Housing and Property Chamber
First-tier Tribunal for Scotland

Reference number: FTS/HPC/LM/24/0388 and **FTS/HPC/LM/24/4160**

Re: Property at The mutual area of land opposite 29, 31 & 25, East Kilngate Wynd, Edinburgh, EH17 8UQ ("the Property")

The Parties:

Mr Ronald Melville, 25 East Kilngate Wynd, Edinburgh, EH17 8UQ ("the Applicant")

Trinity Factoring Services Ltd, 209 Bruntsfield Place, Edinburgh, EH10 4DH ("the Respondent")

Legal Member: Mr Andrew McLaughlin
Ordinary Member: Ms Sandra Brydon

Background

[1] The Applicant has submitted two separate Applications to the Tribunal seeking a Property Factor Enforcement Order in relation to two separate issues.

Application with reference FTS/HPC/LM/24/0388

[2] By Application in Form C2, the Applicant seeks a determination that the Respondent has failed to comply with The Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors 2021 ("*The Code*"). That Application also answers "*yes*" to the question: "*Does your complaint relate to a failure to carry out the Property Factor's duties?*".

[3] The Applicant alleges that the Respondent has failed to plant and maintain "*four flowering cherry trees*" on a certain area of common land. The Applicant says that there originally were such trees there, although they are thought to have disappeared some 20 years ago. The Applicant only moved into his home in 2017 and the Respondent was only appointed as the relevant Property Factor, within the meaning of the Act, in 2006. The Application also refers to an alleged failure on the part of the Respondent to comply

with their obligations in respect of complaint handling. The Respondent has submitted representations addressing the principal complaint in relation to the cherry trees. They point out that they knew nothing about the trees when they took over factoring the development. They also said that they subsequently organised a ballot to establish if residents wanted to incur the expense of planting the trees. Out of the 177 owners, 7 owners agreed to the planting and 29 owners disagreed. They therefore took no further action.

[4] In Application with reference FTS/ FTS/HPC/LM/24/4160, The Applicant alleges that the Respondent has failed to carry out their Property Factor's duties to maintain a specific wooden boundary fence. The Respondent has submitted written representations disputing the allegations and pointing out that they had established that the fence in question is not owned in common but rather is owned by the proprietors of certain other properties which border the fence. The Respondent has submitted correspondence setting out their position and their findings to the Applicant.

[5] The Application had called for a Hearing conducted as a case management discussion by conference call on 24 May 2024. The Tribunal made case management orders in the form of Directions ordering the Applicant to supply further details of the basis of the Application. The Applicant had submitted a response to this Direction. The Tribunal had made a direction ordering that parties should submit full unabridged and complete copies of any title deeds or legal documents that they wished to rely on. Parties each submitted certain documents better setting out their position.

The Hearing

[6] The Application then called for a Hearing at 10 am on 26 August 2025 in George House, George Street, Edinburgh. The Applicant was personally present together with a supporter. As again suggested by the Respondent in advance, they were neither present nor represented at the Hearing. They simply wished to rely on their written representations. Although both Applications were conjoined, the Tribunal considered it sensible to hear evidence about "*0388*" and thereafter to move on to hearing "*4160*". As there was no representation on behalf of the Respondent, the Tribunal invited the Applicant to address the Tribunal on each Application and asked questions throughout to test the evidence and to ensure that the Tribunal understood the Applicant's position.

[7] The Tribunal comments on the Applicant's evidence in each Application as follows.

FTS/HPC/LM/24/0388

The Applicant- Mr Ronald Melville

[8] The Applicant in this Application seeks findings that the Respondent has breached overarching standards of practice 2, 4, 8 and 11 together with paragraph 2.7 of the Code. He also alleges that they have breached their "*Property Factor's duties*" within the meaning of Section 17 (5) of the Act.

[9] The Respondent was appointed as the relevant property factor for the development in which the Applicant resides in 2006. The development was built in 2000. The Applicant moved into his house in 2017. At the time the Applicant purchased his house and at all times since, there have not been flowering cherry trees in the area in question. The area in question is described in the Application as being the mutual area of land opposite 29,31, and 25 East Kilngate Wynd, Edinburgh. The area is 35 m by 8m and is currently open grass.

[10] The Applicant is of the view that in the distant past, long before the Applicant purchased the Property, there were flowering cherry trees on this land. He has obviously never seen these trees with his own eyes and his knowledge of them is derived from the distant memory of certain other individuals who might have knowledge about such matters.

[11] The Applicant, together with the proprietors of certain other neighbouring properties, have been advocating for the Respondent to plant and maintain four flowering trees again in this area of land.

[12] The Respondent has clearly engaged with the Applicant about his desire as is evidenced by the extensive correspondence exchanged between the parties on the matter. In October 2023, the Respondent even organised a ballot of the residents to determine if the Respondent should do what the Applicant wanted- plant and maintain the cherry trees.

[13] The results of the ballot were published in November 2023. It was clear that there was an overwhelming mandate given to the Respondent to take no such action and to incur no such additional expense. The Respondent considered themselves bound by the will of those residents on whose behalf they act as Property Factor. The results were that there were only 7 votes in favour, 29 objections, and 141 residents did not vote.

[14] Interestingly, the Applicant himself did not vote in favour of the proposal which was effectively his own proposal. This is clearly rather a strange feature but is perhaps best explained as being that the Applicant didn't think a ballot was necessary and elected not to add the '*legitimacy*' of his own vote to it.

[15] The Applicant sought to persuade the Tribunal that those who did not vote either way should be considered as being in favour of the proposal. That would however have involved completely misinterpreting the terms of the ballot question posed. The Applicant also struggled to explain away that even on a simple reckoning of votes cast,

the proposal would still have been overwhelmingly defeated. The Applicant is of the view that there should not have been a ballot because the Respondent is bound by the terms of the deed of conditions. The Applicant could offer no particular insight as to why a ballot was wrong and why, a ballot having been arranged, votes cast, and a clear outcome provided, it might have been appropriate for the Respondent to then ignore that outcome and do it anyway. The Applicant had very little of substance to say about that.

[16] Nevertheless, the Applicant wants the Respondent to plant the trees anyway and also to apologise to him.

[17] The Applicant refers to the relevant deed of conditions and states that this legally requires the Respondent to maintain the mutual areas in the original landscaped condition as set by the developer. The Applicant is of the view that the four flowering cherry trees must have been there originally and so should be reinstated in order for the Respondent to maintain the original landscaped area. The Applicant's evidence that there were any flowering cherry trees deserves consideration.

[18] In his evidence to the Tribunal, the Applicant could provide little detail at all about when, how or why the relevant trees ceased to be present. In the Application he states confidently that in 2000: "*when contractors carried out remedial works on subsidence, the contractors used the area of land in question to site their equipment and materials. At this point in time the trees which had been planted by Barret disappeared and were not replaced.*"

[19] However during his evidence the Applicant was frank that he personally didn't know what happened to the trees and the Tribunal notes that this part of the Application which was stated with fact should be treated with some caution. Even taking the Applicant's words in the Application as being completely accurate, there would still in any event be many unanswered questions about the details.

[20] The Applicant's own confident statement about what happened to the trees is also contradicted somewhat by his own evidence submitted with the Application. He included in his Application an email from a Mr David McLaughlin which states :

" *I can confirm that there were cherry trees planted all along this grassy area. Indeed there are 2 of these original trees still remaining. The others were damaged due to children playing there- of which our own 2 children probably played a part! There were also considerable works along that area when the limestone voids were in filled with hoses stretching from a compound of the grassy area in front of the flats to all the houses across from us.*"

[21] This is clearly not entirely consistent with what the Applicant said in his Application. Given that the Applicant derives his entire understanding of the matter from the memories of others like Mr David McLaughlin, the Tribunal cannot help but

consider that the Applicant has been somewhat selective in his wording in the Application.

[22] The Tribunal notes that the Applicant also appears to have submitted two photographs showing the land "*without landscaping*" and then one titled "*Street View showing position of original landscaping*".

[23] The latter photo shows four trees in the space. On closer inspection though it looks very clearly like these trees have been "photoshopped" in. That is because in all other respects the two photographs are completely identical. The same view point; the same car in the background; the same weather conditions and time of day. The only difference is that in the second photo there are four cherry trees. The Tribunal notes that in the Hearing itself no mention was made of this and so the Tribunal is cautious about concluding that the trees have been edited in, but it is hard to imagine how else this could be explained given that the trees have not existed even by the Applicant's best estimate for around 25 years. The car in the photo does not look like the type of car available 25 years ago. It would be astonishing if it was the same car in the same place with everything else the same 25 years later.

[24] The Applicant said that Sections 4 (6), 7 and 13 of the deed of conditions obliged the Respondent to plant the trees. The Tribunal invited the Applicant to take the Tribunal through the deed of conditions which he did. Section 4(6) provides that no trees should be cut down unless they are dangerous. Section 13 provides for the appointment of a factor. The Tribunal listened carefully to the Applicant and in considering its decision reflected on the parts of the deed of conditions referred to by the Applicant. However, the Tribunal notes that the Applicant's position has an obvious difficulty. It is the proprietors of the properties in the development that are bound by the deed of conditions. A deed of conditions can be enforced by each resident of a development against another. The Tribunal notes a recent Sheriff Court decision published on the Scottish Courts website (*Malcolm and Malcolm and others vs Paton and Paton [2025] SC HAM 55)* in which the Sheriff granted interdict against the defenders for threatened breaches of a deed of conditions. However, the Tribunal is not aware of any authority which states that a property factor is bound by the strict terms of any deed of conditions. A property factor such as the Respondent is not a proprietor and is in fact directly instructed by the residents to assist them in the management of their estate. If the residents directly instruct their property factor to take action or to decline to take action, then the property factor cannot simply ignore this but is obliged to act on the instructions given. If the Respondent in this case were to plant and maintain the cherry trees despite the outcome of the ballot, then the Respondent may very well find it hard to resist accusations from the majority that they directly defied those very individuals on whose behalf they take instructions and seek payment.

[25] In this regard the Applicant's case was somewhat unreasonable. The Respondent had acted entirely reasonable in how it had gone about its business. It would not be at all reasonable or appropriate for the Tribunal to order the Respondent to do something which the majority of the residents directly didn't want.

[26] Having considered the Application and the evidence heard, the Tribunal makes the following findings in fact.

1. *The Applicant is the proprietor of 25 East Kilngate Wynd, Edinburgh.*
2. *The Respondent was appointed as the relevant property factor for the development in which the Applicant resides in 2006. The development was built in 2000. The Applicant moved into his house in 2017. At the time the Applicant purchased his house and at all times since, there have not been flowering cherry trees in the area in question. The area in question is described in the Application as being the mutual area of land opposite 29,31, and 25 East Kilngate Wynd, Edinburgh. The area is 35 m by 8m and is currently open grass.*
3. *The Applicant is of the view that in the distant past, long before the Applicant purchased the Property, there were flowering cherry trees on this land. He has obviously never seen these trees with his own eyes and his knowledge of them is derived from the distant memory of certain other individuals who might have knowledge about such matters.*
4. *The Applicant, together with the proprietors of certain other neighbouring properties, have been advocating for the Respondent to plant and maintain four flowering trees again in this area of land.*
5. *The Respondent has clearly engaged with the Applicant about his desire as is evidenced by the extensive correspondence exchanged between the parties on the matter. In October 2023, the Respondent organised a ballot of the residents to determine if the Respondent should do what the Applicant wanted- plant and maintain the cherry trees.*
6. *The results of the ballot were published in November 2023. It was clear that there was an overwhelming mandate given to the Respondent to take no such action and to incur no such additional expense. The Respondent considered themselves bound by the will of those residents on whose behalf they act as Property Factor. The results were that there were only 7 votes in favour, 29 objections, and 141 residents did not vote*
7. *It was not unreasonable for the Respondent to organise a ballot. The proposed expenditure would have been unusual and was not routine. Having done so, the Respondent has acted entirely legitimately in not planting and maintaining four flowering cherry trees.*

Decision

[27] Having made the above findings in fact and having considered the parts of the Code referred to, the Tribunal cannot conclude that the Respondent's actions regarding the cherry trees in any way are in breach of the relevant overarching standards of practice. Neither does the Tribunal consider the Respondent is in breach of paragraph 2.7 of the Code. Neither is there any legitimate basis for concluding that the Respondent

had failed to carry out their Property Factor's duties. The Tribunal however notes that the issue of complaint handling is a separate issue. OSP 11 is in the following terms:

OSP11. **"***You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure"*

[28] The Applicant's evidence was that he raised a "*complaint*" (about the Respondent not planting the trees) on 24 October 2023. The next day he received an email acknowledging receipt and saying that there would be a response within four weeks. A comprehensive response was not issued until 7 December 2023. On 12 December 2023 the Respondent informed the Applicant that they had provided their final reply.

[29] The Tribunal noted that the Respondent's substantive response was beyond the 30 days referred to in their written statement of services and also in their acknowledgment email of 25 October. This amounts to a breach to of OSP 11 in that the complaint was not responded to in full within the 30 days. The Tribunal considers that in the whole circumstances of the case this is a rather minor matter. Accordingly, the Tribunal does not consider that making any Property Factor Enforcement Order would be appropriate.

FTS/HPC/LM/24/4160

Applicant's evidence.

[30] This Application has arguably a similar theme but is about a separate matter. By Application dated 24 September 2024, the Applicant alleges that the Respondent has failed to carry out their "*Property Factor's Duties*" in terms of Section 17 (5) of the Act by not painting a particular fence which is described in the Application as being opposite 21 to 29 Easy Kilngate Wynd. The Applicant says in the Application that he wants it painted "*Cedar Red*". In his parole evidence he moved away from the particular colour and said he was no longer particularly concerned about that colour it should be painted. The Application is premised on the fence in question being owned in common by the proprietors of the development within which the Applicant's Property (and the fence) is situated. As in the previous Application, there is substantial correspondence exchanged between the parties about the issue. The Respondent has informed the Applicant that they may not maintain or paint the fence in question because they understand that the fence is solely owned by each proprietor of those properties which lie beyond the fence in question.

[31] At a previous Hearing conducted as a Case Management Discussion, the Tribunal had ordered that any relevant title deeds should be submitted. It seemed to the Tribunal that the answer to who owned the fence ought to be something that could be readily

answered. The Respondent had circulated certain deeds which were commented on by the Applicant in his Application.

[32] The Application stated that "*Trinity Factoring has failed to provide any evidence to substantiate their claim that the wooden boundary fence belongs to any of the properties on Gilmerton Dykes Road."* On closer inspection though this is simply not true. The Respondent had provided the Applicant with the deeds that formed the basis for its position and which were discussed with the Applicant in detail during the Hearing. The Applicant obviously had received these because he commented on them in his Application.

[33] The Applicant referred again to the deed of conditions which obliged the residents to maintain the boundaries of the development. The fence in question is at the boundary of the estate across from the Applicant's own Property. The fence is adjacent to properties on Gilmerton Dykes Road ("GDR"). The Tribunal had before it photographs of the fence and the properties on GDR and referred to that throughout the Hearing in discussing the Applicant's evidence with him. Perhaps surprisingly the Applicant was not entirely sure of the address of the property on GDR which had the fence in their back garden. He thought it was probably 98 GDR.

[34] The Respondent had supplied title deeds for certain properties on GDR. Each title deed that was considered seemed to very clearly state that the proprietor of those properties owned the boundary outright and that there was also in fact obliged by a real burden to repair and maintain the fence at their sole expense. The Tribunal was not shown the title deeds for the property that was directly in front of the fence. It was unclear why not. Perhaps the Property was not in the Land Register and was still in the General Register of Sasines. The Applicant could not assist with that. The Respondent made no mention of it in their representations.

[35] The Tribunal reviewed the Land Certificate for 104 GDR. The Property Section A made it clear that 104 GDR owned "*the boundaries labelled A-B and E-F in blue on the said cadastral map and any fences, hedges or others lying there along*".

[36] Importantly the boundary "*E-F*" on the plan was the boundary in question which was opposite the Applicant's Property albeit not the precise property that was suspected to own the fence. It was clear therefore that the Proprietor of 104 GDR owned their boundary, be it fence or hedge. That would make sense as the development was only built in 2000 and so there would have been nobody on the other side to own or take any interest in the other half when these other properties on GDR were constructed. They would also clearly have wanted to delineate their boundary which would otherwise have been open to undeveloped land.

[37] At the burdens section D was stated at 4 " *The feuars shall be bound to maintain at their sole expense… the boundaries labelled A-B and E-F in blue on the cadastral map and any fences, hedges and others presently lying therealong*"

[38] So it was very clear that 104 GDR solely owned the relevant boundary and had to maintain it as its own expense. The Applicant stated that the deeds to 104 GDR were not relevant as the boundary there was comprised of a hedge. There clearly was a hedge but the Applicant appeared to be missing the point that all the title deeds of the Properties beyond the development owned their own boundary markers outright and were obliged to maintain them at their own expense. In that respect it didn't seem to matter if it was a hedge or a fence.

[39] The Tribunal also had the Land Certificate for 110 GDR. It had the same title conditions as 104 GDR.

[40] There was no evidence of any other property on GDR which didn't exclusively own its own boundary and also have an obligation to maintain it itself at their sole expense.

[41] It was from this body of evidence that the Respondent derived their position that the fence in question was owned exclusively by those properties outside the development. That seemed to the Tribunal to be a very reasonable position given the information available. The Applicant's position by contrast however appeared focused less on the legalities of the situation and more on how it would be of beneficial if the development took over responsibility for the fence. The Tribunal noted that this approach would have involved disregarding the proprietorial rights of others. The Applicant could produce nothing which challenged the Respondent's position. His reference to the deed of conditions was not convincing. Even if it obliged the residents to maintain the common boundaries of the development it could not serve to deprive other third-party owners of their proprietorial rights.

[42] The Tribunal also noted that the Applicant had made no enquiry with the proprietors of the properties in GDR beyond the fence as to what their understanding of their rights and obligations were in relation to the fence. The Applicant could offer no credible alternative conclusion from consideration of the materials available. The Respondent had highlighted in an email to the Applicant contained within the bundle that' "*..when the sink hole was damaged- this was the rear fence of 96 Gilmerton Dykes Road and the repairs were paid for by the owner of this property."*

[43] The Applicant informed the Tribunal that the fence had now fallen down. The Tribunal imagined that this may accelerate something having to be done about it but there was no basis to suggest that it fell to the Respondent to maintain the fence at the expense of the residents. Again, if the Respondent did incur such costs it may be hard for them to justify those costs to the residents who would be required to pay for it. In the Application the Applicant wrote that *"I believe Trinity has a duty to maintain the*

boundary fence. Trinity is refusing to maintain the boundary fence. I feel cheated by Trinity Factors, inconvenienced and angry." The Tribunal does not consider that this view is warranted or legitimate.

[44] Having considered the Applicant's evidence and the documentary evidence, the Tribunal makes the following findings in fact.

1. *There is a section of fence which is described in the Application as being opposite 21 to 29 Easy Kilngate Wynd. This fence is across some open space from the Applicant's own Property.*
2. *The Applicant wishes the Respondent to paint this fence and maintain it.*
3. *The Respondent has investigated the matter and there is ample correspondence between the parties.*
4. *The Respondent refuses to maintain the fence because its research has led it to believe that the fence in question is not common property owned by the proprietors of the development but instead is owned by the respective property on Gilmerton Dykes Road.*
5. *The Respondent has obtained and provided land certificates for properties adjacent to the fence in question. Each reveals that each section of the boundary is solely owned by each proprietor who is also individually solely liable for the costs of maintaining the boundary.*
6. *The Respondent is also aware that the proprietor of 96 Gilmerton Dykes Road had previously maintained their section of the boundary when it was damaged.*
7. *On the balance of probabilities, the fence in question is owned by the proprietor of the relevant property on Gilmerton Dykes Road in whose back garden the fence lies.*
8. *The Respondent has not breached the Property Factor's Duties by not painting the fence because it is not common property owned by the residents of the development.*

Decision

[45] Having made the above findings in fact, the Tribunal cannot grant the Application and makes no Property Factor Enforcement Order. The Applicant appears not to have understood the Respondent's attempts to explain to the Applicant that the fence is not owned by the residents in the development.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

_____	**2 October 2025**
Legal Member/Chair	**Date**