



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/24/0921

Re: Property at Flat E, 59, Bedford Place, Aberdeen, AB24 3NS (“the Property”)

The Parties:

Ms. Roslawa Marzec residing at the Property (“the Homeowner”) Newton Property Management, 19, Albyn Street, Aberdeen AB25 1XX (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) and Helen Barclay (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor failed to comply with the Property Factor’s Duties in respect of following their complaint resolution procedure.

The Tribunal determined not to make a Property Factor Enforcement Order (PFEO)

Background

1. By application received between 26 February 2024 and 18 March 2024 (“the Application”) the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Code of Conduct for Property Factors and had failed to comply with the Property Factor Duties.
2. The Application comprised the following documents:
 - (i) application form dated 26 February 2024 in the First-tier Tribunal standard application form, Form “C2”, indicating that the parts of the Code of Conduct for Property Factors complained of are Written Statement of Services at Sections 1.1a, B, c, Communications and Consultations at Sections 2.1 and 2.5, Financial Obligations at Section 3.1a, Carrying out repairs and

maintenance at Section 6.9 and Complaints resolution at Section 7.1 and a failure to comply with Property Factor Duties in respect of failing to arrange maintenance of the common parts, providing misleading information, not responding to complaints, failing to pursue the developer and contractors and failing to follow their complaints;

(ii) copy intimation letter to the Property Factor intimating the before-mentioned complaints with reference to the Code of Conduct for Property Factors 2012;

(iii) copy correspondence with invoices between the Parties between March 2023 and January 2024 and

(iv) a copy of the Property Factor's written statements of services (WSoS).

3. The Application was accepted and a Case Management Discussion (CMD) was fixed for 25 June 2024 at 14.00 by telephone conference call. Prior to the CMD, the Property Factor submitted detailed written representations and productions.

Case Management Discussion

4. The CMD took place on 25 June 2024 at 14.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Ms. C. Flanagan, their Customer Services Manager. The Tribunal advised the Parties that the purpose of the CMD was to identify if matters were disputed or could be resolved and if a Hearing on evidence is required. The Tribunal advised the Parties that there was a preliminary matter with which it required to deal which was that the Homeowner appeared to have used the wrong Property Factor Code of Conduct in both the letter of intimation and the Application.
5. The Homeowner agreed that her complaint related to the Property Factor's actions which occurred after 16 August 2021 and explained that she purchased the Property in 2022. The Tribunal explained that its role is to apply the legislation strictly and that it had no discretion to disapply the statutory requirements. The Tribunal explained that Section 17 of the Act states that an application cannot be made unless a homeowner has given prior written notification to the property factor of the specific breaches of the code. In this case, the Homeowner has not notified breaches of the 2021 Code and so an application in respect of the 2021 Code cannot be considered by the Tribunal. The Tribunal explained that if the Homeowner wished to pursue breaches of the 2021 Code for events arising after 16 August 2021, another application would be needed.
6. The Tribunal explained that her complaint in respect of the Property Factor's failure to comply with Property Factor Duties could still be pursued as this complaint is not time bound in the way in which the Codes are time bound. With regard to the duties, the Homeowner advised that it is her position that the Property Factor's failure to comply with the Code is a breach of their

duties. The Homeowner opted to continue with the Application in respect of the complaint of the Property Factor's failure to comply with Property Factor Duties.

7. Ms. Flanagan for the Property Factor made a preliminary plea that the Application was premature as the Homeowner had not exhausted the Property Factor's complaints procedure. She explained that although a complaint had been made in January, it had not been logged properly and so had not been followed up. Ms. Flanagan stated that the first notice which had come to her attention was the Tribunal Chamber's acceptance of the Application. The Homeowner's view is that she could not exhaust the procedure if the Property Factor did not carry it out properly.

8. The Tribunal adjourned the CMD to a Hearing and issued the following Direction:

"The Homeowner is directed to specify what acts or omissions of the Property Factor (individually or cumulatively) are relied upon by her with reference to a failure to comply with property factor duties and to specify why she considers these acts or omissions to be a failure to comply with property factor duties and This Direction should be complied with no later than 3 August 2024 and should be provided by email or hard copy to the Tribunal and the Property Factor.

The Property Factor is directed to submit any response to the Homeowner's compliance with the above Direction no later than 31 August 2024 by email or hard copy to the Tribunal and the Homeowner.

The Property Factor is directed to lodge a brief note on their preliminary plea that the Application is premature. This Direction should be complied with no later than 3 August 2024 and should be provided by email or hard copy to the Tribunal and the Homeowner.

The Homeowner is directed to submit any response to the Property Factor's note no later than 31 August 2024 by email or hard copy to the Tribunal and the Property Factor.

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).

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".

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.

The Parties are advised that the Hearing will be conducted as follows: (a) The Property Factor will speak to their preliminary plea that the Application is

premature and the Homeowner will reply to this; (b) If the plea is not upheld, the Homeowner will present her case first; (c) The Homeowner and her witnesses, if any, will give evidence in respect of the property factor duties complaint and the Property Factor will challenge the evidence by cross-examination; (d) The Property Factor will present their case; (e) The Property Factor and any witnesses will give evidence in respect of the property factor duties complaint and the Homeowner will challenge the evidence by cross-examination; (f) The Parties, if they wish, will sum-up their evidence, with the Homeowner speaking first and (g) The Tribunal will close the Hearing and issue a written decision at a later date.

Reason for Direction

The reason for these Directions is that the onus is on the Parties to ensure that the Applications and the Responses to the Applications are in sufficient order for a Hearing of evidence to proceed.”

Responses to the Direction.

9. With regard to the preliminary matter the Application is premature, the Property Factor lodged a brief note stating that Ms. Marzec, the Homeowner, raised a complaint on 22 January 2024 which was acknowledged on 22 January 2024 by the Property Factor’s then Customer Relationship Manager, Michael McMillan, in line with the Written Statement of Services. There was no further communication from Ms. Marzec in relation to the complaint prior to the Application being lodged with the Tribunal. The Property Factor stated that this did not comply with Rule 43 (2 (a) of the Rules.

10. With regard to the preliminary matter the Application is premature, Ms. Marzec submitted a copy of a letter dated 22 February 2024 in which she notified the duties as :
 1. failing to comply with the Written Statement of Services at Section B, a) by failing to provide cleaning services since 5 August 2023 to date as the cleaning sheet had not been signed;
 2. providing information that is misleading or false in terms of the 2012 Code of Conduct for Property Factors as, by email received 9th March 2023, the then Property Manager apologised for an erroneous charge on an account and stated that the error would be corrected in the next quarterly common charge invoice. By further email on 23rd May 2023, the then Property Manager retracted this statement and advised that the charge would stand;
 3. failing to respond to correspondence within prompt timescales as the Property Factor failed to respond to her complaint dated 22 January 2024 within seven days;
 4. failing to comply with Section 3, 3.1 the 2012 Code of Conduct for Property Factors which states “Homeowners should know what it is they are paying for, how the charges were calculated and no improper payment requests are involved” as the Property Factor made an improper payment

request for payment of a float which had been paid by Ms. Marzec's solicitor;

5. failing to comply with the 2012 Code of Conduct for Property Factors, by failing to pursue contractors or suppliers to remedy the defects in any inadequate work or service provided by failing to pursue the developer and or NHBC to remedy faults with the doors and failing to ensure regular cleaning takes place and
 6. failing to comply with the 2012 Code of Conduct for Property Factors, Section 7 by failing to follow their complaints resolution procedure.
11. With reference to specifying the acts or omissions of the Property Factor, Ms. Marzec categorised these as:
Firstly, the Property Factor failed to provide monthly cleaning services of the communal areas between 3 August 2023 and 28 March 2024.
Secondly, the Property Factor made a charge for a repair to a gate outwith the development boundary.
Thirdly, there is no transparency in respect of repairs and services carried out as notice is only given in the following quarterly invoice and so it is not possible to determine if the work had been out at all or up to the required standard.
Fourthly, the Property Factor has not responded to a query regarding a gate repair, has not taken up Ms. Marzec's request for contractors to leave calling cards and has not replied to this request within the relevant timescale.
12. In response the Property Factor lodged copy correspondence and a copy of their Written Statement of Services.

Hearing

13. A Hearing was held on 16 December 2023 at 10.00 in AB1, the Aberdeen Tribunal Centre. Ms. Marzec was present and unrepresented. She was supported by her husband. The Property Factor was represented by Ms. C. Flanagan, their Customer Services Manager.

Preliminary Matter

14. The Tribunal, firstly, dealt with the Property Factor's preliminary matters in respect of prior notification in terms of Section 17 of the Act. Ms. Flanagan fairly advised that the Property Factor did not insist on this and advised that the Property Factor was prepared to deal with the issues raised by Ms. Marzec.
15. With regard to the initial complaint made by Ms. Marzec in January 2024, Ms. Flanagan stated that the then Customer Services Manager dealing with complaints had neither logged the complaint properly nor followed the complaints procedure in handling the complaint. Therefore, the complaint remained unknown to the Property Factor until the Tribunal notification was received. Ms. Flanagan stated that the then Customer Services Manager is no

longer employed by the Property Factor and that she deals with all complaints personally and in strict adherence to the complaints procedure

Ms. Marzec's evidence – Property Factor's Duties

16. Ms. Marzec's position was broadly in line with the complaints set out in her letter of 22 February 2024 to the Property Factor and in her response to the Direction.
17. She maintained that cleaning of the communal hall had not been carried out as the cleaners had not signed the attendance sheet. She stated that she checked the sheet each month and could not be certain that the cleaning work had been done. She noted having seen a cobweb at the front door after a cleaning visit.
18. Ms. Marzec stated that she did not believe that there had been a proper handover by the developer to the Property Factor as there was confusion and an error made in identifying ownership of a gate which had been repaired. The cost of the repair had been charged to the development of which the Property forms part but had since been refunded. She stated that the investigation into liability for the cost had taken too long and that she had to seek advice from her solicitor.
19. With regard to transparency in dealing with repairs, Ms. Marzec stated that the Property Factor ought to have pursued the developer and NHBC to have a communal door repair carried out. She stated that the Property Factor should not have instructed a contractor to make a simple repair by switching the door to manual. Further, the Property Factor had been misleading and false by adding the cost to the common charges, deducting it and then reversing their decision and adding it again.
20. With regard to transparency in respect of invoices and charging, Ms. Marzec stated that the Property Factor were false and misleading in requesting payment of a float which had been paid by her solicitor. In answer to questions from the Tribunal, Ms. Marzec accepted that the account had been issued before her solicitor had made payment to the Property Factor.
21. With regard to monitoring repairs and contractors, Ms. Marzec stated that the Property Factor's procedure of invoicing in arrears meant that she could not be sure what she is paying for. She explained that she had no opportunity to inspect the repair work to determine if it had been done properly. She stated that the Property Factor should have a procedure to tell owners of all planned repairs and should ensure that contractors leave calling cards.
22. With regard to the complaints procedure, Ms. Marzec stated that this had not been followed to any extent and that she had no option but to apply to the Tribunal.

23. In response to Ms. Flanagan's cross-examination questions, Ms. Marzec stated that she had not been aware of the extent of Ms. Flanagan's discussions with the cleaning company nor that Ms. Flanagan had put a tracking system in place with the company to monitor their attendance. Ms. Marzec agreed that the cleaning costs for the period of her complaint had been refunded to her.

Property Factor's Evidence

24. On behalf of the Property Factor, Ms. Flanagan stated that she had taken up Ms. Marzec's complaint on the lack of cleaning with the cleaning company and had put a new tracked monitoring in place with that company. She stated that she had negotiated the refund of costs for Ms. Marzec. Ms. Flanagan stated that the Property Factor carries out bi-annual inspections of the development.

25. With regard to the gate repaired in error, Ms. Flanagan stated that this had been instructed in good faith as part of the development. She explained that the plan of the development and common property given to the Property Factor differs from the title deeds and that it took some months to identify that the gate in question was not a common part.

26. With regard to the door repair, Ms. Flanagan stated that developers do not provide property factors with operational manuals but might provide these to owners on request. Ms. Flanagan advised that NHBC does not cover common parts nor does it cover faults under £1,000.00 and so this was not an option for the Property Factor. In this case, the correct route was for the Property Factor to instruct a contractor to fix the door.

27. With regard to notifying owners ahead of instructing contractors, Ms. Flanagan explained that this is not a workable process where property factors have delegated authority and a spend limit. She explained that when repairs are reported, property factors categorise them and instruct from approved contractor lists in order of priority. The contractor schedules the work and reports back to the property factor who then invoices. This is common practice. Ms. Flanagan explained that asking contractors to leave calling cards is not practical given the nature of their work.

28. In response to Ms. Marzec's cross-examination questions, Ms. Flanagan stated that, if she wished, Ms. Marzec could be given the tracking records for the cleaners.

29. With regard to the repair work, Ms. Flanagan stated that if there is a report that a repair has failed, the Property Factor sends the contractor back out to re-do at no extra cost.

Further evidence available to the Tribunal.

30. In addition to the evidence at the Hearing, the Tribunal had the benefit of the Application, the Parties' written submissions and productions, correspondence between the Parties, the Property Factor's Written Statement of Services and the Deed of Conditions affecting the Property.

Findings in Fact.

31. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;
- ii) The Property is part of a development known as Bedford Place, Aberdeen;
- iii) Deed of Conditions by Aberdeen Serviced Accommodation Limited dated 14 April 2022 affects the development and so the Property ("the D of C");
- iv) The D of C adopts and incorporates the Development Management Scheme as set out in Schedule 1 to the Title Conditions (Scotland) Act 2003;
- v) The D of C provides for a manager;
- vi) The Property Factor is the manager;
- vii) The duties of the manager include carrying out a maintenance of scheme (common) property;
- viii) The D of C shows the extent of the development outlined in red;
- ix) There is a small linear area coloured brown outwith the development area;
- x) The small linear area coloured brown is not delineated or identified in any way in the D of C;
- xi) The Property Factor issued their Written Statement of Services (WSS) and a letter of introduction to Ms. Marzec on 8 June 2022;
- xii) The WSS sets out the services to be provided in respect of arranging maintenance and repairs to common property;
- xiii) The WSS sets out that Property Factor will send all homeowners a common charge account every three months for repairs carried out in that period;
- xiv) The WSS sets out that the Property Factor will check tradesmen's accounts, including VAT;
- xv) The WSS sets out that the Property Factor will investigate any complaints of unsatisfactory work carried out by contractors.
- xvi) The WSS sets out the Property Factor's two stage complaint procedure;
- xvii) Stage 1 of the complaint procedure states that on receipt, the response to a complaint will be managed by a director who may delegate to an experienced member of staff who will respond within seven working days;
- xviii) If matters cannot be resolved at Stage 1, the complaint can be escalated to Stage 2 to be dealt with by the Managing Director;
- xix) Ms. Marzec complained to the Property Factor in writing during 2023 regarding invoiced repair costs for a common door;

- xx) The Property Factor advised in writing that the repair cost was in error and would be removed from the account and later rescinded that advice;
- xxi) The Property Factor acted on an instruction to repair a gate and apportioned a share of the cost of the gate repair to Ms. Marzec;
- xxii) Ms. Marzec queried the application of the share of the gate;
- xxiii) The Property Factor investigated further and refunded the Ms. Marzec's share of the repair;
- xxiv) From 2023, Ms. Marzec complained about the standard or lack of common stair cleaning;
- xxv) By letter date 22 January 2024, Ms. Marzec made a formal Stage 1 complaint in respect of the Property Factor's handling of door repairs, the gate repair and the lack of cleaning;
- xxvi) The Stage 1 complaint was not progressed by the Property Factor in line with their complaint procedure;
- xxvii) The Property Factor took up the Ms. Marzec's cleaning complaint and arranged for Ms. Marzec to receive a refund of the common cleaning costs;
- xxviii) Ms. Marzec paid a factoring float on purchase of the Property;
- xxix) The float was paid to her solicitor for forward payment to the Property Factor;
- xxx) The Property Factor issued a quarterly account which included a debit for the float;
- xxxi) The Property Factor issued the account before receiving payment from Ms. Marzec's solicitor;
- xxxii) Ms. Marzec's solicitor made payment of the float to the Property Factor;
- xxxiii) The Property Factor issued a subsequent quarterly account which showed payment of the float;

Issues for the Tribunal

32. The issue for the Tribunal was did the Property Factor fail to comply with property factor's duties as notified to the Property Factor and as set out in the Application?
33. The Tribunal noted that the duties complained of were set out with reference to paragraphs of the 2012 Code of Conduct for Property Factors, which Code was not in force at the time of the complaints. The Tribunal considered if this reference nullified the complaint. The Tribunal took the view that, as that Code set out standards by which a property factor should conduct its business and practice, it was open to the Tribunal to take a generous view of the wording of the complaint and to imply that a reasonable property factor would adopt the spirit of the Code in its dealings. Therefore, the Tribunal proceeded to determine the Application.

Decision of the Tribunal and Reasons for the Decision.

34. In reaching its decision the Tribunal noted that the broad facts of the complaints were not disputed and that the dispute centred on the way in which the Property Factor had acted in accordance with their Written Statement of Services (WSS). The Tribunal also had regard to the Deed of Conditions ("D of C"). The Tribunal's view is that it is these documents which set out how the Property Factor should carry out and conduct its business and comply with their duties.
35. The Tribunal dealt with each element of the complaint in turn.
36. With regard to the way in which the Property Factor handled Ms. Marzec's initial complaint of January 2024, the Tribunal accepted Ms. Flanagan's position that this was the action of a rogue employee who has since left the business and was not a deliberate or blatant disregard for following procedures. The Tribunal is satisfied that all complaints are now dealt with in adherence to the complaints procedure. On balance, the Tribunal is satisfied that this was not a failure to comply with the Property Factor Duties.
37. With regard to the cleaning of the communal hall, the only evidence before the Tribunal was that attendance sheets had not been signed. Save for mention of a cobweb, there was no evidence that the cleaners had not attended or that they had not carried out the cleaning work properly. The Tribunal was satisfied that the Property Factor and Ms. Flanagan, in particular, had taken up Ms. Marzec's complaint with the cleaning company and had put a new tracked monitoring in place with that company. This action conforms to the WSS, and so, the Tribunal found that the Property Factor had not failed to comply with the Property Factor Duties.
38. With regard to the wrong charging of the repair to the gate outwith the development boundary, no specific evidence was led in respect of the location of the gate, but the Tribunal suspects it might be located on the area shaded brown in the D of C plan. No evidence was led that the Property Factor acted negligently or improperly in taking the instruction for and instructing the repair work. When the issue was drawn to the Property Factor's attention, the Property Factor acted properly by investigating and refunding the costs. This action conforms to the WSS and so, the Tribunal found that the Property Factor had not failed to comply with the Property Factor Duties.
39. With regard to transparency in dealing with the repair to the common door, similar to the repair to the gate discussed immediately above, no evidence was led that the Property Factor acted negligently in taking the instruction for the repair work. Nor was any evidence led that the Property Factor acted

negligently. The extent of the evidence was that the Property Factor had made a mistake in the invoicing. There was no evidence of the Property Factor being misleading or false. The Tribunal accepted Ms. Flanagan's position that NHBC does not cover common parts nor does it cover faults under £1,000.00 and so this was not an option for the Property Factor. Accordingly, the Tribunal found that the Property Factor had not failed to comply with the Property Factor Duties.

40. With regard to transparency in respect of the float, as Ms. Marzec's solicitor had not paid over the float until after the Property Factor's account had been issued, the Tribunal found that the Property Factor had not failed to comply with the Property Factor Duties.

41. With regard to Ms. Marzec's complaint that the Property Factor's procedure of invoicing in arrears means that she cannot be sure what she is paying for and her view that the Property Factor should have a procedure to tell owners of all planned repairs and she ensure that contractors leave calling cards, the Tribunal's view is that these are not a duties of the Property Factor. The D of C gives the Property Factor a wide and unfettered authority with regard to maintenance. The WSS sets out clearly how the Property Factor will maintain the common property. No evidence was led that the Property Factor does not comply with either the D of C or the WSS in respect of maintenance. The issue here is that Ms. Marzec is misconceived in respect of the law relating to common property, agency and property management. Although Ms. Marzec advised the Tribunal that she understood the concept of delegated authority and understood that the Property Factor did not have an individual contract with her but had a contract with the owners of the development as a whole, her position is that she is entitled to interfere in the business of the Property Factor. No evidence was led in support of this. The Tribunal agreed with Ms. Flanagan that Ms. Marzec's proposals are neither workable nor practical. The simple fact is that the management of maintenance falls to the Property Factor and the Property Factor alone. Accordingly, the Tribunal found that the Property Factor had not failed to comply with the Property Factor Duties.

Property Factor Enforcement Order (PFEO)

42. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to comply with has failed to comply with their Property Factor's Duties in respect of following their complaints resolution procedure, 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."*

43. The Tribunal's view is that although the Property Factor fell foul of the Property Factor Duties, the incident itself was singular and caused by an employee who is no longer in the employ of the Property Factor. The Tribunal accepted Ms. Flanagan's position that the Property Factor has put in place procedures to prevent a re-occurrence. Accordingly, the Tribunal determined that there is no need to make a PFEO to this effect.

44. 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.

Karen Moore, Chairperson

18 January 2025