

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: HPC/PF/23/3768

Flat 7, 4 McEwan Square, Edinburgh, EH3 8EL ("the Property")

Howard Carter, Flat 7, 4 McEwan Square, Edinburgh, EH3 8EL ("The First Applicant")

Wheatley Homes East, Wheatley House, 25 Cochrane Steet, Glasgow ("the Respondent")

Tribunal Members:

Josephine Bonnar (Legal Member) and Sandra Brydon (Ordinary Member)

DECISION

The Tribunal determined that the Respondent has failed to comply with OSP 11, and section 3.2 of the Property Factor Code of Conduct as required by Section 14(5) of the Act. The Respondent has also failed to carry out its property factor duties to a reasonable standard.

The decision of the Tribunal is unanimous.

Background

- 1. The Applicant lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. A related application was submitted under chamber reference HPC/23/3962. The Tribunal determined that the applications should be heard together in terms of Rule 12 of the Tribunal Procedure Rules 2017.**
- 2. The parties were notified that a CMD would take place by telephone conference call on 11 April 2024 at 10am. Mr Carter and Mrs Welsh participated. The Respondent was represented by Ms Aitken and Mr Adams, solicitor. Prior to the CMD all parties lodged written representations and documents.**

Summary of Discussion

3. The Tribunal noted that Mr Carter's application is based on OSP 11 and Section 3.2 of the Code. In addition, the application states that the Respondent has failed to carry out its property factor duties. Mr Carter confirmed that there are two aspects to his complaint. Firstly, that the Respondent has mismanaged the electricity charges in relation to the car park and secondly that historic repair charges have been applied when they should not have been, due to the passage of time. In relation to the electricity charges Mr Carter confirmed that there are several issues – the Respondents lack of awareness of the electricity charges/bills from 2015 until 2021, their failure to secure an acceptable rate from a utility company, recharging the residents for 2021 and 2022 in factoring accounts in 2023, wrong apportionment of electricity charges and charging a management fee during a period that they were mismanaging the development. In relation to the historic repairs, he said that in May 2023, he received a bill from the Respondent which included repairs from 2021 and 2022. The invoice has been lodged – Appendix 9 in his bundle. His complaint is that, when bills are issued so late, it is not possible for homeowners to check or verify the repair.
4. Mr Adams told the Tribunal that the second issue might have been the subject of a complaint that was upheld. Mr Carter said that it had been the subject of a stage 2 complaint that was not upheld. Mrs Welsh advised the Tribunal that she had made a similar complaint, but her complaint was upheld. Mrs Aitken told the Tribunal that the May 2023 account included 12 items. 4 were too old and should not have been included. These were removed in September 2023. In response to questions from the Tribunal she confirmed that she would look again at the May 2023 account in relation to the 2021 repairs which are the subject of the complaint
5. The Tribunal noted that the related application is based on Sections 2.1, 2.3, 2.4, 2.6, 2.7, 3.1, 4.1, 4.9 and 4.11 of the Code. The application also refers to property factor duties although these are not referred to in the notification letter sent to the Respondent before the application was made. Mrs Welsh advised the Tribunal that she sent a copy of her C2 application to the Property Factor in October 2023, prior to submission of the application. This contained full details of the complaints. She had submitted evidence of this to the Tribunal. Mr Adam said that he would need to check if this had been received as he understood that the application was only received when sent to the Respondent by the Tribunal.
6. Mrs Welsh told the Tribunal that in December 2021, the electricity charges went up four-fold. As the homeowners were not invoiced until the summer of 2023, they had no opportunity to speak to the Respondent or challenge the increases. Copies of the electricity bills were only provided after numerous requests by homeowners. In relation to section 2.6, they were not consulted about the bills. They could have been consulted in relation to changing provider or making efficiencies.

7. Ms Aitken said that the Respondent has been re-negotiating with Scottish Power and a new deal has been agreed which will cost £30000 per annum. This will take effect in April 2024, for the previous year. In 2021, Scottish Power sent them all the electricity bills for 2015 onwards. These had not previously been received. They were challenged but the company said that they were due, and the Respondent arranged to pay them as action was threatened. They are still investigating the matter as the bills show some payments having been made but these payments were not made from the Lowther bank account, so they don't currently know who made the payments. Ms Aitken said that a pack is due to be issued to the homeowners regarding the electricity arrangements and a copy of these documents can also be submitted to the Tribunal. In relation to the issue of calculation of the shares of the electricity bills, Ms Aitken said that the Respondent has carried out a check of all the title deeds at the development. This has established that a handful of proprietors do not have rights in relation to the car park and are not liable for a share of the electricity and maintenance. It is a small number and they will require to be refunded. However, these shares will not be passed on to the other residents. The pack that is to be issued will include full details of the sums due, the breakdown and the calculation of shares. Mr Carter said that there are other issues. The Hilton Hotel has a number of spaces and access, but do not appear to pay a share of the maintenance. In addition, some flat owners have sold their space to non-residents. Ms Aitken said that investigations are ongoing into the use of the car park by the Hilton. She said that Stay City own a number of spaces in the car park, and they pay their share of the maintenance and electricity.
8. Ms Welsh told the Tribunal that there is concern among homeowners about money due by former owners and current owners who have refused to pay. No information has been provided about this and the implications for the other residents. Mr Adams said that there are no debt recovery issues affecting the development that will have implications for homeowners and unpaid shares will not be passed on to the other homeowners.
9. In response to further questions from the Tribunal, Ms Aitken said that the Respondent decided that they would only pass on the electricity bills from 2021 onwards to the homeowners. Mrs Welsh raised the issue of the management committees. She said that there is one for block 4 and another for the rest of the development but they are not being consulted. Ms Aitken said that she was unaware that there was a validly constituted management committee and that she would look into the matter.
10. The Tribunal advised the parties that the applications would proceed to an in person hearing and that a direction would be issued for the production of further information and documents. The following factual matters require to be established; -
 - (a) Was the Respondent unaware of the electricity bills for the car park at the development until 2021? If so, why were they unaware and should they have been aware?

- (b) Has the Respondent negotiated a reasonable rate with the utility company for the electricity provision in the car park and why has it taken three years to achieve this?
 - (c) Are the Applicants liable for a share of the electricity charges between 2021 and 2023?
 - (d) Has the Respondent miscalculated the Applicant's shares of the electricity bills since 2021?
 - (e) Are there non-homeowners who are liable to pay a share of the car park maintenance charges who have not been charged and have not contributed?
 - (f) In the account issued in May 2023, has the Respondent charged Mr Carter for repairs carried out in 2021 and 2022 and are they entitled to do so?
 - (g) Did Mr and Mrs Welsh notify the Respondent of their complaints under the Code and property factor duties? What was sent to the Property Factor on 11 October 2023 and delivered on 16 October 2023?
 - (h) Has the Respondent failed to communicate with the Applicants regarding the electricity charges or provide them with information regarding the electricity charges?
 - (i) Has the Respondent failed to respond to complaints and enquiries?
 - (j) Has the Respondent failed to consult with the Applicants in relation to the electricity charges and were they required to do so?
11. The parties were notified that a hearing would take place at George House, Edinburgh on 26 September 2024. Mr Carter and Mrs Welsh attended. The Respondent was represented by Mr Adams, solicitor. Mr Lyon and Ms Aitken also attended and gave evidence. Prior to the hearing both parties lodged submissions and documents in response to the direction.

The Hearing

Preliminary matters

12. At the start of the hearing, Mr Carter confirmed that his complaints are as discussed at the CMD. However, the historic repairs complaint has been resolved although one or two charges have still not been removed from his account. Ms Aitken advised the Tribunal that the remaining historic charges have now been removed from the account and Mr Carter confirmed that he was happy to accept that.
13. The Tribunal asked Mrs Welsh and Mr Adams to clarify the position regarding the complaints which were notified and whether the C2 form had been sent to the Respondent with the letter notifying the Respondent of her complaints. Mrs

Welsh stated that the C2 form was definitely sent to the Respondent with the letter. She was unaware that this was not the usual procedure. She referred to the track and trace report submitted as evidence. Mr Adams said that the Respondent is unable to say what was received. They have been unable to establish whether the letter or the letter and form were received. However, they accept that the track and trace report appears to establish that something was sent and signed for in October 2023. The Tribunal noted that as Mrs Welsh is certain that the form was sent, and as the Respondent is unable to dispute this, it might be reasonable for the Tribunal to accept that Mrs Welsh notified the Respondent of both Code and property factor duties complaints.

14. Mr Carter told the Tribunal that additional charges of £220 suddenly appeared on the factoring statements. Had it been small amounts, they wouldn't have noticed. It took a long time to get copies of the electricity bills but eventually most were provided. These showed payments had been made by the Respondent to the utility company. Mr Carter referred to one of the electricity bills lodged. This bill showed that payments had been made to the account although the Respondent claimed that they had only received the bills in 2023. There was no explanation for the payments and no explanation for the sums being requested from each owner. Mrs Welsh told the Tribunal that the electricity charges had first appeared in 2023. The bills go back to 2015, but the owners were only asked to pay the sums due from 2021 onwards. There had been no previous charges on any invoices for electricity. Mr Carter confirmed that he had not queried the absence of charges for communal electricity. However, the Respondent's invoices were chaotic. He was not asked to pay toward the insurance policy for a while either. Mr Carter said the next issue was the price per unit. For domestic accounts this should be about 25p per unit. They were charged £1 per unit. Mr Carter said that he looked into this. His daughter's block is charged 25p per unit for communal electricity and a government website said that this should be the average rate. He made a complaint about the rate which was not answered.
15. Ms Aitken told the Tribunal that the bills were received in October/November 2022. They started an investigation. The Respondent has a utilities team, and they tried to challenge aspects of the bills, but Scottish Power would not entertain this. Firstly, they challenged the VAT rate which had been applied. They were unsuccessful because of the commercial element in the development. The Finance Team decided that the bills would have to be paid as they were being threatened with court action. Scottish Power relied on the fact that payments had been made to the accounts. These payments had not been authorised. In response to questions from Mr Adams, Mrs Welsh said that she had purchased her property in 2017. Mr Carter said 2016.
16. Mr Lyon said that the Respondent had also tried to challenge the unit rate, but that Scottish Power would not reduce it. However, a better rate has been obtained for 2023/2024 with EDF. In response to questions from the Tribunal, Mr Lyon advised that the majority of properties are owned by letting and investment companies. There are only 90 individual owners. 20 units are owned by a Trust although these are occupied by Wheatley Group tenants. 144

properties are owned by commercial letting companies. Stay City own 49. The Stay City properties are mostly short term lets. Scottish Power would not reduce the unit rate retrospectively and the charges had to be passed on. Mrs Welsh said that the charges for 2015 to 2020 had not been excessive but that the costs had drastically increased in 2021 and 2022. Ms Aitken told the Tribunal that the Respondent had tried to negotiate a lower rate with Scottish Power and looked into other providers before the Tribunal applications had been made. They did not do so only because of the complaints. Mrs Welsh said that the letter issued in September 2023 didn't mention it.

17. Mr Lyons said that he believes that the developer arranged for Scottish Power to be the electricity provider. The Tribunal asked if the development had been tied to this provider for a fixed period. Mr Carter referred to the utility bills which indicate that 30 days notice after 2020 was required. The Tribunal also asked when the development had been finished. Mr Lyon said that construction started in 2010 with the first handover being 2012. The Applicant's block was the final one, handed over in 2017. Ms Aitken confirmed that the unit rate paid from 2021 was higher than the market average.

18. Mr Carter said that the next issue was how the electricity charges were apportioned. The bills were divided according to the number of flats. However, in terms of the title deeds, the bills should be apportioned according to the parking spaces. This has now been addressed. The Respondent has checked the deeds and established that some flats have one space, some have two and there are some with no right to a parking space in the underground car park. However, although this issue has now been resolved, the homeowners are still not clear whether the bills have been correctly apportioned. This is because the car park is not the only area where there is communal electricity. The stairwells, common closes and lifts also have electricity and now some owners are not being charged because they don't have a parking space. Mr Lyon told the Tribunal that the car park has its own electricity meter and the bills refer to the car park. He does not believe the charges for all communal electricity have been aggregated. However, he is certain that there is a separate supply for the internal areas. The Tribunal asked the parties whether the factoring invoices include an entry for other communal electricity charges. Mrs Welsh provided the Tribunal and the Respondent representatives with an invoice from 2023. The Tribunal noted that this did not appear to include communal electricity. Neither Ms Aitken nor Mr Lyon was able to offer an explanation for the absence of electricity charges. Ms Aitken said that she could make enquiries. Mr Lyon said that it is very unlikely that there is only one meter for all the communal electricity, including the car park. The re-negotiations with EDF were just in relation to the car park. Ms Welsh said that she was concerned that some people, such as the Hampton Inns, were not being charged. Mr Lyon said that their legal team has been involved and the charges re-calculated. However, there is nothing in the title deeds about the upper level and they need to establish the legal position.

19. In relation to communication issues, Mr Carter said that there is a 50/50 chance of getting a response to an email. There is a call centre, but he prefers to email. Generally nothing happens until he gets to stage 2 of the complaints process.

He referred to the list of emails he submitted in response to the direction from the Tribunal. He said that it may not be complete as it took some time to go through everything. However, he did not get a response to any on the list. Ms Aitken said that all calls and emails go to the 24 hour call centre and previously were dealt with by general call handlers. A new system was introduced 4 or 6 weeks ago, and calls are now directed to the Lowther team. If they can't answer the enquiry it goes to an agent like John Alexander. The Respondent receives a large number of factoring emails. There is a huge backlog as they did not have enough staff, and the call handlers did not have the knowledge or experience to deal with the enquiries. They are currently working on a new system which should address the problem. This development is particularly complex, and they were not set up or trained to deal with that. In response to questions from the Tribunal Ms Aitken said that the Respondent concedes that the emails listed by both Applicants did not get a response.

20. At the conclusion of the hearing Mr Adams referred to some of the specific breaches of the Code in the applications. He said that section 4.11 is about debt recovery. However, no legal action has been taken against Mr Carter or Mrs Welsh. He also told the Tribunal that although they are entitled to do so, the Respondent has not and will not spread the unpaid charges of any homeowner among the others. Mr Adams asked the Tribunal to take into consideration the complexity of the development and the title deeds and the fact that the Respondent has covered the electricity costs for 2015 to 2020 from their own funds. He referred to the complaint about "improper" payments in terms of section 3.1 and said that there may have been errors, but nothing fraudulent. He said that Mr Carter is seeking a full refund but is not entitled to this as he is liable for his share of the common charges. In addition, the management fee is not just for the car park, but all the other services provided. However, the Tribunal may wish to consider ordering repaying of a proportion of the management fee only. He pointed out that the Respondent has re-credited the accounts with the historic repair charges already.

Findings in Fact

21. The Factoring department of the Respondent were unaware of the electricity bills for the period 2015 to 2022 for the underground car park at the development until 2023.
22. Between 2015 and 2022, the utility company issued invoices for the supply of electricity to the underground car park to the Respondent and payments were made to the account by the Respondent.
23. The unit rate charged by the utility company for 2021 and 2022 was higher than the average market cost and a better rate could have been obtained by the Respondent.
24. The Respondent miscalculated the Applicant's share of the car park electricity and maintenance costs as they apportioned the costs equally among all

homeowners and not according to the provisions of the deed of conditions for the property. The Respondent has reviewed the car park and the title deeds for each property and has corrected this error.

25. The Respondent included repair charges for 2021 and 2022 in an invoice issued to the Applicant in 2023. They have now removed these charges from the account.
26. The Respondent failed to respond to email complaints and enquiries from the Applicant dated 27 May 2023, 3 July 2023, 10 July 2023, 12 July 2023, 12 August 2023, 20 August 2023, 23 August 2023, 28 August 2023 and 25 March 2024.

Reasons for Decision

27. The Tribunal noted that the parties are generally agreed about most of the relevant facts. The Respondent does not dispute that they failed to respond to a large number of email enquiries. They accept that there were payments made to the electricity accounts, although they cannot account for this as the relevant department did not know about the electricity bills. They accept that the unit rate payable in terms of the 2021 and 2022 bills was significantly higher than should have been paid and that the charges were not properly apportioned until recently. The Respondent has recently addressed the issue of the historic repair charges. By doing so, they appear to concede that these should not have been applied to the invoices as the homeowners could not verify them, due to the passage of time.

OSP 11 – You must respond to complaints and enquiries within reasonable timescales and in line with your complaints handling procedure

28. Mr Carter submitted a list of emails. He said that he did not receive a reply to these emails. The Respondent confirmed that this was the case.
29. The Respondent provided an explanation for their failure to respond to the emails. They said that the call center was overwhelmed with calls and emails and that the staff dealing with the enquiries did not have the knowledge or expertise to deal with them. Although this may explain the failure, it does not justify or excuse it. The Respondent should not have undertaken factoring services at development if they did not have the resources and skills to do so. The Tribunal is satisfied that a breach of this section of the Code has been established.

Section 3.2 – The overriding objectives of this section are to ensure property factors – protect homeowners funds; provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; make a clear distinction between homeowners funds, for example a sinking or

reserve find, payment for works in advance or a float or deposit and a property factors own funds and fee income.

30. There is no evidence that either the first or third aspect of this section have been breached. However, the Tribunal is satisfied that the Applicant has established a lack of “clarity and transparency” in the Respondent’s “accounting procedures”. Their failure to comply with this provision appears to be due to a number of factors. These include the complexity of the development and the deed of conditions. However, this cannot justify inaccurate charges in invoices due to incorrect apportionment of the electricity bills. It also does not excuse the absence of information in the invoices about communal electricity for several years. Although not part of the application, recent invoices still appear to have no information about the other electricity charges for stairwells, hallways and lifts. These issues, as well the inclusion of historic repair charges in invoices, left the Applicant confused and unclear as to what he was due to pay and whether the invoices were accurate. The Tribunal is satisfied that the Respondent’s accounting procedures lack clarity and transparency and that a breach of this section has been established.

Property Factor duties.

31. The Tribunal is satisfied that the Respondent has failed to carry out its property factor duties to a reasonable standard. In particular, they failed to do the following

- (a) Establish what services were being provided at the development and ensure that invoices issued to the homeowners covered all relevant common charges and were accurate.
- (b) Ensure that they correctly apportioned the car park electricity costs.
- (c) Ensure that they obtained the most competitive rate for communal electricity that could be arranged.
- (d) Ensure that common repair costs were charged timeously.

32. There are no grounds to reject the Respondent’s explanation that the relevant department was unaware of the electricity bills. The witnesses were very candid about the challenges the Respondent has faced. It appears that the Respondent has undertaken factoring contracts without having the staff, skills and resources to meet their obligations. They have been unable to challenge the utility company in relation to the bills. The bills must have been received by someone within the organization because payments were made. The charges passed on to homeowners were unacceptably high for 2021 and 2022, because they did not negotiate a better rate or change supplier and could not do so retrospectively. They have addressed some of their failings by covering some costs themselves – historic repair costs and the electricity charges from 2015

to 2020. However, this should not have been required and some of the adjustments have only been made because the Applicant (and others) have made complaints. It is concerning that the position regarding the other communal electricity costs is still unclear. However, as this is not a specific complaint in the application, the Tribunal cannot make a determination in relation to it.

Proposed Property Factor Enforcement Order

33. The Applicant asks the Tribunal to order a refund of all electricity charges for the relevant period, a refund of all factoring charges from 2016 onwards and compensation of £1600 (four days at £400 per day). The Tribunal is satisfied that it is appropriate that the Applicant be compensated. He has been put to considerable inconvenience and his endeavors have clearly been time consuming. However, the Tribunal is not persuaded that the proposed daily rate is appropriate. There is no evidence to support it. In the circumstances, the sum of £1000 is proposed. The Tribunal is also not persuaded by the other requests. Although the costs may have been higher than might have been obtained, the electricity charges were due and are evidenced by the bills. The Applicant and the other homeowners benefited from the supply of electricity to the car park and are due to pay their share. Similarly, they cannot expect to have all factoring charges refunded. These charges do not relate only to electricity. They cover the other services provided at the development such as insurance and repairs and the Applicant is liable in terms of the title deeds for his share of these charges. However, the Applicant has undoubtedly received a very poor service from the Respondent, and it is reasonable that they should repay part of the management fee charged. As this also covers services unrelated to the complaints, the Tribunal proposes that the Respondent be ordered to repay 50% of the management fee for 2021, 2022 and 2023.

The Tribunal therefore proposes to make a Property Factor Enforcement Order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Josephine Bonnar, Legal Member and Chair

27 October 2024