



**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/23/2339 ("the Application")

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

**The Parties:**

Mr. Garry Calder and Mrs. Jane Calder residing at Pyat Shaws Cottage, Longyester, Near Gifford, EH41 4PL (“the Homeowners”)

Charles White Limited, having a place of business at 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 6 and Section 6, Carrying out repairs and maintenance at 6.6

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 five determinations that the Property Factor had failed to comply with the 2021 Code of Conduct for Property Factors (“the “2021 Code”).

Four of the Applications also complained of failures to comply with property factor duties.

2. The Application comprises the following documents received on 16 July 2023: -  
(i) First-tier Tribunal standard application form, Form "C2", dated 16 July 2023 (ii) copy statutory notification letter to the Property Factor in respect of the 2021 Code dated 17 July 2023, and (iii) a copy of the Property Factor's Written Statement of Services. This Application complains of the following breaches of the 2021 Code:- OSP at OSP 2,4,5,6 and 11, and Section 6 Carrying out repairs and maintenance. The Application complains that the Property Factor did not have authority to instruct the works and the cost of the works are disproportionately high. This Application also complains of a breach of property factor duties in respect of the way in which the Property Factor acted with regard to the repair and in accordance with the Written Statement of Services.
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 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.*
- 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 Direction 1 and the CMD note 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.”*

19. The Tribunal noted that the Homeowner's formal intimation letter under Section 17 is dated 17 July 2023 and that the Application is dated 16 July 2023 and lodged on the same day. The complaints noted in this letter match the complaints in respect of the 2021 Code noted in the Application. On the face of it, this letter does not give the Property Factor sufficient notice in terms of Section 17(3) (a) and (b) of the Act and so the Application would not comply with the Act. The letter does not notify a complaint in respect of property factor duties.

20. The Tribunal then had regard to the background papers which form part of the Application and noted that no correspondence is lodged with the Application which specifically mentions failures to comply with the 2021 Code. There is,

however, correspondence dated around October 2022 and lodged on 2 August 2024 which specifically mentions failures to comply with OSPs 2, 4, 5 and 6 and Section 6.6 of the 2021 Code. There is no notification of property factor duties.

### **Properly notified breaches of the 2021 Code.**

21. The Tribunal, therefore, had:

- a) an Application complaining of the following breaches: OSP at OSP 2, 4, 5, 6 and 11, Section 6 Carrying out repairs and maintenance in its entirety and a failure to comply with the property factor duties;
- b) A notification letter which does not give sufficient notice and does not notify the property factor duties and
- c) Proof of notification of giving sufficient notice of the following breaches: OSPs 2, 4, 5 and 6 and Section 6 Carrying out repairs and maintenance at Section 6.6 but no notification of property factor duties.

22. For the sake of completeness, the Tribunal considered the breaches of the 2021 Code at OSP 2, 4, 5 and 6 and Section 6.6 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.**

23. 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.

24. The complaint is that the Property Factor instructed works to remove items which had been fly-tipped at the development of which the Property forms part. The complaint was that the Property Factor instructed the work without authority to do so, did not tender or obtain quotes for the work, did not investigate who might be responsible for the fly-tipping and the cost was excessive for the work carried out. Further, the Property Factor appointed a contractor who did not have adequate professional certification.

25. The Homeowner's position is that the Property Factor instructed work without approval and consent of any of the owners. The Homeowner became aware of the instruction when it appeared as an entry on the common charges invoice and raised concerns with the Property Factor, who reported that work was instructed following a report of a sofa, bed frames, mattresses and a box of rubbish being dumped at two of the blocks at the development, neither of which was the block in which the Property is situated. The Property Factor advised that the contractor is an "all trades" contractor, that the cost of £360.00 was

within the Property Factor's delegated authority level and that the cost included the council's fee for disposing of the items. The Homeowner did not accept this explanation and challenged the Property Factor further. The Property Factor maintained that it had authority in terms of Section 2.5 of the WSoS.

26. 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 22 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.

27. Mr. Calder for the Homeowner referenced Sections 1.2, 2.5 and 18 of the Property Factor's WSoS, the Deed of Conditions which affects the Property, letters of complaint sent by or on behalf of the Homeowner to the Property Factor together with replies and the invoice from the contractor. Mr. Calder further referred to a letter dated 28 August 2018 from the proprietors of Chilton, the block of flats of which the Property forms part, which authorised Mr. Calder to act as spokesperson on behalf of the owners in dealings with the Property Factor.

#### **Property Factor's Evidence.**

28. 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 had breached the 2021 Code as set out by the Homeowner and the property factor duties.

29. Ms. Rae maintained the Property Factor's position as set out in its Written Submissions of October 2023, that the Property Factor had authority to carry out the repair and that the cost was within the delegated authority limit in the WSoS. She accepted that the Property Factor had not tried to find out who had fly –tipped the items and that she was not aware that the Property Factor could arrange for a local authority uplift which would cost less than a commercial contractor. Ms. Rae explained that the work was treated as work for the whole development as the items had been left on common ground for the whole development.

#### **Further evidence available to the Tribunal.**

30. 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.**

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

*"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.*

*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.*

*2.3 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 £50 exc. VAT per client, which ever shall be greater. In exceptional circumstance, 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.*

### **Mr. Calder's letter dated 28 August 2018**

32. The Tribunal had no evidence in respect of the context of this letter, which on the face of it, appeared to relate to a roof project rather than repairs in general. Therefore, the Tribunal put little weight on it in respect of 2021 Code breaches. However, the Tribunal acknowledged Ms. Rae's offer, made during the course of the evidence, to treat Mr. Calder as a "key contact" as a positive step.

### **Findings in Fact.**

33. 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 Services Provided and Core Services as set out in the WSoS do not contain specific provisions in respect of either the owners or the Property Factor instructing routine repairs;
  - vi) The Services Provided as set out in the WSoS makes reference to emergency repairs identified during routine inspections;
  - vii) The Property Factor's delegated authority level for emergency repairs identified during a routine inspection in 2022 was £250.00 which could be exceeded in exceptional circumstances;
  - viii) The WSoS does not refer to any other financial delegated level;
  - ix) On 29 July 2022, the Property Factor instructed Fitzpatrick Property Services to "attend and remove dumped items" from two blocks at the development;
  - x) Neither of the buildings is one in which the Property is situated;
  - xi) The work was not instructed as an emergency repair or as an emergency repair in exceptional circumstances;
  - xii) On 5 August 2022, Fitzpatrick Property Services issued an invoice for £360.00;
  - xiii) The Property Factor explained its choice of contractor as an all trades contractor who carry out a variety of work;
  - xiv) The Property Factor maintained that Section 2.5 of the WSoS gives authority to instruct the work;

### **Decision of the Tribunal and Reasons for the Decision.**

#### **2021 Code**

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

34. From its Findings in Facts, the Tribunal finds that the Property Factor has misinterpreted and misapplied its WSoS in respect of a repairs procedure and its level of delegated authority.

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

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

36. From its Findings in Facts, the Tribunal finds that the Property Factor has misinterpreted and misapplied its WSoS in respect of a repairs procedure and its level of delegated authority. It appears to the Tribunal that the Property Factor

has made erroneous assumptions, that these errors have been the basis of its correspondence with the Homeowner and so the Property Factor has been negligent in the way in which it has provided information.

37. 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.*

38. There was no evidence in respect of this part of the 2021 Code and so the Tribunal found that there was no failure to comply with this part of the 2021 Code.

*OSP6. You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.*

39. The Tribunal considered the Property Factor's misinterpretation and misapplication of its WSoS and took the view that the Property Factor's staff lack knowledge and training in this respect. The Property Factor appeared to have misunderstood that local authority's policy on bulk uplifts which incurred additional expense and so lacked knowledge in this regard.

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

### **Property Factor Enforcement Order (PFEO)**

41. 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.*"

42. The Tribunal's view is that the Property Factor breaches of the Code are significant as they arise from the Property Factor's misinterpretation of its own WSoS. The Tribunal noted that although the cost of the repair is minimal, the time and effort which the Homeowner and her representative have had to expend to pursue the Property Factor are considerable.

43. 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.

44. 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 £100.00 to be reasonable in respect of compensation.

45. 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 in respect of a repairs.

46. 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.

47. 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

30 September 2024