 and Section 2, Communications and Consultation at Sections 2.1, 2.6 and 2.7. The Application focuses on the way in which the Property Factor called an annual general meeting (AGM) for 16 June 2022. The Application also complains of a breach of property factor duties in respect of the way in which the Property Factor complied with the title deeds to the Property.
3. A legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion (CMD) was fixed 4 September 2023 at 10.00 by telephone conference call. The CMD dealt with four other applications concerning the same Parties and the same Property.
4. Prior to the CMD, the Property Factor lodged written submissions and stated that they had not breached the 2021 Code.

First CMD

5. The first CMD took place on 4 September 2023 at 10.00 by telephone conference call. Mr. and Mrs. Calder were present on the call. The Property Factor was represented by Ms. R. Rae.
6. The Tribunal explained to the Parties that the purpose of the CMD was to take a broad overview of the Application and that the purpose of the CMD was not to hear evidence or to make a decision on the Application and the other applications. The Tribunal advised the Parties that the Application process was a legal process and, although less formal than court proceedings, the terms of the Act and the Tribunal Rules must be followed and that the Homeowner would need to show in what way the Property Factor had failed to comply with the each of breaches of the 2021 Code and the property factor duties and why the Homeowner considered this to be the case. The Tribunal explained that, although information had been provided in the Application and the other applications, it was not the role of the Tribunal as

adjudicators, to co-relate this information to the failures complained of and that the Homeowner would need to bring this out in evidence at the Hearing.

7. The Tribunal advised that it would proceed to a Hearing of evidence and stated that it would issue a Direction to the Parties in respect of the evidence required.

Direction 1

8. The Tribunal issued the following Direction:

“1. The Homeowners are directed to:

- i) With regard to each of the Applications, to specify what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon by the Homeowners with reference to the breaches of the specific sections of the 2021 Property Factor Code narrated in each Application and to specify why they consider these acts or omissions to be breaches.*
- ii) With regard to those Applications which allege a failure to comply with property factor duties, to specify (a) which property factor duties have not been complied with, (b) what alleged acts or omissions of the Property Factor (individually or cumulatively) are relied upon by the Homeowners with reference to these failures and (c) why they consider these acts or omissions to be failures to comply with the property factor duties.*

This Direction should be complied with no later than 13 October 2023 and should be provided by email or hard copy to the Tribunal and the Property Factor.

- 1. The Property Factor is directed to submit any response to the Homeowners' compliance with the above Direction no later than 3 November 2023 by email or hard copy to the Tribunal and the Property Factor (sic).*
- 2. With regard to documentary evidence on which the Parties intend to rely at a Hearing of evidence, both Parties are directed to have regard to Practice Direction No.3 and the “Guidance to Tribunal Administration and Parties Documentary Evidence”, copies of which have been issued to the Parties, and to submit productions in a hard copy format, paginated (page numbers) and with an indexed inventory (List of contents).*
- 3. With regard to documentary evidence already submitted, if this is to be relied on at a Hearing of evidence, both Parties are directed to re-submit this in accordance with Practice Direction No.3 and the “Guidance to Tribunal*

Administration and Parties Documentary Evidence”.

4. *The Parties are directed that the documentary evidence should be lodged in one bundle for each Party for all Applications.*
5. *The Parties are directed that the bundles of documentary evidence should be lodged by email or hard copy with the Tribunal and the other Party no later than 14 days before the date of the Hearing to be fixed.*
6. *The Parties are advised that a copy of the title sheet for the Property should be lodged by one of them.”*
9. The Homeowner complied with the Direction to an extent. The Property Factor did not submit any further documentation.

First Hearing

10. A Hearing by Webex was fixed for 11 December 2023 at 10.00. The Hearing dealt with four other applications concerning the same Parties and the same Property. The Hearing could not take place due to technical difficulties and, as the Tribunal took the view that Parties did not seem to be prepared, the Tribunal adjourned the proceedings to a further CMD and issued a further Direction. For the sake of completeness, no evidence was heard.

Direction 2

11. The Tribunal re-issued its Direction with amendments to the dates for compliance. Neither Party responded to the re-issued Direction.

Further CMD

12. The CMD took place on 14 March 2024 at 10.00 by Webex, with the Chair taking part by voice call, due to technical difficulties. Again, the CMD dealt with four other applications concerning the same Parties and the same Property.
13. The Homeowner was present and represented by Mr. Calder. The Property Factor was represented by Ms. S. Wilson. It became apparent that the Tribunal may not have had receipt of all the documents. The Tribunal, therefore, adjourned the CMD for the Tribunal administration to ensure that all Parties and the Tribunal members had all of the paperwork.
14. The Tribunal considered Mr. Calder’s position in respect of the documents already lodged and took the view that a further CMD would serve no useful purpose and so adjourned the CMD to a Hearing to be fixed and intimated to

the Parties.

15. Prior to the Hearing, the Homeowner, by email dated 2 August 2024, submitted a written statement, cross-referenced to documents which were also submitted, in response to both Direction 1 and the CMD note which was issued following the CMD of 14 March 2024. The Property Factor did not submit anything further.

Second Hearing

16. The Hearing took place on 15 August 2024 at 10.00 by Webinar. Mrs. Calder, the Homeowner was present and represented by Mr. Calder. The Property Factor was represented by Ms. R. Rae. As before, the Hearing dealt with the four other applications concerning the same Parties and the same Property.

Issues for the Tribunal

17. The issues for the Tribunal were a) did the Property Factor breach the 2021 Code breaches as set out in the Application b) did the Property Factor fail to comply with property factor's duties and c) is the Application competent in respect of the procedure set out in Act?

18. The Tribunal, firstly, had regard to Section 17 of the Act which states “(1)A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed (a)to carry out the property factor's duties, (b)to ensure compliance with the property factor code of conduct as required by section 14(5) (the “section 14 duty”). (2)An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty. (3) No such application may be made unless (a)the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and (b)the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.(4)References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard. (5)In this Act, “property factor's duties” means, in relation to a homeowner (a)duties in relation to the management of the common parts of land owned by the homeowner, or (b)duties in relation to the management or maintenance of land (i)adjoining or neighbouring residential property owned by the homeowner, and (ii)available for use by the homeowner.”

The Tribunal then had regard to the content of the correspondence between the Parties from 13 June 2022, the first letter of complaint, to 11 May 2023, the Homeowner's formal notification letter under Section 17 of the Act and had regard to the complaints raised in the Application form.

The Tribunal noted that the Application form refers to the 2021 Code at OSP 2, 4, 5, 6, 11 and 12, to Section 2, Communications and Consultation at Sections 2.1, 2.6 and 2.7 and to property factor duties.

The notification letter of 11 May 2023 refers to OSP 2, 3, 4, 5, 8 and 11 and Section 2 at 2.1 and 2.7. The notification letter does not mention property factor duties. To comply with the Act, the notification letter and the Application should reflect each other.

As the Application does not refer to OSP 3 and 8 and the notification letter does not refer to OSPs 6 and 12, to Section 2.6 or to property factor duties, the Tribunal was unable to consider a breach of these parts of the 2021 Code and was unable to consider a failure to comply with property factor duties.

For the sake of completeness, the Tribunal considered the breaches of the 2021 Code at OSP 2, 4, 5 and 11 and Sections 2.1 and 2.7 as being the only parts of the Application to have been properly notified and competent in terms of the Act. Therefore, these are the parts of the Application on which the Tribunal made determinations.

Homeowner's Evidence.

19. Mr. Calder confirmed to the Tribunal that the facts of the complaint are as set out in detail in the Homeowner's written submission of 2 August 2024 and the supporting documents.
20. The complaint is that the Property Factor arranged an AGM without the power and authority to do so, and, failed to follow the procedures set out in both the Deed of Conditions affecting the Property and the Property Factor's Written Statement of Services ("WSoS").
21. The Homeowner's position is that the Property Factor issued a newsletter at the beginning of June 2022 which referred, amongst other things, to a Residents' Meeting to be held on 16 June 2022 at 6.30 pm at a venue and with an agenda to be made known at a later date. The newsletter indicated that the purpose of the meeting was "to discuss matters on the development, build relationships & make future plans for the communal areas". A letter from the Property Factor to the Homeowner dated 7 June 2022 and posted second class on that date followed. The Homeowner received the letter on 11 June 2022. The letter was headed "Gracefield Court- Annual General Meeting" and stated that the meeting would be held on 16 June 2022 at 6.30 pm in the Esk Rooms, Ladywell Way, Musselburgh. The letter advised that "decisions can only be made if the meeting is quorate" and stated that a

quorum of eleven proprietors or their mandates was required for a decision making quorum. The letter went on to state that, if proprietors cannot attend “it is very important” that they nominate a proxy or register a vote in advance of the meeting. The letter set out the agenda as “Welcome and Apologies; Regular Meeting Schedule; Cleaning and Gardening; Budget and Any Other Business”. A further letter was issued by the Property Factor on 5 July 2022 which stated that the meeting on 16 June 2022 was not quorate as only six of seventy-two proprietors attended and so no decisions were made. The letter stressed the importance of attending AGMs. A Minute of the meeting of 16 June 2022 accompanied the letter of 5 July 2022. The Minute outlined the agenda items discussed and allocated action points to the Property Factor to carry out.

22. Following the issue of the letter of 5 July 2022 and the Minute of the meeting, the Homeowner and Mr. Calder on her behalf, raised her concerns and her complaint with the Property Factor by letters and emails dated between 13 June 2022 and 30 August 2022. The points raised by the Homeowner were that the Property Factor “forced” owners to attend a meeting without authority to do so, that the newsletter did not explain the meeting was to be a decision making AGM, that insufficient notice of the meeting was given, that the Property Factor knew in advance that there would a low turn-out but proceeded in any event and that the real purpose of the meeting was to “force” owners to change the invoicing to payments in advance. The Homeowner also noted that the Property Factor has not called any further meetings.
23. The Property Factor responded to the Homeowner’s concerns and complaints and maintained that the Property Factor acted in terms of the title conditions and disputed that it acted in its own interests. In its responses, the Property Factor made reference to wording from the title conditions and repeatedly insisted that it had acted in accordance with the title conditions.
24. Mr. Calder for the Homeowner referenced Sections 1.2, 7.8 and 18 of the Property Factor’s WSoS, the Deed of Conditions which affects the Property and the various letters of complaint sent by or on behalf of the Homeowner to the Property Factor. Mr. Calder submitted that the WSoS should be subservient to the Deed of Conditions and so, where there is a disconnection, the Deed of Conditions should prevail. He submitted that the Property Factor appeared to act in its own interests and the business needs of its whole organisation rather than in the interests of homeowners and in accordance with the title conditions of individual developments.

25. In her written submission of 2 August 2024, in addition to breaches of the 2021 Code narrated in the Application and notified in correspondence as discussed in paragraph 18 above, the Homeowner sets out several other breaches of the 2021 Code. As these several other breaches were not notified to the Property Factor and do not form part of the Application, the Tribunal gave no consideration to them.

Property Factor's Evidence.

26. On behalf of the Property Factor, Ms. Rae helpfully advised that the Property Factor did not dispute the factual position of the Homeowner case. Ms Rae disputed strongly that the Property Factor acted without authority and had breached the 2021 Code set out by the Homeowner and the property factor duties.

27. Ms. Rae's stated that the Property Factor's position is that the Property Factor is entitled to call meetings in terms of Clause Nineteenth of the Deed of Conditions. Ms. Rae's position is that, by virtue of its appointment as Property Factor, the Property Factor acts for all owners, and, so fulfils Clause Nineteenth's requirement that eleven owners are needed to call a meeting.

28. Ms. Rae stated that the calling of the meeting had not been part of the Homeowner's original complaint but that, in any event, calling a meeting was the best way to obtain the views of homeowners and was something which the Property Factor could do. She refuted that owners had been "forced" to attend the meeting and stressed that the request to attend was "an invite". Ms. Rae agreed that the Property Factor had not provided a full excerpt of the relevant clauses from the Deed of Conditions and had provided a "snippet". She explained that the reason for this was data protection rules. She advised that sufficient notice of the meeting had been given and that the Property Factor could not be held responsible for delays caused by couriers. She accepted that there is a client portal for the Property which could have been used.

29. With reference to the Property Factor's WSoS, Ms. Rae accepted that the wording at 7.8 which relates to the procedure for AGMs is incorrect as there has not been an Owners' or Residents Association for the Property since around 2019. She accepted that, although the WSoS was updated in 2023 by way of an annexure to the original document, reference to an Owners' Association remained. She maintained that the Property Factor complied with its WSoS.

30. Ms. Rae could not explain why the meeting was referred to as a "Residents' Meeting" in the newsletter and as an "AGM" in the subsequent letter.

Further evidence available to the Tribunal.

31. In addition to the evidence at the Hearing, the Tribunal had the benefit of the Application, the Property Factor's written submission and response with indexed productions dated August 2023, the productions lodged by the Homeowner in October 2023, further documents lodged by the Homeowner in March 2024 and the Homeowner's written submissions and productions dated August 2024.

Property Factor's WSoS.

32. The Tribunal gave consideration to the following parts of the Property Factor's WSoS as relevant to the Application:

"Page 2: Preamble

This written statement sets out the following:

- the authority that Charles White Limited has to act as client relationship managers for your development;*
- details of the core services that Charles White Limited provide specifically for your property;*
- financial and charging arrangements, including payment of bills and debt recovery procedures;*
- communication arrangements, including timescales for responses and details of what options are open to you should you have a complaint; and*
- details of how to change or terminate the service arrangement with Charles White Limited.*

1 Authority to Act

1.1 Charles White Limited (CWL) are the Managing Agents for your development. As Managing Agents, CWL deal with the up keep, maintenance and insurance of the common areas which are co-owned by all of the proprietors within your development.

1.2 The Deed of Conditions (DC) which is your title in co-ownership with the other proprietors within your development sets out rights, responsibilities and obligations on the owners and conveys a delegated authority to the Managing Agent in the management and maintenance of the common areas of the development. CWL must operate at all times in accordance with the terms of the DC. Your development was managed by a company called Safe Hands until October 2003 when the management interests of this company were acquired by CWL. At that point CWL took over all property managing responsibilities for your development. This provides the authority for CWL to act as Managing Agents.

1.3 CWL has additional powers to carry out any necessary or emergency repair works as provided by rule 7.1 of Schedule 1 of the Tenements (Scotland) Act 2004.

1.4 It is important to note that CWL act as agents for the Owners' Association. All contractual or other arrangements are entered into on this basis, CWL are at no time acting as principals. Provided that CWL act within the provision of the DC the Owners' Association will at all times indemnify CWL in respect of their actions.

1.5 CWL have authority only in respect of the common parts of the development and cannot become involved in any other matters.

2 Services Provided

2.1 CWL will carry out the services and perform the duties of the Owners' Association with reasonable skill and diligence in accordance with the principles of good estate management.

2.2 The Owners' Association will be assigned a dedicated, trained and experienced client relationship manager who will be assisted by other members of the team and will be responsible for providing an efficient service. This will include prompt and courteous responses to communications, records of queries in relation to repair works and other significant matters. All correspondence will be in plain English and provided in a timely manner. CWL will also ensure that all procedures comply with relevant legislation.

2.3 Emergency repairs will be attended to as and when the need arises. If you become aware of any matter requiring urgent attention please contact your client relationship manager immediately. Should an emergency arise out of normal working hours or on a public holiday (e.g. severe water leak, serious electrical fault, storm damage to roof, etc) please call 0131 447 8191. In the event of a gas leak, or if you can smell gas please call Scottish Gas Networks (SGN) on 0800 111999.

2.4 A routine inspection of your development will be carried out by a Charles White Ltd representative once every eight weeks.

2.5 In the course of CWL undertaking the routine inspection of your development, we shall where emergency works are identified, instruct the works necessary to mitigate this risk. We shall act based on the following threshold, individual repairs up to the value of £500 exc. VAT, or the aggregate of £500 exc. VAT per client, whichever shall be greater. In exceptional circumstances, works shall be instructed out with this threshold, where the risk is significant and remedial works within the threshold limit would not reduce the risk to an acceptable level. For example, repairs to fire safety system, risk of falling masonry/trees, and water ingress to electrical equipment. Thresholds are per individual repair and in general are on a per block basis for internal repairs or building fabric repairs, or on a development wide basis where related to hard and soft landscaping. For simple defects containable within the threshold a full repair will be instructed, for larger more complicated repairs, interim works to make safe will be undertaken within the threshold, while the full repair is scoped, costed and communicated with clients.

3 Core Services

CWL will provide the following core services routinely for your development:-

3.1 Communal Electricity. CWL will from the owners' funds held in the client account pay for the cost of the common electricity supply serving all common areas, including communal internal and external lighting, access gates and secure entry system.

3.2 Gardening and Landscaping CWL shall arrange for a contractor to provide gardening and landscaping services in order to keep the common areas, including grassed areas and shrub beds, within the development in good order and hard surfaces free from weeds.

3.3 Cleaning of Common Areas (internal) CWL shall arrange for a contractor to provide cleaning services on a regular basis, in order to keep all interior common areas including entrances, halls, landings, stairs and stairwells in a clean and tidy condition.

3.4 Cleaning of Common Areas (external) CWL will arrange for a contractor to sweep parking areas, paved entrances, bin store areas and remove litter from external communal areas.

3.5 Window Cleaning CWL shall arrange for a contractor to regularly and routinely clean the communal windows of the development. 3.6 Security CWL will make and set up appropriate arrangements in respect of maintenance of existing security arrangements within the development.

3.7 Hire of Hall CWL will 1) as so instructed by an owners committee or 2) on behalf of all owners, arrange for the hire of a hall for a meeting of owners or annual general meeting of owners. The cost of the hire will be apportioned to owners.

4 Client Portal

4.1 The Client Portal enables you to benefit from the convenience, security, accessibility of your account 24/7. The benefits include relevant documentation stored securely on-line, quick and straightforward invoice payment, correspondence/invoices delivered electronically. Follow the link to sign up and tick the receive paperless correspondence/invoices <https://my.charleswhite.co.uk/>

5 Managing Development Finances

5.1 please note that Condition 19 of the DC states that each owner is jointly liable along with the other owners within the development for costs incurred by CWL in maintaining and repairing the development.

7.8 Annual General Meetings

CWL will assume that the Owners' Association will fulfil the role of organising all meetings in terms of the DC including the taking of Minutes at any such meetings. CWL can however facilitate such meetings by prior agreement. In the event we are invited to the AGM and receive a request to record and produce minutes, an administration charge of £50 plus vat will be applied and charged to the

development. CWL will attend AGM / Residents Meetings by invitation or other arrangement out with normal working hours, Monday to Thursday only after 5pm.

18. Communication with CWL

18.4 CWL will endeavour to work within the following timescales:

- to return telephone messages within one working day;*
- to acknowledge both electronic and paper correspondence within forty-eight hours;*
- to respond to both electronic and paper correspondence within five working days;*
- to ensure that when you visit our offices you are welcomed within a short time of your arrival;*
- to ensure that you are referred to the appropriate person who will be able to answer your enquiries or at the very least put you in touch with someone who can record compliments, comments and constructive criticism, and use accordingly to review and improve our services.*

18.6 CWL are determined to create a service that not only meets, but also exceeds customer expectation. In order to resolve any anomalies swiftly, CWL have created this customer feedback system. May we invite you to put your concerns in writing to the client relationship manager for the property under management. The client relationship manager will:

- acknowledge your correspondence within forty eight hours and*
- seek to correct any problems to your satisfaction within 28 business days.*

Deed of Conditions affecting the Property

33. The Tribunal had regard to the Deed of Declaration of Conditions by Malcolm Bremner Homes Limited recorded in the G.R.S. (Midlothian) on 13 October 1987 ("the Deed of Conditions") which affects the development of which the Property forms part and to the following clauses, being the clauses which relate to property factoring:

"EIGHTEENTH There shall be appointed a Factor who shall be Gumleys (hereinafter referred to as "the Factor") presently having a place of business at 43 Hanover Street who will be responsible for instructing and supervising the common repairs and maintenance of the said blocks and the whole common items of the said subjects and for apportioning the cost thereof among the several proprietors in accordance with the provisions of these presents. The said Factor shall be appointed by us at any time after completion of any of the flats in the Development.

NINETEENTH After we have ceased to be a proprietor of any of said flats, the proprietors of any eleven of the said flats shall have power to call a meeting of the whole proprietors of said flats to be held at such reasonably convenient time (excepting Saturdays and Sundays and Public Holidays) and place as the convenors

of said meeting may determine and of which time and place of meeting at least seven days notice in writing shall be given by or on behalf of the convenors of said meeting to the other proprietors, and at any meeting so convened any of the proprietors may be represented by a Mandatory appointed by written Mandate to attend, vote and act on behalf of the proprietor or proprietors granting the Mandate. The proprietor or proprietors of any eleven or more flats (there being not less than one representative from each of the eleven blocks) or the Mandatory or Mandatories of such proprietor or proprietors shall be a quorum and the proprietors present or their Mandatories shall be entitled to one vote for each flat owned by him or his principal; Declaring that in the event of any of the said flats being owned by two or more persons, only one of such owners shall be entitled to vote and in no case may more than one vote be allowed in respect of a single dwellinghouse; and it shall be competent at any such meeting by a majority of the votes of those presents (said votes to be computed as aforesaid) (Primo) to order to be executed any common or mutual operations, maintenance and repairs, decoration et cetera to the said common property or any parts common or mutual to the flats and/or carparking spaces or bin stores); (Secundo) to make any regulations in conformity with these presents which may be considered necessary with regard to the preservation, cleaning, use or enjoyment of the said common property; (Tertio) to delegate to the Factor appointed as aforesaid full right, power and authority to take charge of all matters pertaining to the maintenance and preservation of the common property, both internal and external and the employment of labour thereon, as if said right, power and authority could be exercised by a majority vote at such a meeting; (Quarto) to instruct the collection by the Factor of the annual maintenance charge aftermentioned from each proprietor and the accounting by the Factor for his intromissions therewith; (Quinto) to instruct the employment by the Factor of a Gardener or Gardeners and other staff as required for the maintenance and preservation of the common property; (Sexto) to determine the amount of the annual maintenance charges from time to time; DECLARING THAT the said Factor shall, unless otherwise determined by a meeting of proprietors, be entitled during the continuous of his employment, to exercise the whole rights and powers which may competently be exercised at or by a meeting of the proprietors and others convened as aforesaid; DECLARING THAT all expenses and charges incurred for any work undertaken or services provided in terms or in furtherance of the provisions hereincontained and the remuneration of the Factor shall be payable by the proprietors of the said flats whether consentors thereto or not in the proportions as hereinbefore detailed in the same way as if their consent had been obtained and in the event of non payment within one calendar month, the Factor shall be entitled to sue for recovery of the same in his own name together with all expenses incurred by him. In the event of failure to recover the same and/or the expense of any action then any such sums will fall to be paid by the other proprietors in the same Block as the defaulting Proprietor or by the other proprietors of all the dwellinghouses erected on the said area of ground as the Factor in his absolute discretion shall determine.

TWENTIETH Each flat shall be burdened with the real lien and burden of an initial float of £100 and thereafter by such other sum by way of maintenance charge as may be determined in accordance with CLAUSE NINETEENTH hereof but in which event will always be sufficient to maintain a float of £100 in respect of each flat, said sum to be payable half yearly in advance at Whitsunday and Martinmas each year to the Factor appointed as aforesaid and to be applied by the Factor in his accounting for his intromissions to the several proprietors of the said flats towards the indebtedness of each proprietor for his proportion of the whole expenses of maintenance and preservation of the common property, including the factorial remuneration and wages incurred by the Factor for and on behalf of said proprietors; in the event of said expenses of maintenance, wages and factorial remuneration being in excess of the total maintenance charge paid to the Factor as aforesaid, the Factor will be entitled to levy immediately against each proprietor his proportionate share of the excess calculated as aforesaid; in the event of the total of said maintenance charges per flat exceeding the said expenses of maintenance, wages and factorial remuneration, calculated as aforesaid, for each year the balance of said maintenance charges in the hands of the Factor shall be retained by him towards the following year's expenses; DECLARING THAT the Factor shall, if requested, within one month of Whitsunday in each year make available to a meeting of proprietors convened as aforesaid a full Statement of Account of his intromissions validly vouched and failing such request shall make such Statement and Vouchers available in his place of business to any proprietor wishing to have sight thereof or to his appointed Agent.”

Findings in Fact.

34. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;
- ii) The Property Factor's WSoS relates specifically to the development known as Gracefield Court and of which the Property forms part;
- iii) There is no Owners' Association at the development;
- iv) The WSoS is erroneous in respect of references to an Owners' Association;
- v) The WSoS does not contain specific provisions or powers in respect of the Property Factor calling meetings;
- vi) Deed of Declaration of Conditions by Malcolm Bremner Homes Limited recorded in the G.R.S. (Midlothian) on 13 October 1987 ("the Deed of Conditions") affects the Property;
- vii) The WSoS makes reference to Clause 19 of the D of C in its WSoS;
- viii) Clauses Eighteenth, Nineteenth and Twentieth of the D of C relate to property factoring;
- ix) The Deed of Conditions does not contain specific provisions or

- powers in respect of the Property Factor calling meetings;
- x) The Deed of Conditions appoints a specific body, Gumleys, as factor;
 - xi) The Deed of Conditions gives powers to Gumleys, as factor;
 - xii) The Deed of Conditions does not give powers to any other body as factor;
 - xiii) The Deed of Conditions does not give powers to the Property Factor;
 - xiv) The Property Factor issued a newsletter to the Homeowner in or around 3 June 2022;
 - xv) The newsletter proposed a meeting of residents “to discuss matters on the development, build relationships & make future plans for the communal areas”;
 - xvi) The Property Factor sent a letter to the Homeowner dated 7 June 2022;
 - xvii) The letter was headed “Gracefield Court- Annual General Meeting” and contained details of where and when the AGM would take place;
 - xviii) The letter was received by the Homeowner on 11 June 2022;
 - xix) The letter advised that “decisions can only be made if the meeting is quorate” and stated that “a quorum of eleven proprietors” or their mandates was required for a decision making quorum;
 - xx) The letter set out the meeting agenda as “Welcome and Apologies; Regular Meeting Schedule; Cleaning and Gardening; Budget and Any Other Business”;
 - xxi) The Property Factor issued a further letter to the Homeowner on 5 July 2022 which stated that the meeting on 16 June 2022 was not quorate;
 - xxii) The letter of 5 July 2022 stressed the importance of attending AGMs;
 - xxiii) A Minute of the meeting of 16 June 2022 accompanied the letter of 5 July 2022;
 - xxiv) The Minute outlined the agenda items discussed and allocated action points to the Property Factor;
 - xxv) The Property Factor has not held any further meetings at the development;
 - xxvi) The Homeowner’s concerns in respect of the calling of the meeting were raised in an email of 13 June 2022;
 - xxvii) The Property Factor responded with two emails on 13 June 2022;
 - xxviii) A follow –up email was sent on behalf of the Homeowner on 14 June 2022 and was responded to by the Property Factor on 15 June 2022;
 - xxix) A formal detailed complaint was sent on behalf of the Homeowner on 15 July 2022 and was responded to by the Property Factor on 11 August 2022;
 - xxx) A further letter was sent on behalf of the Homeowner on 15 August 2022, was responded to by the Property Factor on 16 August 2022,

advising that a more full response would be issued and a full response was issued by the Property Factor on 30 August 2022;

- xxxi) The Property Factor's correspondence to the Homeowner's letters of complaint maintained that the Property Factor had acted in accordance with the Deed of Conditions;
- xxxii) The Property Factor misquoted or quoted inaccurately from the Deed of Conditions in its correspondence to the Homeowner and her representative;
- xxxiii) The Property Factor issued a final letter closing its complaints' procedure on 29 March 2023;
- xxxiv) The Property Factor has a portal as a communication tool;
- xxxv) The Property Factor levied a charge for the hire of the venue for the meeting of 16 June 2022.

Decision of the Tribunal and Reasons for the Decision.

35. In reaching its decision the Tribunal noted that the facts of the complaint were not disputed and that the dispute centred on the way in which the Property Factor had acted in line with its WSoS and the Deed of Conditions. The Tribunal's view is that it is these documents which set out the scope and the limitations of how the Property Factor should carry out and conduct its business and it is these documents on which the Property Factor is entitled to rely when acting on behalf of the owners of Gracefield Court, of which the Homeowner is one. Therefore, the Tribunal paid particular attention to the wording of these documents.

36. The WSoS sets out the Property Factor's authority as deriving from its acquisition of Safe Hands. The WSoS does not set out any of the contractual or other terms of Safe Hands' appointment or the extent of Safe Hands' powers. The WSoS makes one reference to the calling of meetings at Section 7.8 which states that the Property Factor "*will assume that the Owners' Association will fulfil the role of organising all meetings*" in terms of the Deed of Conditions. Section 7.8 goes on to provide that the Property Factor can "*facilitate such meetings by prior agreement*" and to confirm that the Property Factor "*will attend AGM / Residents Meetings by invitation or other arrangement*". Accordingly, the WSoS does not give the Property Factor power to call meetings.

37. Section 1.2 of the WSoS states "*CWL must operate at all times in accordance with the terms of the DC*", DC being the Deed of Conditions. However, the Deed of Conditions does not give the Property Factor power to call meetings. The Deed of Conditions sets out that this power is vested in the owners alone.

38. The Deed of Conditions at Clause Eighteenth states “*there shall be appointed a Factor who shall be Gumleys (hereinafter referred to as “the Factor”) who will be responsible for instructing and supervising the common repairs and maintenance of the said blocks and the whole common items of the said subjects*” (emphasis added). The words “shall be” are definite and specific and refer to Gumleys. The Deed of Conditions places the obligation for common repairs on Gumleys.

39. The Deed of Conditions at Clause Nineteenth states “*the proprietors of any eleven of the said flats shall have power to call a meeting of the whole proprietors of said flats*”. The Deed of Conditions does not go on to confer this power to Gumleys as Factor. Clause Nineteenth sets out a wide scope of decision making at meetings, none of which refer to the appointment of an alternative property factor.

40. With regard to “the Factor”, Clause Nineteenth states “*the said Factor shall, unless otherwise determined by a meeting of proprietors, be entitled during the continuous of his employment, to exercise the whole rights and powers which may competently be exercised at or by a meeting of the proprietors and others convened as aforesaid*” (emphasis added) and Nineteenth goes onto make reference to “the Factor”. The Deed of Conditions at Clause Twentieth deals with remuneration of the Factor and refers to “*the Factor appointed as aforesaid*” and goes on to make reference to “the Factor”.

41. Whether intentional or not, the Deed of Conditions does not make provision for any party other than Gumleys to be appointed and act as property factor.

42. The Tribunal’s view is that the wording of the Deed of Conditions does not negate the Property Factor’s appointment as they clearly act in that capacity nor does it negate the Property Factor being able to call meetings as a consultation tool in the normal course of its business. The wording does, however, negate the Property Factor’s ability to act in terms of and rely on the Deed of Conditions.

43. The Tribunal then gave consideration to each of the complaints.

2021 Code

OSP2. You must be honest, open, transparent and fair in your dealings with homeowners.

44. The Tribunal noted that the Property Factor’s position throughout and in its correspondence with the Homeowner is that it acted in terms of the Deed of

Conditions in calling the meeting. Having found in fact that the Property Factor does not have a power to call a meeting in terms of the Deed of Conditions, this is clearly an erroneous position and so cannot be held to be in line with this part of the 2021 Code.

45. The Tribunal noted Ms. Rae's submission that, by virtue of its appointment as Property Factor, the Property Factor could call meetings on behalf of the owners and could assume the role of the eleven owners as set out in the Deed of Conditions. The Tribunal found this to be an untenable position. Neither the WSoS, the newsletter nor the letter calling the meeting give any indication that this is the way in which the Property Factor was acting. None of the subsequent correspondence with the Homeowner mentions this approach. The Tribunal noted that the Property Factor took the view that the meeting of 16 June 2022 was inquorate. If the Property Factor's view was that it assumed the role of owners in calling a meeting, the Property Factor clearly reversed this view when it came to holding the meeting.

46. The Tribunal finds that the Property Factor's actions have not been "*honest, open, transparent and fair*" as the Property Factor's written correspondence has not provided the Homeowner with full and accurate information. By referring to "snippets" of the Deed of Conditions, the Property Factor did not set out a comprehensive narration of the Deed of Conditions and so did not treat the Homeowner honestly or fairly.

47. The Tribunal found that the Property Factor did not comply with this part of the 2021 Code.

OSP4. You must not provide information that is deliberately or negligently misleading or false.

48. As set out in detail in paragraphs 45 to 48 above, the Tribunal's view is that the Property Factor has been disingenuous in its dealings with the Homeowner. The Property Factor's decision to refer to "snippets" of the Deed of Conditions misled the Homeowner in respect of the procedure for calling meetings. The Property Factor's failure to disclose the full wording of the Deed of Conditions at Clauses Eighteenth, Nineteenth and Twentieth, was deliberately misleading in respect of the Property Factor's powers.

49. The Property Factor's WSoS at Section 7.8 is erroneous and its statement at 1.2 that "*The Deed of Conditions (DC) ... conveys a delegated authority to the Managing Agent in the management and maintenance of the common areas of the development*" is wholly incorrect as the Deed of Conditions give no such delegation. This is a deliberate falsehood, or at best, a negligent misinterpretation of the Deed of Conditions.

50. The Tribunal noted that the wording in the newsletter and the meeting invite letter of 7 June 2022 differed significantly in respect of the purpose of the meeting and that it was not clear what the true purpose of the meeting was. The Property Factor has a portal for communication and has email addresses for owners, the Homeowner, in particular, and chose not to use these. By doing so the Property Factor limited accessibility to the notice of the meeting. Even if the Property Factor, as it claimed, was following the Deed of Conditions, the Property Factor issued the notice of the meeting by second class post on 7 June 2022 and should have anticipated that the notice would not be received before 9 June 2022 at the earliest. The Property Factor appears to have taken the view that only seven days' notice should be given and not "*at least seven days*". This is a misleading way of providing information and a negligent misinterpretation of the Deed of Conditions.

51. The Tribunal found that the Property Factor did not comply with this part of the 2021 Code

OSP5. You must apply your policies consistently and reasonably.

52. The Tribunal did not hear any specific evidence in this respect and so found that the Property Factor did not fail to comply with this part of the Code.

53. The WSoS is erroneous in respect of references to the Deed of Conditions and the Property Factor's actions do not align with the terms of the WSoS and so the Property Factor's staff do not appear to know how to apply the WSoS. No care has been taken to ensure that the Property Factor is acting correctly and properly.

54. As a senior employee, Ms. Rae's view that the Property Factor assumes the role of owners by virtue of its appointment alone is concerning as it shows a grave misconception of the principles of agency and the interpretation of legal documents.

55. The Tribunal found that the Property Factor did not comply with this part of the 2021 Code

OSP11. You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

56. The WSoS sets out response times as Sections 18.4, 18.5 and 18.6. The initial acknowledgement target response time is within a day to forty eight hours and to respond within five days. The complaints process aims to

respond between forty eight hours and twenty eight business days. The Homeowner's complaint of 15 July 2022 and was responded to on 11 August 2022 with a full response given on 30 August 2022 and so is line with the stated times. The final letter closing the complaints' procedure was not issued until 29 March 2023. Although this is outwith the target times, it is not part of active ongoing correspondence and so the Tribunal did not treat it as subject to these targets.

57. The Tribunal found that the Property Factor did not fail to comply with this part of the 2021 Code.

2.1 Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.

58. Again, the Tribunal's views and findings as set out in paragraphs 45 to 51 above evidence that the Property Factor's communication with the Homeowner has been inadequate. The Property Factor's approach in calling the meeting of 16 June 2022 is confusing and does not reflect appropriate consultation. The WSoS is erroneous and does not set out clearly or accurately what the Homeowner can expect of the Property Factor. The Property Factor's actions do not reflect the process set out in the WSoS.

59. The Tribunal found that the Property Factor did not fully comply with this part of the 2021 Code

60. 2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall, a property factor should aim to deal with enquiries and complaints as quickly and 15 as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale. This section of the 2021 Code is broadly similar to OSP 11. Having found that the Property Factor did not breach OSP11 of the Code, the Tribunal is satisfied that the Property Factor did not breach this part of the 2021 Code

Property Factor Enforcement Order (PFEO)

61. 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.”

62. The Tribunal’s view is that although the Property Factor fell foul of the Code, the incident itself was singular, albeit compounded by the Property Factor’s intransigent handling of the complaint which ensued. The Tribunal noted that the cost of the venue for the meeting attributed to the Homeowner is minimal at £2.63, although the time and effort which the Homeowner and her representative had to expend to pursue the Property Factor are considerable.

63. The Tribunal noted that the Homeowner seeks the following outcomes:

- Associated costs to be removed from her account;
- The Property Factor to commit to learn from their mistakes;
- The Property Factor to write to the development owners in respect of the Tribunal’s decision;
- A written apology and
- Compensation for time, effort and distress.

64. The Tribunal agrees with the broad principles of these outcomes and agrees that the Homeowner should be refunded associated costs and compensated for time and effort. The Tribunal did not hear evidence in respect of distress. The Tribunal considers £150.00 to be reasonable in respect of compensation.

65. The Tribunal considers that it can address the other outcomes sought by the Homeowner by instructing the Property Factor to issue an updated WSoS and to issue procedures or protocols for both calling and holding meetings and the ways in it will carry out its functions and duties bespoke to for Gracefield Court.

66. Section 19(2)(a) of the Act states that before making a PFEO, the Tribunal must give Notice to the Parties and must give the Parties an opportunity to make representations. Therefore, in accordance with Section 19(2)(a) of the Act, the Tribunal issues separate Notice to the Parties.

67. This decision is unanimous.

Right of Appeal

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

16 September 2024