



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

AMENDED STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/24/1381

Property address: 85 Whiteford Road, Stepps, Glasgow, G33 6GA (“the Property”)

The Parties

Mr Stephen McDougall, 11 Pear Tree Drive, Stepps, Glasgow, G33 6NT (“the Homeowner)

Hacking and Paterson, 1 Newton Terrace, Glasgow, G3 7PL (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)
Ms E Munroe (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with paragraph 1.5A of the 2021 Property Factor Code of Conduct (“the Code”), as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”). The Property Factor has failed to carry out their property factor duties.

The decision is unanimous.

Background

1. By application received in the period between 25th March and 16th April 2024, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with numerous paragraphs of the Code, and had failed to carry out its property factor duties.

2. The Property Factor lodged written representations on 13th May 2024, indicating that they did not intend to attend the Case Management Discussion (“CMD”).

The Case Management Discussion

3. A CMD took place by telephone conference on 8th July 2024. The Homeowner was in attendance. The Property Factor was not in attendance. With reference to the Homeowner’s application, the Tribunal explained to the Homeowner that it does not have a remit to inform other authorities of alleged breaches of the law. If the Homeowner believes there have been breaches of the law, it is for him to report those to the relevant authorities. Any failure to comply with a Property Factor Enforcement Order (“PFEO”) is reported to the relevant authorities. The Tribunal’s remit is to consider the complaint between the Homeowner and the Property Factor, and whether the Property Factor has failed to comply with the Property Factor Code of Conduct (“the Code”) or failed to carry out its property factor duties. The Tribunal explained that, if a matter falls within the Code, it will not also be considered as a property factor duty by the Tribunal. Any allegations in relation to property factor duties must concern matters that are not covered by the Code. The Tribunal explained that, if the Homeowner wishes the Tribunal to consider that the Property Factor has failed to comply with any legislation, and that failure clearly falls within the Code, he would be expected to bring evidence to the Tribunal in that regard. The Tribunal does not make investigations or seek out evidence. It is for the Homeowner to make their case in regard to alleged failures to comply with paragraphs of the Code or failures to carry out property factor duties, with sufficient evidence to allow the Tribunal to make findings in that regard. The Tribunal highlighted several areas where it would not be considering matters, or requesting or providing any further information, as suggested by the Homeowner, including:

- (i) The reason for the departure of a member of staff from the Property Factor’s employment.
- (ii) Providing background information from a previous Tribunal case.
- (iii) Carrying out an investigation to determine how many customers’ terms of service fail to meet the requirements of the Code.
- (iv) Checking the Scottish Government position on charging an administration fee for amending terms of business or providing a copy of documents.
- (v) Considering whether the PF has breached a previous PFEO.
- (vi) Investigating whether the Property Factor’s staff have posed as customers on social media or posted reviews of their own services.
- (vii) Asking the Property Factor for a revenue split of core service and management fees.

- (viii) Asking the Property Factor to provide financial statements.
 - (ix) Considering complaints regarding directors being directors of others firms.
 - (x) Referring any directors to the Insolvency Service.
4. The Tribunal explained the procedure to be carried out at a hearing and the requirements for lodging documents. At the request of the Tribunal, the Homeowner undertook to lodge a further copy of pages 467 to 475 of the case file, with suitably sized text, and to compile a simple table showing each paragraph of the Code that he alleges has been breached, with a list of the details of when and how the particular paragraph has been breached, and a similar table outlining the alleged failures to carry out property factor duties. The Tribunal explained that parties must refer at the hearing to documents by referring to the page number in the top right corner of the paper case file, and the page number of the PDF of the Property Factor's written representations.
 5. The Property Factor lodged further written representations dated 18th July 2024, stating they did not intend to attend the hearing.
 6. Parties were notified on 30th August 2024 of a hearing to take place by telephone conference on 10th December 2024.
 7. In the period leading up to the hearing, the Homeowner lodged more than 50 emails which included complaints, representations, and direction requests.
 8. On 10th September 2024, the Tribunal issued a direction to the Homeowner in the following terms:

The Homeowner must lodge the following within 21 days of the issue of this Direction:

1. A further copy of pages 467 to 475 of the case file, with suitably sized text.
 2. A simple table showing each paragraph of the Code that he alleges has been breached, with a list of the details of when and how the particular paragraph has been breached.
 3. A simple table showing each alleged failure to carry out property factor duties, with a list of the details of when and how the alleged failure has occurred.
9. The Homeowner subsequently indicated his refusal to comply with the Tribunal's direction.

10. On 22nd October 2024, the Tribunal issued a further direction in the following terms, including notice to the Homeowner that the application may be dismissed if he failed to comply in terms of Rule 27(2)(a).

The Homeowner must lodge the following within 21 days of the issue of this Direction:

1. A further copy of pages 467 to 475 of the case file, with suitably sized text.
2. A simple table showing:
 - (i) each paragraph of the Code that he alleges has been breached;
 - (ii) a list of the details of when and how the particular paragraph has been breached; and
 - (iii) clear cross referencing to the evidence to support each alleged breach by reference to the page number of said evidence in the case file.
3. A simple table showing;
 - (i) each alleged failure to carry out property factor duties;
 - (ii) a list of the details of when and how the alleged failure has occurred; and
 - (iv) clear cross referencing to the evidence to support each alleged failure by reference to the page number of said evidence in the case file.

11. By email dated 22nd October 2024, the Homeowner lodged five direction request applications, seeking *inter alia* to have the Tribunal compel the Property Factor to lodge evidence to prove their compliance with the Code and to compel the Property Factor to appear at the hearing. The applications were copied to the Property Factor. No comments were received from the Property Factor.

12. By two emails dated 6th November 2024, the Homeowner lodged productions extending to almost 2000 pages, claiming to be in compliance with item 1 of the direction, whereby the Tribunal had asked for 9 pages of text. The Tribunal refused to accept the Homeowner's productions.

13. By decision dated 11th November 2024, the Tribunal refused to grant the applications for direction requests from the Homeowner.

14. By email dated 20th November 2024, the Homeowner lodged applications for a further eight direction requests. The applications were copied to the Property Factor. No comments were received from the Property Factor.

15. By decision dated 25th November 2024, the Tribunal refused to grant permission to the Homeowner to appeal the decision of 11th November 2024 to the Upper Tribunal.
16. By email dated 27th November 2024, the Homeowner lodged written representations extending to 132 pages.
17. By decision dated 4th December 2024, the Tribunal refused to grant the application for eight direction requests from the Homeowner.
18. By email dated 5th December 2024, the Homeowner lodged an index to accompany the PDF document of 132 pages.
19. By email dated 9th December 2024, the Homeowner stated he had not received notice of the hearing and that the matter had been reported to the police.
20. By email dated 10th December 2024, the Homeowner stated:

The tribunal have failed to be impartial and have shown bias towards the property factor. The tribunal, the President, HPC, SCTS and the Judicial Office for Scotland have all been reported to the Police. This is now a Police matter and the tribunal cannot progress until the SCTS can provide me with an impartial tribunal! The current tribunal are unfit to judge my case! Do I make myself clear?!

The Hearing

21. A hearing took place by telephone conference on 10th December 2024. The Homeowner was in attendance. The Property Factor was not in attendance.
22. The Tribunal considered the terms of Rule 29. The Tribunal determined that the requirements of Rule 24 had been satisfied, and it was appropriate to proceed with the application in the absence of the Property Factor.
23. Responding to questions from the Tribunal concerning his email sent on the morning of the hearing, the Homeowner said he was concerned about the impartiality of the Tribunal and the fact that he had reported the matter to the police. The Tribunal indicated there had been no notification of any police involvement, and the Tribunal was in a position to proceed with the hearing. The Homeowner indicated he wished to proceed with the hearing.
24. The documents considered at the hearing were the case file (CF), the Applicant's 132-page PDF, and the two emails of written representations from the Property Factor.
25. The Tribunal explained, again, to the Homeowner that it was usual to go through the complaint by Code paragraph. However, as the Homeowner had refused to provide the documentation agreed at the CMD, which was the subject of two Directions to the Homeowner, this would make matters more

difficult. The Tribunal explained that the Homeowner's application and additional documents, extending to over 600 pages, were repetitive and difficult to follow. The Homeowner said he would follow the order set out in his application.

Procedure for applying apportionment fee

The Homeowner's position

26. The Homeowner explained the background to the application, which centred around his sale of the Property in July 2023, and an apportionment fee of £200 plus VAT charged by the Property Factor. The Property Factor requested the sum of £265 from the Homeowner's solicitor following a letter from the solicitor requesting the standard factoring information required at the point of sale. The Homeowner complained that the Property Factor had not notified him of the charge, which had not been agreed in advance, as required by the Written Statement of Services ("WSS").
27. The Homeowner referred to the original WSS (CF160-163) provided to him on moving into the Property in 2015. On page 2 of the WSS, it is stated under 'Additional Services' that the Property Factor is able to offer services at an additional cost to be agreed with homeowners prior to commencement, including 'Liaising with solicitors acting for homeowners at a change of ownership, including apportioning common charges.' Further down, under 'Notes on Service', it is stated 'Where a service is provided by HPMS which will incur additional fees, over and above those included within the Factoring Services, HPMS will consult homeowners in writing for consent prior to incurring expenditure'.
28. The Homeowner said the Property Factor had to update their terms of service in August 2021 as a result of the Scottish Government's new Code of Conduct. The Homeowner said he had not received an email on 30th August 2024 providing a link to the new WSS, which the Property Factor claimed to have sent. He accepted he had been issued with a letter dated 28th September 2021 (CF177) by the Property Factor which included a link to access an updated WSS. The Homeowner requested a copy of the WSS and was provided with the WSS for another property (CF219). He was then provided with the current WSS for the Property (CF178). It was the Homeowner's position that the updated WSS did not show a list of changes, which the Property Factor was obliged to provide, in terms of the Code. The Homeowner said he did not think the WSS at p178 was his document, but a new WSS provided to the new owner of the Property. It was the Homeowner's position that his old terms of service, i.e. the 2015 document, still applied, as he had not been provided with the requisite list of changes to the new WSS.
29. The Homeowner said that, even if the WSS was valid and the updated version applied, the Property Factor did not have the Homeowner's consent to charge him an apportionment fee. The updated WSS states at paragraph 3.4 'Beyond the Core Factoring Services, we are able to offer services at an additional cost, to be agreed with homeowners prior to commencement, including:'

There then follows a list of services, which includes ‘Liaising with homeowners and/or their solicitors at a change of ownership, including apportioning common charges.’ At paragraph 3.5 it is stated: ‘Where a service is provided by us which will incur additional fees, over and above those included within the Core Factoring Services, we will consult you, your appointed representative, or, where necessary, the group of homeowners, in writing, for consent prior to incurring expenditure.’

30. The Homeowner complained that the Property Factor had lied by claiming to have obtained his solicitor’s consent to the apportionment charge being applied. He claimed they then changed their story and said he had consented. The Property Factor had not obtained consent from either the Homeowner or the solicitor. Asked by the Tribunal what the Property Factor would have done if the Homeowner had expressed a refusal to consent to any charge for apportionment, the Homeowner said the Property Factor is legally obliged to provide certain information to a homeowner’s solicitor at the point of sale. Asked for the source of this legal obligation, the Homeowner said it was listed on the Property Factor’s website, along with the Property Standardisation Group’s 11-point letter for this purpose.
31. The Homeowner stated this was a breach of the WSS and **paragraph 2.6** of the Code. The Tribunal explained that it would not consider an issue a failure to carry out property factor duties if the issue was covered by the Code. The Homeowner stated that a breach of the Code is a failure to carry out property factor duties.

Tribunal decision

32. The Tribunal did not find there had been a failure to comply with paragraph 2.6. The Property Factor has a procedure to obtain the consent of homeowners before applying apportionment fees, by informing the homeowner or their solicitor, if appointed on the homeowner’s behalf, of the fee, which is also clearly set out in the Schedule of Fees.

Apportionment fee – lack of consent

The Homeowner’s position

33. The Homeowner referred to the Property Factor’s practice of charging a fee of £100 plus VAT for apportionment at the time of sale. The Property Factor charges £200 plus VAT if the sale is not notified to the Property Factor within 10 days of the date of sale. The Homeowner described the charges as excessive. On request, the Property Factor had failed to justify the fee to the Homeowner. The Homeowner said he had spoken to the Property Factor’s Calvin Watson on 16th August 2023 and he had admitted the apportionment of fees is not carried out until the sale is completed, as it would be pointless to carry out the work earlier in case the sale fell through.
34. The Homeowner said Calvin Watson offered to remove the additional fee of £100 imposed on late notification on the condition that the Homeowner

dropped a complaint he had made. The Homeowner felt he was being tricked, as an email sent by the Property Factor (CF279) on 16th August 2023 had not mentioned dropping the complaint was required. The Homeowner considered he was being bribed by the Property Factor.

35. The Homeowner said neither he nor his solicitor consented to payment of the sum sought. There was no express consent provided by the solicitor. The solicitor did not have the power or authority to give consent. The Homeowner instructed his solicitor not to pay the sum. Trying to take payment through his solicitor was not a recognised form of payment as set out on the back of invoices issued by the Property Factor (CF212). This list did not include payment through a solicitor. Furthermore, the Homeowner's solicitor had informed him (CF414) that the Property Factor's request to hold funds for payment to the Property Factor in due course was not something they were keen to do, as the Law Society of Scotland does not authorise a solicitor to hold clients' funds for any lengthy period of time.
36. The Homeowner submitted the above was a breach of the following paragraphs:
- (i) OSP1 – the Property Factor had breached Financial Conduct Authority rules.
 - (ii) OSP2 – the Property Factor had not been honest, open, transparent or fair in their dealings with the Homeowner, by trying to take the money from his solicitor, because people trust their solicitor.
 - (iii) OSP3 – the Property Factor had not provided information in a clear and easily accessible way as it was not clear what the charge was for, and the Homeowner knew nothing about it until he received his final invoice in August 2023. The Homeowner said the solicitor was not acting for him in terms of making this kind of payment. Many factors do not charge for apportionment, so the Property Factor should not be charging.
 - (iv) OSP4 – the Property Factor had provided information that was deliberately or negligently misleading or false by claiming to the Homeowner that his solicitor had consented to the charge being applied. Asked by the Tribunal to indicate where the Property Factor claimed that the solicitor had consented, the Homeowner referred to emails from CF279 onwards. The Tribunal was unable to see an email stating explicitly that the solicitor had consented. The Homeowner then claimed the Property Factor stated this by telephone.
 - (v) OSP6 – The Property Factor tried to bend the rules and say they got consent from the Homeowner's solicitor.
 - (vi) OSP12 – the Property Factor had communicated with the Homeowner in an abusive, intimidating or threatening way by threatening to remove the fee only if the complaint was dropped. Asked by the Tribunal to

direct them to the email that stated this, the Homeowner was unable to do so and stated that the Tribunal ought to have read the application case file.

Tribunal decision

37. The Tribunal did not find there had been a failure to comply with these paragraphs of the Code for the following reasons:

- (i) OSP1 – there was insufficient evidence from the Homeowner to prove that the Property Factor had breached Financial Conduct Authority rules. The Property Factor is not bound by any rules applied to solicitors by the Law Society of Scotland. It is for a solicitor to ensure they comply with the rules of the Law Society of Scotland. The Tribunal noted that the solicitor asked the Homeowner to remit the sum to her on 6th July 2024. The Property Factor is not bound to only collect payment by the methods listed on the back of invoices.
- (ii) OSP 2 – the Property Factor was contacted by the Homeowner's solicitor acting on behalf of the Homeowner and seeking the required information. The Property Factor is entitled to deal with the solicitor as agent for the Homeowner and make requests for outstanding sums from the solicitor.
- (iii) OSP 3 – the Property Factor provided the required information in a clear and easily accessible way to the Homeowner's solicitor, who had contacted the Property Factor, acting on behalf of the Homeowner.
- (iv) OSP 4 – the Homeowner was unable to provide evidence to the Tribunal that the Property Factor had provided information that was deliberately or negligently misleading or false by claiming to the Homeowner that his solicitor had consented to the charge being applied. The emails between the parties show that the Property Factor informed the Homeowner that his solicitor had asked for an apportionment of factoring charges between the parties as at the date of entry, and that the Property Factor responded to the solicitor confirming the fee, with the statement 'we trust this is acceptable to you, acting on behalf of your client'. The emails show that the Property Factor informed the Homeowner that they had relied upon the lack of feedback from the solicitor disputing the fee. Even if the Homeowner is correct, and no express consent was provided, there is no indication that the Property Factor provided any misleading or false information to the Homeowner in this regard, far less doing so deliberately or negligently.
- (v) OSP6 – there was no evidence to indicate the Property Factor had not carried out this service using reasonable care and skill. A Property Factor is entitled to communicate with a solicitor acting for a homeowner without also having to contact the homeowner.

- (vi) OSP12 – the actions of the Property Factor in offering to remove the fee if the complaint was dropped does not constitute communicating with the Homeowner in an abusive, intimidating or threatening way. In any event, the Homeowner was unable to show evidence that this had been stated by email to the Homeowner.

Provision of WSS with incorrect address

The Homeowner's position

37. The Homeowner submitted that the Property Factor's error in sending him the WSS for another address was a data protection breach and a failure to comply with paragraphs OSP2, OSP4, OSP6, OSP10 and 2.2. The Homeowner said an address is a sensitive piece of information that can be traced to an individual. Asked whether he had reported this matter to the Information Commissioner, the Homeowner said he had not done so. Asked whether he had considered that this was a matter of human error, the Homeowner said the Property Factor knew it was not his WSS, however, he also submitted the Property Factor thought it was a generic document without an address on it. The Homeowner submitted that the Property Factor staff required training in this area.

Tribunal decision

- 38.
- (i) OSP2 - The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as there was an insufficiency of evidence to show that the Property Factor had not been honest, open, transparent or fair in this matter.
 - (ii) OSP4 - The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as there was no indication the wrong WSS was provided deliberately or negligently.
 - (iii) OSP6 - The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Tribunal considered it likely this mistake was down to human error, rather than a lack of training.
 - (iv) OSP10 and 2.2 – The Tribunal did not find there had been a failure to comply with this paragraph of the Code. Personal data is data that relates to an identified or identifiable individual. While this can include an address, the Tribunal considered it unlikely that an individual could be directly identified by the provision of an address. It is open to the Homeowner to report the matter to the Information Commissioner should he so wish.

Intimidation

The Homeowner's position

39. The Homeowner said the Property Factor's Scott Nicholl told him that all property factors charge an apportionment fee. The Homeowner's solicitor told him that many property factors do not charge an apportionment fee. It was the Homeowner's position that the Property Factor was trying to bully and intimidate him with this information. Asked by the Tribunal whether he felt bullied or intimidated at the time, the Homeowner said he felt there was nowhere for him to turn. He described himself as a strong person. This was a breach of **paragraph 2.1**.

Tribunal decision

40. The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as there was insufficient evidence before the Tribunal to indicate that the Property Factor had miscommunicated with the Homeowner in this regard. Mr Nicholl may well have been of the understanding that all property factors charge an apportionment fee. There was no evidence before the Tribunal to indicate the truth or otherwise of this statement, other than hearsay evidence from the Homeowner as provided by his solicitor.

Late payment charge

The Homeowner's position

41. The Property Factor was unable to justify the additional charge of £100 plus VAT due to the sale being notified late. There was no consent to this charge.

42. Three directors of the Property Factor are involved in another factoring firm that does not charge an express fee for late notification of apportionment requests. The other firm states notification should ideally be made ten days before sale. The apportionment cannot be carried out until the sale takes place, so there is nothing late about notifying the Property Factor eight days before the sale, as happened in this case.

43. The Homeowner submitted that the following paragraphs were breached:

- (i) OSP5 - The charge is not applied consistently as some people get charged it and others do not. Asked to provide evidence of this, the Homeowner said he can see this from reading other Tribunal decisions and from review websites.
- (ii) 3.1 – the Homeowner did not know what he was being charged for
- (iii) 3.2 – the Homeowner's funds were not protected. There was no clarity or transparency. If he had paid the £265 up front it would have been

sitting in the Property Factor's account for three months. His funds could have been in jeopardy if the Property Factor had gone bust or got into financial trouble. There are very strict FCA rules. The Property Factor has withdrawn from the FCA. A solicitor in Livingstone has written to the Law Society for Scotland (CF174) warning solicitors about the procedures carried out by property factors around apportionment and fees, and the risk of consenting either expressly or by paying the money.

- (iv) 3.3 – the Property Factor failed to carry out money laundering checks on the Homeowner at the start of their contract, as required by FCA rules. They should not be holding clients' funds. The Homeowner has reported this to the FCA but they cannot comment any further.

Tribunal decision

44.

- (i) OSP5 – The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as there was no evidence before the Tribunal to indicate that the policy is applied inconsistently.
- (ii) 3.1 – The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as it was entirely clear what the Homeowner was being charged for. The charges are clearly referred to in the WSS.
- (iii) 3.2 – The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Homeowner did not make payment of the sum, so his funds were never in jeopardy. The Tribunal noted this his solicitor was content to accept the sum on his behalf to make payment to the Property Factor.
- (iv) 3.3 – The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as the Homeowner did not provide any evidence to indicate that a property factor must carry out money laundering checks on homeowners.

Complaints procedure

The Homeowner's position

45. The Homeowner said he asked the Property Factor for their complaint application form on 18th August 2023. By 5th September 2023, the Property Factor was still refusing to send the application form, although they requested the Homeowner's address on that date (CF273) in order to post the form. The Homeowner requested it electronically. The Property Factor provided the form electronically on 5th September 2023 (CF311) and the Homeowner returned it electronically on 11th September 2023 (CF310). The form was acknowledged on 12th September 2023 (CF310) and a response promised by 2nd October

2023. A few days before the response was due, the Homeowner was contacted by the Property Factor with an offer to remove the charge on the condition that the Property Factor would not have to respond to the complaint. The Homeowner said the Property Factor had sat on the complaint for seven days, doing nothing. They could not possibly offer a full response in the remaining seven days. Asked whether he had any evidence that the Property Factor had done nothing, the Homeowner accused the Tribunal of defending the Property Factor. It was his position that the Property Factor was trying to bribe him, by offering him money to drop his complaint (CF345). This was the Property Factor trying to skip their responsibilities. The Homeowner also said the Property Factor had threatened to take him to a Tribunal. On being advised by the Tribunal at the hearing that the Property Factor cannot take a homeowner to a Tribunal, the Homeowner said the Property Factor had told him he would have to take them to a Tribunal.

46. The Homeowner referred to an email from the Property Factor dated 2nd October 2024 (CF323). By email of the same date (CF351) the Property Factor responded with a response to the complaint. It was the Homeowner's position that the response was incomplete as it did not detail sub-sections correctly. The Property Factor stated that an updated WSS had been provided. This was incorrect. The Property Factor referred to a hidden schedule of fees. The Property Factor was now changing their story to say they had delegated authority. The Title Deeds do not state there is delegated authority. The Title Deeds state that apportionment fees are included in management fees. The Homeowner responded to the complaint response by email on 2nd October 2024 (CF349). He received no response,
47. The Property Factor was trying to cause fear and intimidation by stating that they had been supported by the First-tier Tribunal in similar cases. The Property Factor provided a copy of a Tribunal decision. The Homeowner said his complaint was about prior consent, not whether the Property Factor is entitled to make the charge, so the decision provided was not relevant.
48. The Homeowner said the Competition and Markets Authority ("CMA") had started a UK-wide investigation into property factors and their charging structure after this application was made. Following the investigation, the CMA has serious concerns about property factor fees. They have made recommendations to the Scottish Government. By letter dated 24th November 2023 (76/132), the Property Factor had made representations to the CMA. In their response to question 6, the Property Factor stated that registration compels them to meet standards. The Property Factor is agreeing in this letter that they have to comply with legislation but they are not doing so. The Property Factor states they do not have mandatory qualifications and that consumers are protected by the legislation and Code. The Property Factor admits that they are required to be transparent and must have written complaint procedures. It was the Homeowner's position that the CMA findings indicate that the Property Factor is failing to meet UK consumer laws. Responding to questions from the Tribunal, the Homeowner said the Property Factor was breaching the Consumer Rights Act 2015 in its entirety.

49. The Homeowner said the above constituted breaches of the following paragraphs:

- (i) OSP2 – the Property Factor had not handled the complaint or followed their procedure.
- (ii) OSP3 – the Property Factor had not provided any information.
- (iii) OSP4 – the Property Factor had said they would provide a written decision and had not done so. Asked by the Tribunal when the Property Factor had stated this, the Homeowner said they had stated it when they wrote their complaints procedure.
- (iv) OSP5 – the Property Factor had not followed their complaints procedure.
- (v) OSP6 – the Property Factor had not followed their complaints procedure, so they had failed to provide a service.
- (vi) OSP11 – the Property Factor had failed to respond in line with their complaints procedure.
- (vii) OSP12 – The Homeowner felt intimidated by the Property Factor offering him money to drop his complaint.
- (viii) 7.1 – the Property Factor had failed to apply their written complaints handling procedure consistently and reasonably.

Tribunal decision

50. Paragraph 2.7 – The Tribunal did not find that the Property Factor failed to comply with this paragraph of the Code. The Homeowner emailed the Property Factor's Scott Nicholl on 16th August 2023 (CF247) and got an automatic message stating that emails could not be accessed, so he emailed the Property Factor's generic mailbox. He did not, in the second email, request the application form, but requested that the fee be removed from his account or he would 'take further action' to reclaim the sums. The Property Factor responded that day and a phone call took place between the parties. The Property Factor offered to reduce the fee by £100 (CF243). On 23rd August 2023, the Homeowner responded to the Property Factor (CF242) reiterating his concerns, but he did not request the application form, instead asking the Property Factor to rectify matters. On 31st August 2023 (CF241) the Homeowner emailed the Property Factor and asked when he would get a corrected bill 'without having to take further action.' The Property Factor responded on 1st September 2023 (CF240) stating that he understood the offer to reduce the fee had been rejected. The Homeowner responded the same day (CF239) asking the Property Factor to remove the fee. Later that day, the Homeowner requested the application form for formal complaint resolution. On 5th September 2023, the Homeowner against requested the form. On 5th September 2023, the Property Factor asked for the Homeowner's

address to post the application form. The Homeowner requested that it be sent electronically, and it was sent that day. Given that the Homeowner knew from the automated response to his email of 16th August 2023 to Scott Nicholl that the email had not been accessed, and that the Homeowner did not request the form again until 1st September 2023, the request can only be considered properly made on 1st September 2023. The form was provided within the timescale set out in the WSS.

51. Paragraph 7.1 – The Tribunal did not find that the Property Factor failed to comply with this paragraph of the Code. The Property Factor did not fail to apply their complaints procedure consistently and reasonably. The Homeowner returned the complaint form electronically on 11th September 2023 (CF310). The form was acknowledged on 12th September 2023 (CF310) and a response promised by 2nd October 2023. The Property Factor contacted the Homeowner by email dated 21st September 2023 (CF347) with a response that clearly shows the complaint has been considered, and an offer to bring matters to a satisfactory conclusion by refunding the apportionment fee, failing which, a full response will be provided. There is nothing in the Property Factor’s complaints procedure that prohibits them from trying to settle matters while a complaint is being investigated at stage 1. The Homeowner did not accept the proposal, and a full response was issued by the Property Factor by email on 2nd October 2023, which was within the timescale provided by the Property Factor and within the complaints procedure timescale. No abusive, intimidating or threatening communications were made by the Property Factor. Although it was not addressed at the hearing, it is noted within the Homeowner’s representations that the Property Factor appears to have moved the matter to stage 2 on or around 13th October 2023, and a final response was issued on 30th October 2023 (CF316). The Tribunal was satisfied that the complaints procedure had been applied properly.
52. OSP paragraphs – The Tribunal did not find that the Property Factor had failed to comply with the remaining paragraphs for the reasons set out above. The Tribunal noted that the Homeowner had not referred to OSP1, despite his submission that the Property Factor was not complying with the Consumer Rights Act 2015 in its entirety. The Tribunal considered the Homeowner was mistaken in his submissions regarding this legislation, and his assertion that the CMA findings mean the Property Factor is not complying with legislation.
53. The Tribunal noted that the complaint form submitted by the Homeowner referred to the old Code rather than the Code on which his application is based.

Online portal

The Homeowner’s position

54. The Homeowner claimed that the Property Factor’s practice of putting documents on the online portal and requiring homeowners to sign in using a 9-digit account number and unique reference number is designed to confuse customers. The signing-in procedure is not easy to remember and customers

have to look at their bill to access the details. The invoices are sent by attachment to an email and the Homeowner's submission was that all documents should be sent that way, and that the Property Factor was being sneaky, misleading and dishonest in their practice. This breaches paragraphs OSP2, 3, 4, 5 and 6, and paragraph 1.5(G).

Tribunal decision

55. The Tribunal did not find there had been a failure to comply with these paragraphs of the Code. The Code provides at paragraph 2.3 that information and documents can be made available in a digital format, for example ... on a web portal. This is a common practice among property factors, and the ability to access the portal using the numbers provided ought to be within the ability of most homeowners. If it is not, the Code provides that paper copies of documentation must be provided in response to any reasonable request from a homeowner.

Authority to Act and Title Deeds

The Homeowner's position

56. The Homeowner referred to paragraph 2.1 of the WSS (CF180) where it is stated that the Property Factor obtains their authority to act by reference to Custom and Practice. This is incorrect as the Property Factor was appointed by Clause ELEVENTH of the Title Deed (CF198).

57. The Homeowner also claimed that the Title Deeds state at Clause ELEVENTH that the sale apportionment costs are included in the core services and normal fees, citing sub-clause Third where it is stated 'for apportionment of the costs thereof amongst the proprietors.' This means the Property Factor cannot charge an additional fee for apportionment.

58. The Homeowner said this was a breach of paragraphs 1.1 and 1.5A.

Tribunal decision

59. Paragraph 1.1 - The Tribunal did not find there had been a failure to comply with this paragraph of the Code. This paragraph refers to the provision of a WSS, and this was not what the Homeowner was complaining about under this heading.

60. Paragraph 1.5A –The Tribunal noted that the Property Factor stated in their written representations that their authority to act is correctly stated in the WSS, this being a different matter than their original appointment. The Tribunal considered further representations were required in this regard. The matter is dealt with further below.

61. It was not clear what paragraph of the Code the Homeowner was referring to in respect of the matter of clause ELEVENTH (Third). The Tribunal considered this probably ought to have been submitted under property factor

duties, but it had not been notified to the Property Factor under that category. In any event, the Homeowner's interpretation of the clause was incorrect. It is stated in that clause that the Property Factor is responsible for administering common repairs and maintenance of common parts, and arranging insurance, and for apportionment of the costs thereof. There is no mention of apportionment upon sale.

Fee for amendment of WSS

The Homeowner's position

62. The Homeowner referred to a letter to homeowners from the Property Factor dated 28th September 2021 (CF177) regarding amendment to the WSS following the introduction of the new Code on 16th August 2021. The letter stated that amendments required were considerable, although the agreed terms were not substantially altered. According to the Homeowner, the Property Factor said the Scottish Government had required that homeowners be charged for the process of amending the WSS. Asked by the Tribunal to indicate where this was stated in the letter, the Homeowner said it was stated in an email of 20th September 2021. Asked by the Tribunal to direct them to the email, the Homeowner again became argumentative and stated that the Tribunal Members ought to have read the case papers in their own time.

Tribunal decision

63. The Homeowner did not address the Tribunal on the alleged breaches in relation to this complaint, however, it can be seen from the case file that he alleges breaches of OSP2, 3, 4, 5, 6, 9, 10, 11, 1.1, 1.5B, 1.5C, 1.5D, 2.1, 2.3, 2.6, 3.1, 4.2 and 4.3. It is not clear how these paragraphs apply. It was clear to the Tribunal that the letter of 27th September 2021 did not state that the Scottish Government had required the Property Factor to charge for the costs of revising the WSS. The Property Factor stated that they were required to render an administration fee.

64. The Tribunal considered it required further representations from the Property Factor in this matter. This is dealt with further below.

Change to management fees

The Homeowner's position

65. The Homeowner said the Property Factor has been failing to comply with paragraph 4.2 of the WSS by not informing homeowners in advance of annual changes to management fees. The Homeowner referred to the quarterly invoice dated 9th November 2021 (CF205) which showed the management fee of £15.25, and a statement that the Property Factor was 'currently reviewing our management fees and any adjustments will be incorporated in the next account'. The next account (CF206) showed an increase of 75p per quarter to £16.00. The Homeowner complained that the Property Factor ought to have informed homeowners in advance of the rise. This is also a breach of

paragraph 3.1, as the Property Factor has not shown how the charges were calculated. The Homeowner claimed to have asked the Property Factor but received no response. The Homeowner said it was also a breach of paragraph 3.2.

Tribunal decision

66. The Tribunal did not find there had been a failure to comply with the Code in this regard. The Property Factor has been following the procedure clearly outlined in paragraph 4 of the WSS.

Schedule of Fees

The Homeowner's position

67. The Homeowner said all fees must be contained in the WSS, rather than in a schedule of fees, so this is a breach of paragraphs 1.5B, C and G.

Tribunal Decision

68. The Tribunal did not find there had been a failure to comply with these paragraphs of the Code, which do not state that additional fees cannot be listed in a schedule.

Apportionment fee

The Homeowner's position

69. The Homeowner claimed it does not cost £200 plus VAT to change numbers on a spreadsheet. It is misleading for the Property Factor to say there is extra administration involved. The Homeowner was billed for the apportionment in August 2023, as part of their normal billing cycle, so there was no extra administration involved. This is a breach of paragraphs 1.5C, 1.5A, 2.1 and 2.6.

Tribunal decision

70. The Tribunal did not find there had been a failure to comply with these paragraphs. The Property Factor clearly set out in their complaint correspondence to the Homeowner that extra administrative works are involved in apportioning the account upon sale of the property, stating that the date of sale fell outwith the normal accounting procedures, therefore they were required to apportion the account separately. This is clearly set out in the WSS. The additional work was further explained in an email from Scott Nicholl on 11th August 2023 (51/132). The additional work was further explained to the Homeowner by email from Gordon Buchanan dated 30th November 2023 (CF423). Although the invoice was issued in the normal billing cycle, that does not mean the work involved was not carried out separately from the normal accounting work. It stands to reason that additional work will be required to apportion the account upon sale. It is noted

that the Homeowner's solicitor stated in an email of 22nd August 2023 (CF414) that other factors charge a similar sum, although some factors do not.

Fake social media reviews

The Homeowner's position

71. The Homeowner submitted that the Property Factor is writing fake five-star reviews on social media and referred the Tribunal to reviews lodged on page 122/132. The Homeowner said the Property Factor is very poorly rated. This is a breach of new criminal and consumer laws. This is a breach of OSP1.

Tribunal decision

72. The Tribunal did not find that there has been a failure to comply with this paragraph of the Code. It was not clear how the Tribunal was expected to deduce from the social media evidence provided that the Property Factor was behind the two five-star reviews posted. They also appeared to have been posted in November 2024, which was after the application to the Tribunal had been made. There were further undated social media screenshots within the case file (CF209) from a group entitled 'Hacking and Paterson – how to leave' which appeared to show the Homeowner accusing another person of being employed by the Property Factor, and a post warning that the Property Factor was monitoring the group and sending legal letters to participants. Again, it was not clear how the Tribunal could give any weight to such evidence. It was also unclear what legislation the Property Factor was said to have breached.

Blocking emails

The Homeowner's position

73. The Homeowner claimed that the Property Factor had blocked his emails as he had sent them important information in respect of this case by email on 4th April 2024, copying in all the company directors, and he had not received a response, neither had he received an out of office notification. This had been reported to the Housing and Property Chamber by email dated 16th April 2024 (63/132). Asked whether he had any evidence that his emails had been blocked, the Homeowner said the Property Factor responded to the Tribunal on 21st May 2024, stating that they had not received the email from the Homeowner. The Homeowner said he later discovered that the Property Factor regularly blocks customer emails and has been warned by a Tribunal previously in this regard. The previous Tribunal accepted it was a one-off and due to third party software, rather than being a deliberate act. Responding to questions from the Tribunal, the Homeowner confirmed he left the Property on 7th July 2023, ceasing to have a contractual relationship with the Property Factor thereafter. The Homeowner said the Property Factor should not have blocked him, and doing so meant they failed to receive important documentation. This was a breach of paragraphs OSP11, 2.1, 2.4, 2.5 and 2.7

Tribunal decision

74. The Tribunal did not find there had been a breach of these paragraphs of the Code. There was insufficient evidence to make any finding that the Property Factor had blocked the Homeowner's emails. It was also not clear where the duty to reply to such emails came from given that there was no contractual relationship between the parties.

Summary by the Homeowner

75. The Homeowner said it was clear that the CMA had not cleared the fees charged by the Property Factor. The Property Factor had failed to follow their complaints procedure. They should be removed from the register of property factors. It was concerning that the Property Factor had chosen not to participate in the proceedings.

Further procedure

76. Following the hearing, the Tribunal issued a Direction to the Property Factor dated 17th December 2024 in the following terms:

The Property Factor must lodge the following within 7 days of the issue of this Direction:

- A full submission in respect of their authority to act in respect of the development of which the Property forms part.
- A full submission in respect of their authority to apply an administration fee for amending the terms of service in preparation for the new Code of Conduct in August 2021.

77. The Property Factor requested an extension to the time allowed for a response, which request was granted. A response was lodged on 8th January 2025.

Direction response – Authority to act

78. The Property Factor stated that their authority to act operates from custom and practice. They have acted for over 20 years for this development. They hold no records as to how they were initially appointed. The Title Deeds state they were the first appointed Property Factor and the appointment lasted for three years from completion of the development. Since that time, the homeowners have been in control of the appointment per the mechanisms available to them with their Title Deeds. In terms of the Title Conditions (Scotland) Act 2011, the initial basis of appointment cannot apply beyond the expiration of the initial Manager Burden. The continuing authority to act must have been agreed informally between the parties thereafter. The informal agreement was crystallised thereafter by the WSS. Homeowners, having been notified in the WSS that this is the basis of the Property Factor's authority to act, have not taken a decision to amend or change the agreement.

Homeowner response – Authority to act

79. The Homeowner made extensive written representations on the Property Factor's Direction response.
80. In an email of 16th January 2025, the Homeowner brought to the Tribunal's attention a recent Upper Tribunal decision – UTS/AP/23/0977 – involving the Property Factor and the matter of authority to act.
81. It was the Homeowner's position in an email of 17th January 2025 that, in the absence of any formal signed agreement by the majority of homeowners, the Property Factor had not been legally appointed. The homeowners had been misled by the Property Factor, who had no legal authority to act, and the Property Factor should now refund all fees paid to them over the past 20 years.

Tribunal Decision – Authority to act

Paragraph 1.5A

82. The Tribunal found there was a breach of this paragraph of the Code. The Property Factor's representations regarding their authority to act are misconceived. In terms of the Deed of Conditions (CF192) registered 9th August 2000 and applying to the development as contained in the Title Deed for the Property, at paragraph ELEVENTH, the Property Factor was appointed as factor, with their responsibilities and powers outlined thereafter. The source of their authority to act, therefore, is the Deed of Conditions. The legislation introduced after the date of registration of the Deed of Conditions does not change the basis of the source of the authority to act, and it is incorrect to state in the WSS that the authority to act is based on custom and practice.
83. The Tribunal found no merit in the Homeowner's representations of 17th January 2025 that the Property Factor had no legal authority to act and that all fees should be refunded.

Direction response – Administration fee

84. The Property Factor stated that the charge to the homeowners was not relative to the WSS, the Act or the core factoring service. The fee reflects additional costs burdened to the Property Factor by the Scottish Government, in respect of the new Code, which costs were, in part, passed on to the Homeowner. The Property Factor said this one-off charge should not be considered by the Tribunal. The Property Factor set out the history to the charge, including excerpts from the 2021 Business and Regulatory Impact Assessment (BIRA) guidance, which discusses that the property factoring business considers there will be one-off costs to homeowners for the work required in amending and issuing the new WSS.

Homeowner response – Administration fee

85. The Homeowner stated in his email of 20th January 2025 that the Code is clear that there is no legal mechanism for property factors to pass on any extra costs to their customers if it is not a core service or an additional service. The Homeowner also submitted that the Scottish Government did not tell property factors they could pass such costs to customers, and that there was no justification of the cost charged.

Tribunal decision – Administration fee

86. The Tribunal was not persuaded that the Property Factor was entitled to make this charge, or that the Homeowner was obliged to make payment of it, given that it was not agreed within the scope of the contract between the parties. The Tribunal did not find there had been a breach of any of paragraphs OSP2, 3, 4, 5, 6, 9, 10, 11, 1.1, 1.5B, 1.5C, 1.5D, 2.1, 2.3, 2.6, 3.1, 4.2 and 4.3. It was entirely unclear why the Homeowner chose to cite so many paragraphs, many of which had no relevance whatsoever to the matter complained of. There was no evidence that the Property Factor had informed the Homeowner that the Scottish Government required or authorised them to make the charge, merely that the Scottish Government recognised that a charge may be made. The Tribunal considered the letter of 28th September 2021 to be entirely clear in its terms.

87. The Tribunal found there was a failure to carry out property factor duties by breaching the requirement within the WSS to consult with homeowners for consent prior to incurring expenditure on a matter outwith the core services. The Tribunal noted that the WSS lists 'liaising with third parties if the property factoring agreement is changed or terminated' as an example of an additional service. Although this was not an exact description of the work carried out in amending the WSS, the Tribunal felt the work actually carried out was of a similar nature, and consent ought to have been sought.

Findings in Fact and Law

- 88.
- (i) The Homeowner was the heritable proprietor of the Property from 2015 to July 2023.
 - (ii) The Property Factor is registered as a Property Factor under registration number PF000288.
 - (iii) The Property Factor provides factoring services to the development of which the Property forms part.
 - (iv) The Property Factor issued a WSS to the Homeowner in 2015.

- (v) In 2021, the Property Factor amended their terms of service and delivery standards as set out in the WSS and associated documents in line with the revised 2021 Code of Conduct.
- (vi) By letter dated 28th September 2021, the Property Factor provided the Homeowner with details to access the revised terms of service and delivery standards on their web portal.
- (vii) The revised WSS provides a list of core services and a list of additional services including liaising with homeowners and/or their solicitors at a change of ownership, including apportioning common charges.
- (viii) The WSS provides that, where a service is provided which will incur additional fees, they will consult with the homeowner or their appointed representative in writing for consent prior to incurring expenditure.
- (ix) The WSS provides that a homeowner's solicitor must inform the Property Factor in writing of an impending change in ownership of the property at least 10 working days before the date of the change, and it provides that applicable fees can be found in the Schedule of Fees.
- (x) The Homeowner's solicitor contacted the Property Factor in late June 2023 to inform them of an impending sale of the Property, with a date of entry of 7th July 2023.
- (xi) The Homeowner's solicitor requested that the Property Factor complete the standard eleven-point letter from the Property Standardisation Group.
- (xii) The Property Factor provided the Homeowner's solicitor with the usual factoring letter to provide to the purchaser's solicitor.
- (xiii) The Property Factor requested that the Homeowner's solicitor retain the sum of £265 for sums anticipated payable. This included a fee of £240 (£200 plus VAT) for apportionment costs.
- (xiv) On 6th July 2023, the Homeowner's solicitor requested that the Homeowner credit her with a sum to include estate agents' and property factor fees, so that the solicitor could make payment on his behalf.
- (xv) The Homeowner did not credit the solicitor with the £265 in respect of the Property Factor's apportionment fee, and raised a complaint with the Property Factor in this regard.
- (xvi) In August 2023, the Property Factor provided a final invoice to the Homeowner including the sum of £240 apportionment fee.
- (xvii) The Homeowner refused to pay the sum of £240 for apportionment, and began complaint discussions with the Property Factor.
- (xviii) The sum of £240 was removed from the Homeowner's account.

- (xix) The Property Factor's authority to act is derived from the Deed of Conditions for the development registered 9th August 2000.
- (xx) The Property Factor failed to consult with the Homeowner or their appointed representative in writing for consent prior to imposing a fee for amending the WSS in late 2021.
- (xxi) On 12th September 2023, the Homeowner completed the Property Factor's application for formal complaint resolution.
- (xxii) The Property Factor confirmed their final complaint decision to the Homeowner by email dated 30th October 2023.

Observations

89. The progress of this application was not assisted by the behaviour of the parties. The Homeowner presented an application that was difficult to understand and follow. He adopted a scattergun approach to each individual complaint, citing numerous alleged Code breaches, many of which were not relevant. The Homeowner presented numerous repetitive emails in the period between the CMD and the hearing that showed a considerable misunderstanding of the process. The Homeowner made repeated, unsubstantiated allegations against the Tribunal members, and others within the Housing and Property Chamber, including allegations of bias, corruption, and criminality. The Homeowner refused to comply with two Directions of the Tribunal to address the issues with his application. Had he done so, it would have assisted the Tribunal and the Homeowner at the hearing. Instead, the Homeowner insisted on presenting his case by following his application submission, which was repetitive and unclear. When requested by the Tribunal at the hearing to substantiate his claims, or even just to direct the Tribunal to the relevant evidence within his significant bundles of productions, the Homeowner became defensive and argumentative, accusing the Tribunal members of favouring the Property Factor, and suggesting members had not read the papers. The members had read the papers repeatedly, in an attempt to try and understand the application. The Homeowner appeared to be under the impression that if he made an allegation and the Property Factor did not answer it either by written representations or by attending the hearing, the Tribunal should find in his favour, without requiring to see any appropriate evidence or clarification.

90. The Property Factor did not assist the Tribunal by failing to appear at the CMD and hearing.

Proposed Property Factor Enforcement Order (PFEO)

91. Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

79. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

80. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

In terms of section 46 of the Tribunals (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 original decision was sent to them.

Helen Forbes

Legal Member

24th February 2025
Date