Housing and Property Chamber
First-tier Tribunal for Scotland

Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 (1) of the Property Factors (Scotland) Act 2011

Reference number: FTS/HPC/PF/23/1675

Re: Property at 28 Easter Livilands, Stirling, FK7 0BQ ("The Property") ("the Property")

The Parties:

Mr Adam Kindreich, 3 Rua Nossa Senhora do Carmo, Bemposta, 320-024 Almoster AVZ, Portugal ("the Applicant")

James Gibb Residential Factors, 65 Greendyke Street, Glasgow, G1 5PX ("the Respondent")

Tribunal Members:

Mr A. McLaughlin (Legal Member) and Mrs F. Wood. (Ordinary Member)

Background

[1] The Applicant seeks a determination that the Respondent has breached their obligations under *The Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors* ("The Code").

[2] The paragraphs of the Code alleged to have been breached are:

Overarching Standards of Practice- Sections 4, 6 and 11
Communications and Consultation: Sections 2.4 and 2.7
Financial Obligations: Sections 3.5 and 3.6
Debt Recovery- Section 4.10
Insurance- Sections 5.3; 5.5; 5,8; 5.9; and 5.10.

Overview of Claim

[3] The allegations can be categorised as relating to certain principal issues which are said in the Application to result in a breach of the standards referred to. The main issues set out and the relevant paragraphs of the Code alleged to have been breached by each one is as follows:

1. A two-month delay in retuning a factoring float due to the Applicant in the sum of £65.67 (alleged breaches of OSP 6, and paragraphs 2,7 and 3.6)
2. Sending the Applicant an invoice reminder without having sent the original invoice (alleged breach of paragraph 6)
3. A failure to supply the Applicant with insurance statements for the years 2020, 2021 and 2022 and other documentation including copies of invoices requested by the Applicant (alleged breaches of OSP 11 and paragraphs 2.4, 3.5 5.3, 5.5, 5.8.,5.9 and 5.10)
4. A failure adequately to inform the Applicant of measures taken to recover non-payment of fees from certain other properties in the development (alleged breach of paragraphs 4.10)
5. Treating the Applicant's email of 28 April 2023 of his intention to raise these proceedings as "*a complaint*" which the Respondent stated"*must follow our advertised Complaints Procedure*" (alleged breach of OSP 4)

The Hearing

[4] The Application called for a Hearing by video conference, at 10 am on 13 August 2024. The Applicant was personally present. The Respondents were represented by their own Ms Lorraine Stead and Mr Alastair Wallace. Neither party had any preliminary matters to raise. The Tribunal began by ensuring that all parties had the relevant documentation and understood the purpose of the Hearing. The Respondent also explained that the sum of £3.28 which was due to be returned to the Applicant would be credited into the Applicant's bank account during the course of the day. That particular strand of the dispute between parties was therefore treated by all as having been resolved.

[5] The Tribunal began hearing evidence. The Tribunal decided that each of the issues raised in the Application should be addressed in turn with each party giving evidence on that bespoke point and each having an opportunity to cross examine the other on that point before moving on to the next issue. All parties were agreeable with this approach. After all evidential topics had been covered in this manner each party thereafter had the opportunity to make closing submissions explicitly drawing the Tribunal's attention to the sections of the Code alleged to have been breached. Mr

Wallace and Ms Stead both gave evidence on topics after each other and the Tribunal considered it appropriate to be flexible in this regard. The Applicant was given the right to question both of them in any cross-examination. Ms Stead and Mr Wallace's evidence is collectively referred to as "*the Respondent's evidence*".

[6] The Tribunal therefore turned to the first issue raised in the Application and heard evidence in this manner before proceeding on to the subsequent issue. The Tribunal comments on the evidence heard as follows.

[7] ***"A two-month delay in retuning a factoring float due to the Applicant in the sum of £65.67"***

Mr Kindreich's evidence

[8] This matter was straightforward to understand. The Respondent ceased being the relevant property factor for the development in which the Property is situated in May 2022. All homeowners in the development received a final invoice in September 2022 asking them to contact the Respondent to obtain a refund of any sums paid to the Respondent as an initial float payment. The Applicant stated that he had to press the Respondent regarding this matter and eventually received his refund on 9 December 2022.

The Respondent's evidence.

[9] Ms Stead and Mr Wallace acknowledged that there had been a delay in making the refund and apologised. They explained that there was little much to say beyond they regretted that it took as long as it did for the Respondent to return the Applicant's float.

[10] ***"Sending the Applicant an invoice reminder without having sent the original invoice."***

Mr Kindreich's evidence

[11] The Applicant explained that on 5 July 2022, he received an invoice reminder letter by email from the Respondent "*threatening*" a late payment fee of £30.00 in the event of non-payment within 7 days of this notification. The Applicant explained however that he had never received the original invoice.

The Respondent's evidence

[12] Ms Stead and Mr Wallace accepted that their software had made an error by sending a chaser email for an invoice which they had not actually been issued to the Respondent at that time. They explained that there was little much to say beyond that they regretted the error made by the software. The Applicant asked whether there was any evidence of the software glitch and the Respondent said they had not sought this from those responsible within the company.

[13] ***"A failure to supply the Applicant with insurance statements for the years 2020, 2021 and 2022 and other documentation including copies of invoices requested by the Applicant**."*

Mr Kindreich's evidence

[14] The Applicant's position was that the Respondent had failed to respond to his email of 11 April 2023 asking for a detailed annual insurance statement for each of the three years 2020, 2021 and 2022. The Applicant also explained that the Respondent failed to send him copies of all invoices previously issued from October 2019 to May 2022 which were also requested in this email. The Applicant also requested information about how his share of the insurance premium had been calculated, the sum insured, the premium paid, the main elements of insurance cover provided by the policy and any excess which applied; the name of the company providing insurance cover and any other important or relevant terms of the policy.

[15] The Tribunal questioned the Applicant about why he requested this information from the Appellant by email on 11 April 2023 when the Respondent ceased to be the factor on 20 May 2022. The Applicant's evidence was that, in essence, he considered that the Applicant had an ongoing responsibility to answer his queries despite their business relationship having ended around 11 months previously. The Tribunal pressed the Applicant as to why he was emailing the Respondent about this matter such a substantial time after they ceased being the relevant property factor.

[16] The Applicant's evidence was that he wanted to check that he "*wasn't over insured*" and paying too much as he had other forms of insurance over the Property which he let out for rent. The Applicant's evidence here was somewhat hard to make sense of. The Tribunal asked the Applicant why he wouldn't instead have emailed his current property factor if he genuinely wished this information. The Applicant accepted, as a matter of fact, that he had not and he appeared to have restricted his line of enquires to the Respondent. The Applicant's answers here appeared vague and uncertain. The Tribunal took the view that the Applicant was more likely than not to have been continuing a grievance against the Respondent. The Applicant did not appear to genuinely and reasonably need the information requested at that stage as opposed to previously and his explanation for the long time lapse did not support his suggestion

that the matter was important. He also had little answer to the Respondent's position that all this information was available to the Applicant by means of the Respondent's online portal with which the Applicant was very familiar during the currency of the Respondent's tenure as factor and indeed for a not insubstantial period thereafter.

The Respondent's evidence.

[17] Ms Stead and Mr Wallace pointed out that the many of the sections of the Code which this grievance related to, paragraphs *5.3; 5.5; 5,8; 5.9; and 5.10* did not apply, as these paragraphs of the Code explicitly only apply in terms of the Code if: **"***the agreement with homeowners includes arranging any type of buildings or contents insurance***."** The Respondent pointed out that their contractual relationship with the Applicant expressly did not include the provision of "*building or contents insurance*". This was ultimately then accepted by Mr Kindreich who therefore accepted that the Respondent could not then be competently found to have breached paragraphs *5.3; 5.5; 5,8; 5.9; and 5.10* of the Code.

[18] In any event, Ms Stead and Mr Wallace pointed out that the information was available to the Applicant during the currency of their business relationship as this documentation was expressly available for inspection by means of an online portal. The Applicant was said to have been familiar with how to use this portal as he was recorded as having registered and regularly accessed the portal. This was not disputed by the Applicant. The Respondent did not accept that 11 months after they stopped being the factor that they had an obligation to answer the Applicant's requests to supply information that had been available to the Applicant whilst they were the relevant property factor and indeed for a substantial time thereafter.

[19] ***"A failure adequately to inform the Applicant of measures taken to recover non-payment of fees from certain other properties in the building."***

[20] The Applicant's evidence was that he requested information from the Respondent asking them to demonstrate what steps they had taken in the case of three homeowners in the development who allegedly had outstanding charges. Mr Kindreich was very keen to emphasise that the Respondent had failed to "*demonstrate*" the steps the Respondent has taken to recover unpaid charges.

The Respondent's evidence.

[21] Ms Stead and Mr Wallace again pointed to their debt recovery policy that was published on their website which explained the steps the Respondent would take to recover unpaid debts. The Respondent's evidence was also that they would refer such matters to their solicitors and act upon their advice. The Respondent's invoices referenced the costs occasioned by the taking of such professional advice. The online portal provided further information about the breakdown of the legal fees accrued. Ms

Stead and Mr Wallace pointed out that the Respondent had to be cautious about revealing the precise details of any strategic thinking regarding the pursuit of unpaid fees, lest it embolden or assist others who may seek to evade payment. The individual steps taken to pursue non-payers were also confidential.

[22] The Tribunal struggled to understand what the Applicant actually expected of the Respondent in this issue. In hearing the Applicant's evidence and the answers to the questions asked of him, the Tribunal was left with the impression that it was almost as if the Applicant wanted to be personally consulted about such matters and given unrestricted access to the Respondent's internal procedures about such sensitive matters. The Tribunal considered this was not appropriate or reasonable.

[23] "**Treating the Applicant's email of 28 April 2023 of his intention to raise these proceedings as "*a complaint*" which the Respondent said "*must follow our advertised Complaints Procedure*.**"

The Applicant's evidence.

[24] The Applicant gave evidence that he had emailed the Respondent on 28 April 2023 stating his intention to raise these proceedings. He explained that the Respondent had claimed that the Respondent had treated this is a "complaint" which they said must follow their complaint procedures when they ought to have known that it was not a complaint but rather a necessary pre-requisite before bringing these proceedings. He suggested the issue had been 'weaponised to stall legal action' and that they had 'maliciously invoked the complaints procedure', had been 'maliciously manipulative' and 'deliberately manipulative'.

The Respondent's evidence

[25] The Respondents denied breaching any paragraphs of the Code. They said that they treated any dissatisfaction with their services as a complaint and that minor ones would be treated informally, and otherwise they would be treated formally. They had tried to get resolution and there was nothing malicious in their actions, but the staff member Mr McAllister who had been dealing with the matter had left the business and it was not now possible to be sure why they had not formally responded under their complaints procedures. They also made reference to the cessation of their services and therefore the ending of their obligations to the Applicant in respect of the Code.

[26] After the conclusion of evidence, each party made closing submissions.

[27] The Applicant said that the Respondent had consistently failed to respond and was trying to save its image and that it was only the threat of a Tribunal action that made the Respondent respond. He submitted that the Respondent was more incompetent than malicious but that a Property Factor Enforcement Order was required and that he should be awarded financial compensation. He also suggested that the Respondent should be grateful for the learning experience occasioned by this process.

[28] The Respondents said that they do learn from complaints and that they had made minor errors in their dealings with the Applicant but that were not in breach of the Code in any respect. They had tried to resolve issues even though they had long ceased to be the Applicant's Factor and had already offered the Applicant £50.00 as a goodwill gesture, but this had been refused.

[29] Having considered the Application and having heard evidence, the Tribunal made the following findings in fact,

I. *The Applicant is the proprietor of 28 Easter Livilands, Stirling, FK7 0BQ.*

II. *The Property was factored by the Respondent within the meaning of the Property Factors (Scotland) Act 2011.*

III. *The Respondent ceased being the relevant property factor for the Property in May 2022. All homeowners in the development received a final invoice in September 2022 asking them to contact the Respondent to obtain a refund. The Respondent was somewhat tardy in issuing the Applicant's refund, which was not received by the Applicant until 9 December 2022.*

IV. *The Applicant explained that on 5 July 2022, he received an invoice reminder by email from the Respondent regarding a late payment fee of £30.00 in the event of non-payment within 7 days of this notification. The Applicant had never received the original invoice.*

V. *The Respondent accepted that their software had made an error by sending a chaser email for an invoice which had not actually been issued to the Applicant.*

VI. *The Respondent's agreement with the Applicant did not include arranging any type of buildings or contents insurance. The Applicant was a villa owner and this service was only provided for flats in the development.*

VII. *The Applicant had emailed the Respondent on 11 April 2023 asking for a detailed annual insurance statement for each of the three years 2020, 2021 and 2022. The Applicant also requested copies of all invoices from October 2019 to May 2022. The Applicant also requested information about how his share of the insurance premium was calculated, the sum insured, the premium paid, the main elements of insurance cover provided by the*

policy and any excess which apply; the name of the company providing insurance cover and any other important or relevant terms of the policy.

VIII. *The Respondent had made all this information available to the Applicant by means of an online portal during the currency of their business relationship. The Applicant's motivation for requesting the information so long after the cessation of the provision of services was opaque and may very well been simply to continue an ongoing general grievance against the Respondent. The Applicant even accessed the online portal in March 2023 which had continued to be made available to him for an extended period after the ending of the Respondent's services.*

IX. *The Respondent's debt recovery policy was published on their website which explained the steps the Respondent would take to recover unpaid debts. The Respondent's invoices referenced the costs occasioned by the taking of such professional advice. The online portal provided further information about this. The Respondent took advice from a reputable firm of solicitors about debt recovery matters and acted upon that advice.*

X. *The Applicant emailed the Respondent on 28 April 2023 stating his intention to raise these proceedings. The Respondent initially treated this as a "complaint" which they said must follow their complaint procedures.*

[30] Having made the above findings in fact, the Tribunal makes the following findings in respect of the paragraphs of the Code alleged to have been breached.

The 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."

[31] This paragraph of the Code has not been breached by the Respondent. The Respondent carried out services using reasonable care and skill and in a timely way. There is nothing to suggest that the staff did not have the training and information that they needed to be effective.

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

[32] This paragraph has not been breached. The Tribunal does not consider that there is a sufficient basis to support any such finding. The Respondent responded to enquiries and complaints within reasonable timescales and in line with their complaints handling procedure.

*"**2.4** **Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is good reason not to."***

[33] This paragraph has not been breached. The information requested was available to the Applicant during the Respondent's appointment as the relevant property factor. The Applicant even accessed the online portal in March 2023 which had continued to be made available to him for an extended period after the ending of the Respondent's services. There is nothing to suggest that the Applicant did not make all necessary information available to the Applicant during the provision of their services and also for a substantial time thereafter. The Applicant's requests for further information were also more likely than not to have been designed purely to cause disruption to the Respondent and in that regard it was not clear that they were made in good faith.

*"**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 as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale."***

[34] This paragraph has not been breached. The Tribunal does not consider that there is a sufficient basis to support any such finding. The Respondent responded to enquiries and complaints within reasonable timescales and in line with their written statement of services.

*"**3.5** **If homeowners decide to terminate their arrangement after following the procedures laid down in the title deeds or in legislation, or the property factor decides to terminate the arrangement, a property factor must make the financial information that relates to their account available to the homeowners. This information must be provided within 3 months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services)."***

[35] This paragraph has not been breached. The information requested was available to the Applicant during the Respondent's appointment as the relevant property factor. The Applicant even accessed the online portal in March 2023 which had continued to be made available to him for an extended period after the ending of the Respondent's services. There is nothing to suggest that the Applicant did not make all necessary information available to the Applicant during the provision of their services and also for a substantial time thereafter. The Applicant's requests for further information were also

more likely than not to have been designed purely to cause disruption to the Respondent and in that regard it was not clear that they were made in good faith.

*"**3.6 Unless the title deeds specify otherwise, a property factor must return all funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill, following a change of property factor."***

[36] This paragraph has not been breached. The Applicant took longer than might have been hoped to return a float payment to the Applicant of £65.67. Whilst this is unfortunate, the Tribunal does not consider that it crosses the threshold of amounting to a breach of this paragraph of the Code.

"4.10 A property factor must be able to demonstrate it has taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging other homeowners (if they are jointly liable for such costs). This may include providing homeowners with information on options for accessing finance e.g. for major repairs. Any supporting documentation must be made available if requested by a homeowner (subject to data protection legislation)."

[37] This paragraph has not been breached. The Respondent's debt recovery policy was published on their website which explained the steps the Respondent would take to recover unpaid debts. The Respondent's evidence was also that they would refer such matters to their solicitors and act upon their advice. The Respondent's invoices referenced the costs occasioned by the taking of such professional advice. The online portal provided further information about this.

"If the agreement with homeowners includes arranging any type of buildings or contents insurance, the following standards will apply:

*"**5.3 A property factor must provide an annual insurance statement to each homeowner (or within 3 months following a change in insurance provider) with clear information demonstrating:***

- ***the basis upon which their share of the insurance premium is calculated;***
- ***the sum insured;***
- ***the premium paid;***
- ***the main elements of insurance cover provided by the policy and any excesses which apply;***
- ***the name of the company providing insurance cover; and***
- ***any other terms of the policy.***

This information may be supplied in the form of a summary of cover, but full details must be made available if requested by a homeowner."

[38] This paragraph of the Code has not been breached as the Respondent's agreement with the Applicant did not include arranging any type of buildings or contents insurance.

"5.5 A property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit that is paid to them or anyone in control of the business or anyone connected with the factor or a person in control of the business, in connection with the policy. They should also disclose any financial or other interest that they have with the insurance provider or any intermediary. A property factor must also disclose any other charge they make or apply for arranging such insurance."

[39] This paragraph of the Code has not been breached as the Respondent's agreement with the Applicant did not include arranging any type of buildings or contents insurance.

"**5.8** ***On request, a property factor must be able to demonstrate how and why they appointed the insurance provider, including an explanation where the factor decided not to obtain multiple quotes***."

[40] This paragraph of the Code has not been breached as the Respondent's agreement with the Applicant did not include arranging any type of buildings or contents insurance.

"***5.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available to homeowners on request."***

[41] This paragraph of the Code has not been breached as the Respondent's agreement with the Applicant did not include arranging any type of buildings or contents insurance.

"***5.10 A property factor must notify homeowners in writing of the frequency with which property revaluations will be undertaken to establish the building reinstatement valuation for the purposes of buildings insurance. It is good practice for re-valuations to be undertaken at least every 5 years and sums assured reviewed in other years using the BCIS Rebuilding Cost Index. The property factor must adjust this frequency of property revaluations if instructed to do so, in line with the arrangements in any agreement with homeowners."***

[42] This paragraph of the Code has not been breached as the Respondent's agreement with the Applicant did not include arranging any type of buildings or contents insurance.

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

[43] This paragraph of the Code has not been breached. The Tribunal cannot consider that in the context of the voluminous exchanges between the Applicant and the Respondent that the Respondent provided the Applicant with information that was deliberately or negligently misleading or false. The Tribunal concludes that the Respondent has acted professionally in its dealings with the Applicant. Especially so given that at the time the Applicant submitted an email of complaint the Respondent had ceased to be the relevant property factor for a substantial period of time.

Property Factor Enforcement Order

[44] Having made the above findings, the Tribunal found no basis for making a Property Factor Enforcement Order in terms of Section 19 (2) of the Act.

APPEAL PROVISIONS

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.

______________________________ **10 December 2024**

Legal Member