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Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision on Homeowners Application: Property Factors (Scotland) Act 2011 ("the Act")

Decision under Section 19(1)(a) of the Act

Chamber Ref: FTS/HPC/PF/23/1788

Flat 1 Broomvale Court, 267 Mearns Road, Newton Mearns, Glasgow, G77 5LU ("The Property")

The Parties:-

Mr Jonathan Sammeroff, residing at Flat 1 Broomvale Court, 267 Mearns Road, Newton Mearns, Glasgow, G77 5LU("the Applicant")

Hacking & Paterson Management Services Ltd, a Company incorporated under the Companies Acts (Company Number SC073599) and having their registered office at 1 Newton Terrace, Glasgow, G3 7PL ("the Respondent")

Tribunal Members:

Mr E K Miller (Legal Member)
Mrs E Dickson (Ordinary Member)

Decision

The Tribunal determined that the Respondent had (a) breached Sections 2.1, 2.6 and 6.12 of the Code as well as OSP1, OSP2 and OSP5 of the Code and (b) had failed in their property factor's duties as defined in Section 17(1)(a) of the Act. The Tribunal resolved to make a Property Factor Enforcement Order as set out below.

The decision was unanimous.

Background

1. In this Decision the Property Factors (Scotland) Act 2011 is referred to as "the Act"; The Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-Tier Tribunal for Scotland (Housing & Property Chamber) (Procedure) Regulations 2016 as amended as "the Regulations".

2. The Respondent is a registered property factor (Registration Number PF000288) and its duty under Section 14(5) of the Act to comply with the Code arises from that date.

3. An initial Case Management Discussion ("CMD") took place before the same legal members at Glasgow Tribunal Centre, 20 York Street, Glasgow on 29 November 2023. The Applicant was present and represented himself. The Respondent was neither present nor represented. With his initial application, the Applicant had helpfully submitted some medical evidence regarding his mental health and the challenges this presented him with. Notwithstanding his nervousness on the day of the CMD, the Applicant gave a clear account of his issues with the Respondent over a number of years. Due to the long running nature of the complaint, the paperwork was extensive and so the Tribunal was able to use the CMD to help focus in on the key issues that were outstanding between the parties and to obtain information on the Applicant's position. The key areas identified at the CMD were:-

    - The Applicant's claim he was being subjected to forced labour in having to deal with the Respondent;

    - The Respondent failing to adhere to the "Supplementary Terms and Conditions" that the Applicant had imposed in the contractual relationship between them as well as the Respondent failing to respond to the Applicant's complain;

    - The Respondent having failed to make reasonable adjustments in their manner of communication with the Applicant to take account of his mental health

    - A dispute over ADT fire servicing invoices for work never carried out

    - A dispute regarding repair works carried out by A. Menzies

    - A wider general complaint regarding the instruction, supervision and checking of repair and maintenance works.

    Following the CMD, the Tribunal had prepared a direction to the Respondent seeking some information on the last 3 points above.

4. Having identified the key areas in dispute, the Tribunal determined to refer the matter to a full hearing and a date was set for 18 April 2024. On the day of the hearing the Applicant was unable to attend. He had felt anxious in the period leading up to the Tribunal and did not feel he could take part. The Tribunal understood and appreciated his position. The Tribunal was satisfied that it had obtained a good amount of information from the Applicant at the CMD and had a large amount of paperwork before it as well to assist.

5. Again, the Respondent was not present or represented. The Tribunal were surprised that the Respondent had not responded to the direction, as they would normally do so. It transpired that the request for the direction to be issued had happened over the festive period and had gone astray. The Tribunal, in the interests of fairness, ordered the direction to be served on the Respondent again and set a fresh date of 27 August 2024 for a hearing. In the absence of any objection from either party, the Tribunal proposed to determine matters on that date based on the papers. Neither party objected and the Tribunal convened on that date to determine the matter.

Preliminary Matters – Forced Labour, Supplementary Terms & Complaint Forms

6. The Tribunal viewed these first three points as preliminary issues to be addressed at the outset as they did not fall directly under the Code or Terms of Service issued by the Respondent. Nonetheless, it was apparent from the CMD that these points were important to the Applicant and so the Tribunal considered these. They also formed the basis upon which the Applicant claimed to be able to impose certain costs against the Respondent in his favour

7. Part of the Applicant's submission was that the behaviour of the Respondent towards the Applicant meant that he was effectively being subjected to "forced labour". He submitted that he was being compelled to respond to the Respondent and deal with them. The Applicant cited the Convention Concerning Forced or Compulsory Labour (1930), the Human Rights Act 1988, Article 5 of the EU Charter of Fundamental Rights and the Modern Slavery Act 2015.

8. The Forced Labour Convention 1930 contains a widely recognised definition of forced labour in article 1 of "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"

9. The Tribunal accepted that the Applicant had a genuine belief he was being subjected to forced labour. However, the Tribunal was not of the view that the circumstances that the Applicant faced with the Respondent could reasonably be designated as forced labour. "Labour", in the context utilised, meant work or employment on onerous or unfair terms where an employee/slave is being forced to perform work or services for the employer for little or no reward.

10. The situation in this matter was that there was a contract between a group of homeowners, of whom the Applicant was one, and the Respondent. This was a private matter. The Applicant was not being forced to carry out "work" as envisaged by the 1930 Convention nor was he providing services to the Respondent. Rather, the Applicant was in dispute with the Respondent in relation to how the Respondent was providing services to the homeowners under that contract. Where a dispute arises between people and/or organisations, it may well be the case that it causes a large amount of frustration and can cause a party to spend a significant amount of time fighting their corner. Frustrating as that may be for an individual and regardless of the inconvenience and angst that such a dispute may cause, that is not the same as one party being forced to work for the other. Individuals have rights of redress through the courts or, in this instance, through the Tribunal to resolve disputes, enforce contracts or challenge the behaviour of others. This does not then bring them within the ambit of forced labour/slavery legislation. For similar reasons, the Tribunal was satisfied that the other forced labour/modern slavery legislation referenced by the Applicant was not applicable here.

11. Accordingly the Tribunal, whilst appreciating that the Applicant felt he was subject to forced labour, determined that he was not and his submissions in this regard did not have any impact on the matter or on any obligations or penalties to be imposed on the Respondent.

12. The Tribunal then considered a set of "Supplementary Terms and Conditions" that the Applicant had drafted and sent to the Respondent. The Applicant had stated to the Respondent that if the Respondent continued to engage with him then these Supplementary Terms would apply to their relationship. The Applicant had emailed these to the Respondent on 1 September 2022. These terms largely consisted of penalty charges to be levied on the Respondent if they carried out certain acts.

Examples were:-

- Sending a letter to the Applicant referencing the use of the Respondent's poral/app - £300
- Initiating debt recovery against the Applicant - £2,000
- Serving a Notice of Potential Liability (NOPL) on the Applicant's Property – £100,000

The Applicant sought these contra charges from the Respondent. It was not clear to the Tribunal exactly how much money was being sought by the Applicant under his Supplementary Terms. There was correspondence to indicate a NOPL had been served on the Applicant by the Respondent but the Tribunal could not see this on the title sheet of the Property. No up to date list of total charges was submitted but it appeared to the Tribunal to be in the region of £30,000 or £130,000, depending on whether the NOPL had actually been served.

In any event, the Tribunal was satisfied that the Supplementary Terms and Conditions were not valid or applicable. The relevant underlying contract was the contract between the group of homeowners as a whole and the Respondent. The Applicant could not amend this unilaterally.

13. The Applicant submitted that he was entitled to these charges. He had intimated the charges to the Respondent and indicated that if they continued to engage with him they would be accepting the imposition of these. The Respondent had continued to respond to the Applicant and so, in his submission, had accepted these. The Applicant gave the example of if he had a gardener doing poor work for him. If the Applicant told the gardener he would not be paid for any future poor work then even if the gardener rejected these terms but nonetheless continued to turn up and do poor work then the gardener would have accepted the terms and would not be paid for poor work. Regardless of any validity of the Applicant's argument in that particular context, the Tribunal did not consider this was an equivalent or similar contractual relationship as existed between the Applicant and the Respondent.

14. The contractual arrangement between the Applicant and the Respondent arose as a result of the Respondent being the factor of the whole block in which the Applicant resided. There were not single contracts between each homeowner in the block and the factor. Rather, there was a single contract between the collective homeowners and Respondent. There may be elements of that single contract that vary between homeowners such as, for example, the proportion of repair cost that is applicable to each individual property according to the titles. The right of an individual to complain to the Tribunal, for example, would be another element which is given to each individual. These individual elements are, however, still created by the collective contract between a group of homeowners and a factor.

15. Contracts between homeowners and a factor may generally be created by 3 means. Firstly, in more modern developments, the developer will often retain a a right to select and appoint the first factor to the development in terms of the Deed of Conditions relating to the wider development. Secondly, the homeowners as a group, may approach a factor and make a direct appointment by accepting an offer from a factor to provide the services as set out in the factors contract/Terms of Service. Thirdly, the factor may simply have been in situ for many decades. This is not uncommon in the west of Scotland, particularly with older tenemental properties. The exact terms of the original appointment of the factor in these circumstances may have been lost, for want of a better description, in the mists of time. Such

appointments are known as “custom and practice”. The Respondent’s Terms of Service made reference to them having a custom and practice appointment.

16. Historically, the terms applicable to a custom and practice appointment may have been unclear, given there may have been little in the way of formal contract. However, one of the consequences of the Act has been to bring clarity to the terms of such appointment by obliging factors to issue their Terms of Service. This obligation has subsisted since 2012. The Respondents, presumably, had followed their obligations under the Act and issued their Terms of Service when required by the Act. The homeowners, as a group, had continued to employ the Respondents on the basis of the issued Terms of Service. On that basis, the Terms of Service now formed the contractual relationship between the homeowners as a group and the Respondent.

17. A single individual homeowner cannot change the contract a factor operates on with the collective group of homeowners. The method of changing the terms a factor operates on is by obtaining the consent of a majority of owners who wish a change to be implemented. If the factor does not wish to adhere to that proposed change then the factor may choose to resign or the homeowners can elect to terminate the services of the factor. The factoring contract is, however, a contract between the homeowners and the factor and cannot competently be unilaterally changed by the Applicant or any other single homeowner. Any other situation would effectively render factoring unworkable. Take a somewhat extreme example where two individual homeowners in the same block follow the example of the Applicant and each attempt to impose conditions on a factor unilaterally. What is to happen if one requires the common close to be painted green and the other requires it to be painted blue. The factor cannot comply with both requests. A majority need to indicate their preference. Similarly, an individual homeowner decides that if the gardener is late by 1 minute to cut the communal grass then a fine of £100,000 will be imposed on the factor. If this were to be legally binding then factoring would cease to exist overnight as no factor could accept individual homeowners imposing unilateral conditions such as these and would have to resign.

18. Factoring contracts exist with a degree of mutuality between the homeowners. This may cause frustration for an individual homeowner such as the Applicant, who feels that the service is not adequate. It may be difficult for a single homeowner to effect a change of factor or to look for different services from the factor by marshalling a majority of proprietors. This is often because there is a degree of diffidence from homeowners, particularly if there are a number of buy to let landlords. Frustrating as this may be for individual homeowners, this does not allow them to impose unilateral terms on the factor. They can hold the factor to account through the Tribunal and they may try and gain a majority consent to effect change but that is the limit of an individual’s ability to change the contractual terms they find themselves in with their factor.

19. On that basis, the Tribunal was satisfied that the Supplementary Terms and Conditions were not relevant in relation to the Tribunal in assessing any sums due by the Respondent to the Applicant. After notification of the Supplementary Terms and Conditions had been notified, the Respondents, as they were entitled to do, had continued to deal with the Applicant under the existing Terms of Service with the wider group of homeowners.

20. As part of his complaint, the Applicant had also prepared “Official Reply Forms” that he wished the Respondent to use when responding to his complaint. A failure to use these forms also carried a penalty in terms of the Applicant’s Supplementary Terms.

The forms prepared were extensive (extending to over 30 pages) and were very detailed. The Respondent elected not to respond using the forms and described them as vexatious. The Respondent instead followed their standard complaint's process.

21. The Tribunal did not view the Applicant's behaviour in this regard as vexatious. The Applicant had clearly taken a significant amount of time in preparing the forms with the genuine intent of providing a framework for the complaint to be considered. That being said, the Tribunal did not consider that the Respondent was required to complete these. For the reasons set out above, the Applicant could not unilaterally impose an obligation on the Respondent to comply with these. The Code required the Respondent to have a complaints process and to follow it. The Respondent had a two stage complaints process and appeared to have followed it. Whilst the Tribunal had some issue with some of the substance of the responses by the Respondent, more detail of which is set out below, the Tribunal was satisfied that there was no failing on the part of the Respondent by refusing to follow the Applicant's forms.

Reasonable Adjustment Complaint

22. Part of the Applicant's complaint related to the reference by the Respondent in email and general correspondence guiding homeowners to use their web portal/app to communicate with the Respondent and to receive and send information.

23. The Applicant has a mental health condition. He had provided the Tribunal with his historical medical file which set this out and corroborated the position that he did have a mental health condition and could become anxious and feel under pressure.

24. The Applicant did not wish to use the Respondents' portal as he found it difficult, confusing and caused him anxiety. The Applicant intimated to the Respondent that he would not use the portal and did not wish reference to be made to it in communications with him. However, correspondence from the Respondent continued to reference the use of the portal regularly.

25. In his written submissions, the Applicant highlighted the obligation contained in s20 of the Equality Act 2010 on a service provider to make reasonable adjustments to prevent a person, such as the Applicant, with a protected characteristic being put at a substantial disadvantage.

26. Reference was also made to section 26 of the Equality Act 2010 which obliges a party not to harass a person with a protected characteristic, such as a mental health condition. The Applicant submitted that the Respondent had failed to make any reasonable adjustment by ceasing to incorporate the reference to the use of the portal. He alleged that their repeated references to it in the communications with him constituted harassment.

27. The Applicant highlighted this issue as part of his complaint to the Respondent on 9th May 2022. In the response of 31st May 2022, the Respondent covered this aspect of the complaint with the following response "*we use a variety of communication methods and where you request hard copies of information we shall be happy to provide these, subject to any appropriate administration charged (of which we do not expect to charge routinely and have not regarding any information requested relative to your complaint).*"

28. The Tribunal considered this matter and was of the view that the actions of the Respondent had been inadequate in two regards in relation to this aspect of the complaint.

29. Firstly, Section 7.1 of the Code of Conduct requires the Respondent to deal with complaints in a clear and transparent manner. The Applicant, in his complaint correspondence was clearly asking for a specific adjustment to be made i.e. the removal of any reference to the portal. The response did not address this at all. The Applicant was receiving documentation via email and letter, that did not appear to be disputed. The complaint was that the email and letter still referred to the portal/app and encouraged the Applicant to use them. This aspect of the complaint was not addressed in a clear and transparent manner as required by the Code. It was simply ignored by the Respondent. However, the Tribunal noted that the Applicant had not referenced 7.1 of the Code in his complaint or application to the Tribunal but nonetheless the Tribunal did note that this had been breached

30. Secondly, as referenced in paragraph 25 above there is an obligation on service providers to consider the terms of the Equality Act 2010 and to make reasonable adjustments. Although that Act is not directly referenced in the Code, Section 2.3 of the Code effectively acknowledges the requirements of the Equality Act by requiring factors to provide information in alternative formats where requested. In addition the Overarching Standards of Practice ("OSP") within the Code that factors "must conduct your business in a way that complies with all relevant legislation" (OSP1)

31. There did not appear to be any suggestion that the Respondent was not prepared to provide information via email and letter rather than through the portal and so, in this regard, there did not appear to be a breach. However, what the Applicant was requesting was what he considered to be a reasonable adjustment by the factor ceasing to make reference to the portal in email and letter correspondence.

32. It is outwith the scope of this decision for the Tribunal to make a formal determination as to whether or not there had been a breach of the Equality Act and whether the proposed reasonable adjustment should have been made. The Tribunal was conscious that factors send out large amounts of communication to homeowners and this will be, to an extent, automated and so may not be easily individualised. Whether it is reasonable for a factor to make an adjustment to individual correspondence on a case-by-case basis would be open to interpretation. Companies, including factors, can be under statutory obligations to improve sustainability, which can go some way to justifying online portals rather than traditional paper correspondence Whether an adjustment is reasonable can also depend on the scale, size and resources of the service provider and the cost of making the adjustment. The Tribunal did not have any of this information available to it from either party and so was unable to make such a determination as to whether the adjustment should have been made.

33. However, the question of whether the adjustment should have been made is, to a degree, secondary to the complaint by the Applicant. The primary point is that the Applicant, as a person with a protected characteristic, was entitled to make the request for the adjustment and for that request to be considered. The Respondent was required to consider the adjustment and give a response to the Applicant. The Tribunal was of the view that the Respondent did not appear to have considered the Applicant's request in any meaningful way and when this was specifically highlighted as part of his complaint, they did not respond to it. Instead, they gave a generic answer that did not address the issue that had been raised. As highlighted at OPS1, the Respondent was obliged to comply with all relevant legislation. By failing to

consider a valid request for a reasonable adjustment to be made by the Applicant the Respondents had breached OSP1.

ADT Refund

34. In relation to this element of the Applicant's complaint, there did not appear to be any dispute as to the general factual situation that had occurred. There was a secure door entry system at the larger block of which the Property formed part. A maintenance contract for this had been in place since at least 1999 (which predated the Respondents' appointment). An annual maintenance and service was meant to be carried out each year. ADT had been billing the homeowners via the Respondent as part of the factoring arrangement. There was a service sheet left in the building which was visible to anyone who wished to view it detailing the dates of the services.

35. It transpired that whilst ADT had been invoicing for the annual service, they had not, in fact, been carrying it out. This appeared to have gone on since 2007, possibly with a single service being carried out in 2014. In any event, it was not in dispute that there were a large number of years in which no work had been carried out by ADT but that invoices had been sent to the Respondent and allocated on to the homeowners. This situation had come to light when another homeowner within the block had looked at the service sheet in late 2021/early 2022. The Respondent had raised this with ADT and, after an extensive amount of correspondence between the Respondent and ADT, had accepted an offer of payment from ADT of a sum equivalent to seven years invoices. This was to be credited back to the individual homeowner's accounts by the Respondent. The Applicant was dissatisfied with this position as he felt (a) the Respondents should have been checking regularly that the works were being done and to a satisfactory standard and that they had liability for the costs incurred and (b) that the factors should not have accepted a partial refund from ADT.

36. The Tribunal considered the point and did not consider that the Respondent had failed in this regard. Neither the Code nor the Respondents' Terms of Service required them to underwrite or guarantee any works carried out by contractors. What the Respondents did have, however, was an obligation under both the Code (6.12) and their Written Statement of Services (3.1) to investigate any complaints of inadequate work.

37. The Tribunal was satisfied that the Respondent had adequately investigated the inadequate service from ADT. In response to the Direction issued by the Tribunal, the Respondent had provided the email and correspondence chains between ADT and the Respondent. A senior director of the Respondent, Gordon Campbell, had chased ADT regularly and robustly regarding the ADT failings. He had obtained an offer of 7 years refund from ADT.

38. The Tribunal noted that in terms of the Prescription and Limitation (Scotland) Act 1973 section 6, the most that a legal action would have allowed the homeowners to reclaim would have been 5 years payment. A legal action against ADT on behalf of the homeowners would have delivered a poorer result. There was no other obvious course of action open to the Respondent to deliver a better result for the homeowners. In the circumstances, the Respondent's actions appeared reasonable.

39. The Respondents had suggested cancelling the ADT contract and no party had objected to this. A minority of homeowners had objected to the offer being accepted but no other responses have been received. In the absence of any other response,

the Respondents either had to accept or decline the offer and given, as highlighted above, this was greater than could be recovered via the courts it was not unreasonable.

40. As highlighted above, the Respondents did not have an obligation to guarantee the works. The Applicant had submitted that he felt the Respondent should have checked that the work was being carried out. The Tribunal reviewed both the Respondent's Terms of Service (3.1) and Part 6 of the Code. Neither document contained an obligation on the part of the Respondent to supervise and double check work instructed on behalf of homeowners. The Respondent's Terms of Service at 3.4 did envisage situations where they would be more involved in the carrying out of works but this was clearly an additional service that attracted an additional cost. There was no suggestion in any of the documentation that the Respondent had been employed other than to carry out core services as set out in 3.1 of the Terms of Service.

41. Unless contractually agreed with homeowners, the Tribunal would not generally expect a factor, for items of cyclical maintenance such as the ADT service, to double check the work had been carried out. Their role was to instruct works through suitably qualified contractors and deal with payments and allocation of costs amongst homeowners. There was an obligation on a factor to investigate complaints of inadequate work or service. As set out above, the Tribunal was satisfied that the Respondent had investigated and pursued the homeowner's complaint once the issue with ADT had come to light. It would not be practical nor cost effective if factors were to check every piece of cyclical maintenance. As an example, this would require someone from the factor to check every time a common close had been cleaned or communal grass had been cut. As is highlighted by the Code at 6.1, there is an obligation on homeowners to look after the maintenance of their property. If cyclical maintenance was not occurring it is not unreasonable to expect the homeowners to draw this to the attention of the factor. The maintenance sheet was available to any homeowner to look at and see. Notwithstanding the lack of maintenance by ADT, presumably the door system had remained in working order and so there would be nothing obvious to homeowners and the Respondent alike, other than the service sheet, that the work had not been carried out.

42. The Tribunal appreciated the frustration that the Applicant would undoubtedly feel at having paid for work that was not carried out. However, this was not the fault of the Respondent. They had complied with their contractual obligations within their Terms of Service. The fault lay with ADT. Unfortunately, due to the length of the missed services, the Prescription and Limitation (Scotland) Act 1973 limited the amount of sums that could be recovered from ADT. The fact that a higher sum had been obtained was as positive an outcome as the Respondent could have achieved.

43. Accordingly, the Tribunal found there had been no breaches of the Code nor the Respondents Written Terms of Service

A Menzies & Sons

44. In relation to this section of the complaint, the factual situation was that there were repairs that were required around two areas of roughcast around a chimney at the larger building of which the Property formed part. The Respondents appointed A Menzies & Sons to carry out the works. The original quotation for the works was in three parts, one of which referenced erecting scaffolding at the building to allow the repair work to be carried out. Following works being done, the homeowners were billed for the works in line with the original quotation.

45. The Applicant was unhappy with the amount of the original quotation being invoiced as he was of the view that no scaffolding had been used by the contractor. He requested a breakdown of the works done under the invoice from A Menzies & Sons. The Respondent replied to the Applicant by sending him the original quotation again. Evidence was also provided that the roughcast repairs had been carried out with pictures of the area around the chimney being provided both before and after the repairs.

46. The Tribunal considered matters. The Applicant did not appear to be disputing that the repair had been carried out. The photographic evidence provided by the Respondent substantiated that. However, the point the Applicant was making to the Respondent was that he did not believe that the contractor had required to use scaffolding to carry out the repair. The question was therefore whether the invoice should have been issued in line with the original quotation or whether it ought to have been reduced. It appeared to the Tribunal that this was a reasonable request for the Respondents to investigate. If scaffolding had not been required then it was perfectly conceivable that the invoice should have been for a smaller sum. The Respondent obtaining confirmation that the works had been completed did not address the actual complaint. The Respondents appeared to have failed to have asked the question as to whether or not the scaffolding had been used. This was not an unreasonable request from the Applicant to have the Respondents ask the contractor this. The Respondent instead asked the Applicant to provide more proof that scaffolding had not been used.

47. In the Respondents Terms of Service (3.1), it provides that one of their responsibilities is "*investigating complaints of inadequate work or service from contractors and service suppliers and pursuing them to remedy these*". In addition, section 6.12 of the Code contains a similar obligation. Ultimately if the question had been asked of the contractor and they had said that scaffolding had been used, it may have been difficult for the matters to be resolved one way or another, it being difficult for the Applicant to prove a negative. It may have been, at that stage, reasonable to come back to the Applicant asking whether he had any other proof that scaffolding had not been used. However, the underlying issue was that the Applicant had asked a reasonable and direct question of the Respondents in relation to the use of scaffolding. It was within the remit of the Respondent both in terms of their Written Statement and the Code to investigate the Applicant's concern. The Respondents appear to have failed to ask that same reasonable and direct question of the contractor and instead had provided other information that did not address the query. This was a breach of both section 3.1 of the Written Statement of Services, 6.12 of the Code of Conduct and the general obligation to communicate and deal with homeowners in a fair and transparent manner. Accordingly, there had been a breach of both the Code and the property factor's duties under the Written Statement of Services.

48. Without a proper investigation of the Applicants concerns there was no certainty that appropriate amounts had been billed to the homeowners and this could lead to breaches of 3.1 and 3.2 of the Code. The Tribunal, in the absence of a definitive landing on what works had been done and whether they had been billed properly was not in a position to make a determination on these sections of the Code, but it highlighted the importance of the Respondent properly investigating the Applicant's concerns so that they could have confidence in the financial arrangements and billing processes.

49. In reaching its decision in relation to any property factoring enforcement order, the Tribunal did note and take account of the fact that the Respondent had subsequently removed the charge from A Menzies & Sons from the Applicant's account.

Contractor Management and Instructing of Repairs

50. This complaint covered a number of issues concerning how the Respondent consulted the Applicant and other homeowners and gained consent for repairs to be carried out. This covered repairs by Tarmac, A Menzies & Son and C Hanlon & Sons, as well as other matters. For the purposes of practicality, these are all dealt with under this general heading as the underlying issues raised by the Applicant are similar. In essence, the Applicant's complaints was that there was a lack of a fair and consistent process in obtaining consent from homeowners for authorisation for works. When authorisation was sought, it was often done on the basis that if a response was not received within a set period then consent would be taken as given. The Applicant had stated that he did not wish his consent to ever be implied because of a lack of response but his request did not appear to be adhered to.

51. The Tribunal first considered the Respondent's Terms of Service as to what its procedures were in relation to gaining consent for carrying out works. The primary clause in the Respondent's Terms of Service is at 2.5 which states "*Where we consider that consultation with the group of homeowners is necessary or that written approval of homeowners is appropriate prior to instructing common works and services, we will consult in writing with all homeowners in the group seeking their views and/or instructions"*

52. Following the CMD, the Tribunal had issued a Direction to the Respondents seeking more detail as to how they obtained consent and carried out consultation given the very generic nature of 2.5 of the Terms of Service. The Respondent had advised that works were generally split in to a number of categories, although there did not appear to be any definitive lists and it appeared to the Tribunal that it remained at the entire discretion of the Respondent to determine what category a repair fell in to.

53. The first category was a "Jobbing Instruction". This was described as matters which the Respondent may consider to be relatively minor such as door repairs, routine roof maintenance, plumbing repairs and emergency/urgent repairs.

54. The second category described was a "Pre-Notification". This was described as works where the Respondent may decide to inform homeowners that work is proposed to be carried out and inviting homeowners input often by way of objection/negative assent. Typical works were stated to be gutter cleaning and car park lighting repairs

55. The third category was described as "Voting Requested". This was described as works where the Respondent may decide to provide homeowners with quotations and obtain their consent. This was described as generally being for larger works such as decoration, larger roof works and tree works.

56. The fourth category was described as "Voting and Funds Requested". This was similar to the third category for more significant works but where the Respondents required to be put in funds for the works in advance of them being carried out.

57. The Respondent advised that they did not necessarily take in to account the monetary value of a repair in assessing which category a job fell in to. The

Respondent retained full discretion to determine which category a repair fell in to and how they would consult

58. The Tribunal then considered the relevant clauses of the Code. In particular Clauses 2.1 and 2.6 which state:-

2.1 "*Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations"*

And

2.6 *"A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of condition or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner."*

59. The Tribunal then considered Clause 2.5 of the Terms of Service (and the information the Respondent had provided about how they operated it in practice) against the provisions of Clauses 2.1 and 2.6 of the Code. The Tribunal was not satisfied that how the Respondent operated 2.5 of their Terms of Service was compatible with the provisions of the Code in a number of regards.

60. Firstly, 2.6 of the Code required the Respondent to have a written procedure in place in connection with consultation and consent. Clause 2.5 of the Terms of Service could not be said to be a procedure. It was simply a generic statement that said the Respondent may consult as it saw fit. The additional information that the Respondent had provided about the various different categories they may allocate repairs to and how they would gain consent could also not be viewed as a written procedure. A proper procedure would have some degree of transparency and consistency to it so that a party, on reading it, would generally understand which method would be used and how it would operate in practice. It seemed very unusual not to take account of the level of cost of the repairs in assessing how consent would be obtained as that would be a consistent and understandable measure for homeowners. It was apparent from their response to the Direction that the Respondent had no such written procedure in place. The Respondent sought to retain carte blanche as to what they did or did not consult on.

61. Secondly, the Respondent was exercising a level of delegated authority in carrying out minor repairs. The Tribunal accepts that having a level of delegated authority is a sensible commercial arrangement between factors and homeowners that allows minor matters to be dealt with efficiently. However 2.6 of the Code requires an "*agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold".* By the Respondent's own admission there was no such authority in place in writing and nor was there an agreed threshold. The Tribunal did note that Respondent had indicated in response to the Direction that if the homeowners wished to agree a level of delegated authority they would be happy to

agree to that. In the view of the Tribunal that was not a sufficient response. If the Respondent wished to exercise a level of delegated authority they needed to set that out in writing in their Terms of Service or written procedure and with the financial amount and any other parameters specified.

62. Thirdly, the Code at 2.6 requires "consent" to be obtained. The Tribunal appreciated, as mentioned above, that it can be difficult for factors to get positive consent from homeowners. A few disinterested owners in a block can make getting a positive response challenging and can mean that necessary works never happen due to a level of inertia setting in. For that reason, the Tribunal understood why a factor would, on occasion wish to take a "silence equals consent" approach. However, the Tribunal was not satisfied that the Respondent had set this out in sufficient detail. As stated, there was no clear and transparent written procedure that set out when a silence equals consent approach may be taken. It was not explicitly stated in the Terms of Service that this approach would be taken and in what circumstances. There did not appear to be any set timescale that the Respondent would give before taking a deemed consent, it appeared to be entirely at the discretion of the Respondent. In any event, 7 days appeared to be too short a period of time given that individuals may be away on work or on holiday for longer periods of time. A homeowner may wish to consider matters and make their own investigations and queries and again 7 days would be too short a timescale. The Tribunal did not think that a "silence equals consent" policy could never be carried out, although it was outwith the scope of this decision to determine that. It may be the case that if the Respondent's written procedure in terms of 2.6 of the Code and their Terms of Service had proper detail and set out the parameters clearly then it may be allowable. However, the Respondent did not have a proper written procedure and generally the process lacked transparency. If homeowners were to be subject to a "silence equals consent" procedure they should understand how it would operate. If a majority of homeowners accepted this when agreeing terms with a factor then that might be a different to the situation here.

63. Generally, for the reasons set out above, the Tribunal also found there to be a breach of 2.1 of the Code. To reiterate the wording of that section, homeowners are entitled to be consulted appropriately in decision making and have access to the information that they need. The Tribunal, having had the response of the Respondent on how they operated their Terms of Service, were not clear on how the Respondent would consult appropriately for various repairs. It seemed to the Tribunal to be an opaque process that varied from repair to repair. The Tribunal appreciated that from a factor's perspective, retaining a broad discretion to do as a factor wished was commercially beneficial to a factor. However, it was inconsistent with the general principles of the Code and also 2.1. As that section notes, good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. The Tribunal was of the view that the inconsistent method of consultations, the lack of willingness to give more detailed information on repairs to the Applicant, the short notice period had all contributed to the dispute between the parties and there had not been appropriate consultation.

64. The tribunal also considered the manner in which repairs were progressed by the Respondent to be in breach of OSP2 "*You must be honest, open, transparent and fair in your dealings with homeowners."* The carte blanche discretion and lack of procedure could not be said to be open, transparent or fair. Similarly there was a breach of OSP5 *"You must apply your policies consistently and reasonably."* The submission of the Respondent made it clear that there was no consistent approach taken to gaining consent for repairs

Summary

65. The Tribunal made the following determination on the matters complained of by the Applicant:-

    - The Applicant had not been the subject of forced labour/slavery

    - There was one contractual relationship between the Applicant and Respondent, namely the general Terms of Service set out by the Respondent. The Applicant's Supplementary Terms were not binding on the Respondent and the Respondent had been entitled to continue to engage with the Applicant and the other homeowners under their Terms of Service. The Applicant's charges to the Respondent were not valid.

    - The Respondent had failed to deal properly with the Applicant's complaint in relation to the references to the portal/app and had failed to properly consider the Applicant's request for the Respondent to make a reasonable adjustment in this regard under the terms of the Equality Act 2010. This was a breach of OSP1

    - The Respondent had acted correctly, timeously and fairly in dealing with and obtaining the refund of monies from ADT.

    - The Respondent had failed to properly address the Applicant's complaint in relation to the work carried out by A Menzies & Son. This was a breach of 6.12 of the Code and property factors duties by failing to comply with 3.1 of the Terms of Service

    - The Respondent did not have a proper written procedure in place to consult and obtain the consent of homeowners in relation to works generally and thereafter to instruct works. They had not dealt with the Applicant's queries correctly. This was a breach of OSP2, OSP5, 2.1 and 2.6 of the Code and property factors duties in respect of 2.5 of the Terms of Service

66. The Tribunal considered what, if any steps were necessary to rectify matters. The Tribunal noted that the Respondent had resigned from acting as the factor for the larger development and so the relationship was at an end. This restricted some practical steps the Tribunal may have wanted to direct the Respondent to take given there was now no ongoing contractual relationship between the parties. The Tribunal would, however, recommend that the Respondent review its policy for obtaining consent from homeowners generally for the reasons set out in paras 50-64 above.

67. The issues relating to A Menzies & Son would have merited further investigation also had the relationship been continuing. However, as noted, the Respondent had removed all cost in this regard from the Applicant's account and so there seemed to the Tribunal little merit in taking that aspect further

68. The Tribunal noted that the Applicant had been put to time and expense in dealing with the Respondent and that a number of his queries and complaints contained genuine and reasonable points but had been ignored by the Respondent. Whilst the Tribunal did not accept that the Applicant was entitled to the charges under his Supplementary Terms, they did recognise that he had been put to inconvenience

and a financial payment was, in the circumstances, appropriate. The Tribunal considered that the sum of £750 should be paid by the Respondent to the Applicant.

Property Factors Enforcement Order ("PFEO")

The Tribunal then considered the terms of a PFEO.

The Tribunal proposes to make the following PFEO:-

1. "Within 30 days of service of the PFEO on the Respondent, the Respondent shall pay the Applicant the sum of £750.

A copy of the proposed PFEO is contained in the accompanying notice under Section 19(2)(a) of the Act.

Appeals

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

_____ Legal Member and Chair

6 February 2025
_____ Date