Housing and Property Chamber
First-tier Tribunal for Scotland

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

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: HPC/PF/24/1078

4 Nether Liberton Court, Edinburgh, EH16 5UN

Henry Downie, 4 Nether Liberton Court, Edinburgh, EH16 5UN ("the Applicant")

Charles White Ltd, 14 New Mart Road, Edinburgh, EH14 1RL ("the Respondent")
Tribunal Members:

Josephine Bonnar (Legal Member) and Mary Lyden (Ordinary Member)

DECISION

The Tribunal determined that the Respondent has not failed to comply with Sections 1.1, 1.5C(10) and 3.2 of the Property Factor Code of Conduct as required by Section 14(5) of the Act. The Tribunal also determined that the Respondent has failed to carry out its property factor duties to a reasonable standard in the way they implemented the change to billing arrangements and their failure to update the WSS until four months after the change was introduced.

The decision of the Tribunal is unanimous.

Background

1. The Applicant lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act.

2. The parties were notified that a CMD would take place by telephone conference call on 9 October 2024 at 2pm. Prior to the CMD, the Respondent lodged written submissions and a bundle of documents.

3. The CMD took place on 9 October 2024. The Respondent was represented by Ms Rae. The Applicant did not participate or contact the Tribunal in advance of the CMD. The Tribunal clerk contacted the Applicant by telephone. He stated that he had been unaware of the CMD and would have arranged to attend if he

had been notified. He said that he was not able to join the conference call.

4. The Tribunal noted the Applicant's explanation for his failure to join the call. Ms Rae confirmed that she had no objection to an adjournment of the CMD. The Tribunal determined that the CMD should be continued to another date.

5. The parties were notified that a further CMD would take place by telephone conference call on 4 February 2025. The Applicant participated. The Respondent was represented by Ms Rae.

The CMD

6. Mr Downie told the Tribunal that the property is a rental, and he does not live there. Ms Rae confirmed that there are 22 flats in the development. Mr Downie said that the Respondent called a meeting at the end of 2023. He was out of the country. The meeting was not quorate. The Respondent then proceeded to implement the change to the billing arrangements without securing the agreement of the owners. Ms Rae said that the Respondent is changing its billing process for all their factored developments. Around 80% have already been moved to the new arrangement. Their practice is to write to all homeowners to advise them of the proposed change and call a meeting. At the meeting the homeowners can raise any concerns. If the meeting is not quorate and there are no objections to the change, they proceed with it. If there are objections, then they work with the homeowners to resolve any issues that they have. Mr Downie is the only homeowner in this development to have raised any objection. No one who attended the meeting objected. A further meeting took place in December 2024, to discuss the budget for this year. No objection was made. Mr Downie said that he had attended the 2024 meeting. A further change was introduced. The arrangement for paying the common insurance is now separate from the other common charges. Ms Rae confirmed that this is correct and is because the insurance renewal is at a different point in the year and is therefore charged separately.

7. In response to a question about the reason for the change, Ms Rae said that the main reason is transparency. They used to get a lot of queries and challenges from homeowners because they were billed in arrears and did not know about the charges until after the work had been carried out. The Respondent has decided that it is better to tell people in advance what they will be charged for in the forthcoming year. It's more transparent and people are better able to budget. Mr Downie said that the new arrangement is the opposite of transparent. When they were billed in arrears, they were being charged for costs already incurred. Even when a budget is issued in advance it does not cover everything as unexpected items will arise during the year. For example, last year there were some unexpected charges – an insurance excess of £60 and £90 for trees. He told the Tribunal that it is much easier for him to budget when he is billed quarterly. He said that the homeowners' contract with the Respondent is based on quarterly bills, and they must obtain agreement to make a change. In this case, they introduced the change at the start of 2024. They didn't issue an

amendment to the WSS until 23 April 2024. Ms Rae said that the homeowners were notified by letter and at the meeting in December 2023 that the changes were coming in from January 2024. The amendments to the WSS were then issued in April 2024. In response to a question from the Tribunal, Ms Rae said that they became the property factor for the development when they bought over the previous company in 2023. The first WSS was issued in 2014, when the legislation was introduced. She confirmed that there had been a delay in issuing the amendments to the WSS in 2024 and that the whole development was not notified until April. However, the owners knew that the change had occurred, and all had started paying in accordance with the new regime. Most of them pay by direct debit.

8. Mr Downie told the Tribunal that the Respondent contacted him when he purchased the property and sent him the WSS. He paid a float of £250. The change in billing arrangements was a significant change. He is not aware if anyone else objected. The letter about the meeting was issued on 6 December 2023. He was out of the country and didn't return until Christmas. He did not know about the meeting until after it had taken place. The Respondent sent the minutes of the meeting with the invoice. He then lodged his objection. When asked about how he is currently paying the Respondent, Mr Downie said that he looked at the budget, took out the general items and is paying the known charges on a quarterly basis. He said that he only has two rental properties. He still pays the charges for the other property, quarterly in arrears. He is aware that the Respondent still bills other developments in this way. He is not keen on setting up a monthly direct debit as its still based on an estimate. In response to a question from the Tribunal Mr Downie said that there is no relevant provision in the title deeds and his application is not based on a failure to comply with the deed of conditions.

Section 1.1 of the Code

9. Mr Downie said that this has been breached because the Respondent implemented a change to their WSS without amending the WSS. Ms Rae said that it is not disputed that there was a delay which was outwith the 3 months. This was due to administrative error or oversight. Once they realised, they apologised. However, they had notified every one of the change. They just hadn't updated the WSS.

Section 1.5C

10. The Tribunal noted that section 1.5C of the Code has six subparagraphs. The application does not specify which of these is relied upon. Mr Downie said that he was not sure. He confirmed that he would clarify this after the CMD.

Section 3.2

11. Mr Downie said that the Respondent never provides back up information, just the figures. They say in the WSS that they have to ask for the details, and they have provided no details about the float account.

12. Ms Rae told the Tribunal that all relevant information and invoices are on the portal and that Mr Downie uses the portal. They only send them out to those who are not on the portal and there is a charge for sending them out.

Property Factor Duties

13. Mr Downie told the Tribunal that a property factor is there to protect the interests of the homeowners and there is evidence that this is not happening. They are putting their own interests before the owners. In addition to the annual bills, he has concerns about the level of insurance commission they receive. Ms Rae said that the Respondent has not benefited from the change in the billing arrangements. They are no worse or better off than before and their fees and commission are disclosed. There is no significant reduction in admin because of the new arrangements. She stated that currently 80% of their developments operate in this way and the rest will follow this year. The change has reduced the number of complaints and enquiries about common charge invoices. There is an annual meeting to discuss the budget. Mr Downie said that he wants the Respondent to go back to quarterly invoices but accepts that he would have to accept the majority decision.

14. Ms Rae said that the Respondent has difficulty with client engagement at the development. Mr Downie is the only owner who has raised an objection and everyone else is paying. Mr Downie said that the fact that they are paying does not mean that they are happy. He also objects to the late payment charges on his account which he does not think should apply.

15. Following the hearing, the Applicant notified the Tribunal that the relevant paragraph of Section 1.5C is (10) in relation to the timing and frequency of billing. The Respondent lodged a response disputing that this section has not been breached as the WSS contains the information which is required in terms of the section.

Findings in Fact

16. The Respondent changed the billing arrangements for the property from quarterly in arrears to annually in advance on 1 January 2024.

17. The Respondent notified the Applicant of the proposed change on 6 December 2023 and held a meeting of homeowners on 20 December 2023. The Applicant was out of the country and did not receive the letter until after the meeting had

taken place.

18. The Respondent did not seek the approval of homeowners before implementing the change.

19. The WSS does not require the Respondent to obtain homeowner approval or consent before changing the frequency and timing of invoices.

20. The Respondent provided the Applicant with a copy of the WSS when he purchased the property. They provided updated versions of the WSS at various intervals thereafter.

21. The Respondent did not issue an updated version of the WSS which incorporated the new billing arrangements until April 2024

Reasons for Decision

22. The Tribunal notes there is no factual dispute in relation to the Applicant's principal complaint. The Respondent agrees that they have changed their billing arrangements and that they did not take a vote either at a quorate meeting (or otherwise) before they did so. The Applicant's position is that they were not entitled to make this change, without obtaining a majority vote in favour of doing so. The Respondent denies that this is required and claims that they are entitled to make a change to billing arrangements as long as the homeowners are notified. There are some ancillary complaints. The Applicant refers to the failure by the Respondent to provide full details of charges and copies of contractor invoices to support their common charge accounts and states that they have failed to provide evidence that the sums paid by the homeowners in the development are ring fenced and placed in a separate account. During the hearing there was also a reference to insurance commission, but this is not part of the application.

The Code of Conduct

Section 1.1 – A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple structures way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2017 Act to the First-tier Tribunal for a determination, the First tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of the code.

23. The Applicant confirmed that he received a copy of the WSS when he purchased the property. His argument is that the Respondent is in breach of this section of the Code because they failed to provide an updated version of the Code at the time they implemented a major change to the billing arrangements. The 2014 version of the Code stipulates that the homeowners will be billed

quarterly in arrears.

24. Ms Rae confirmed that the Respondent did not issue the amendments to the WSS until April 2024, because of an oversight. The Tribunal noted that their update for 2023 (Appendix 5, page 24 of their submission) appears to refer to an annual budget instead of quarterly invoices and it was not clear from the evidence whether this appendix applied to the development in question or if it had been issued to the Applicant. Ms Rae appeared to indicate that it had not. In any event, the Tribunal is not persuaded that this section of the Code has been breached. Section 1.1 must be read in context. The following section - 1.2 - states that a property factor must issue a copy of their WSS to each homeowner in certain specified circumstances. One of these situations is outlined in the last two bullet points of this section. These state that the factor must do this "at the earliest opportunity (in a period not exceeding 3 months) where a substantial change is required to the terms of the WSS". Ms Rae mentioned the three-month time limit in her evidence and confirmed that it had not been met. The Tribunal is satisfied that the Respondent failed to issue an amended WSS within 3 months of the change being made and therefore failed to comply with section 1.2. However, this section is not specified in the application or in the letter notifying the Respondent of the complaints before the application was made, as required by Section 17(3) of the 2011 Act. As a result, the Tribunal cannot consider it. Based on the evidence, the Respondent complied with section 1.1 because they provided the Applicant with a WSS when he purchased the property and provided updated versions at various intervals when changes were made. The late provision of the 2024 updated version does not breach the terms of section 1.1

Section 1.5C(10) – The WSS must make specific reference to any relevant legislation and must set out the following: C Financial and Charging Arrangements (10) the timing and frequency of billing and by what method homeowners will receive their bills.

25. In his email to the Tribunal after the hearing had concluded, the Applicant refers to this section but does not explain further why this section has been breached. In their response, the Respondent says that the updated WSS was issued, albeit late.

26. The 2014 WSS sets out the timing and frequency of billing when it refers to "quarterly itemised accounts to owners". This wording was replaced in the 2024 version with the words "in advance to all co-owners an annual invoice based on the annual budgeted expenditure for the development". In addition, the 2014 WSS says that "service charge invoices will be issued quarterly in arrears". The 2024 version states that "service charge invoices will be issued annually in advance".

27. The Tribunal is satisfied that both the original and updated versions of the WSS comply with Section 1.5C(10) as both provide clear information as to the timing and frequency of billing. The 2024 version was issued late, after the new

arrangement was underway, but owners had been notified and were therefore aware. The Tribunal is not persuaded that a breach of this section has been established.

Section 3.2 – The overriding objectives of this section are to ensure property factors; protect homeowners finds; provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; make a clear distinction between homeowners finds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factors own funds and fee income.

28. The are two complaints under this section. The first is that the Respondent has failed to provide full details of charges in the accounts, copies of contractor invoices, evidence that the homeowners' funds are ring fenced and that the sums paid by the homeowners (including the float) are in a separate account or accounts.

29. The Tribunal notes that this section of the Code requires a property factor to protect homeowners' funds and make a clear distinction between their funds and those of the homeowners. The section does not require a property factor to provide information or evidence. There are numerous provisions in the Code regarding the provision of information to owners. Some information must be provided automatically, without a request being received. Other information must be provided on request.

30. Mr Downie provided a copy of some emails with his application. These relate to his complaint about the conversion to an annual billing arrangement without the agreement of the owners and to late payment charges which have been applied. There are no references to contractor invoices or homeowner funds and bank accounts. The Respondent provided the same email correspondence. The first mention of bank accounts and invoices is in the notification letters issued to the Respondent in April 2024, when the application was being processed by the Tribunal. These letters state that the Respondent has failed to provide information and documents. However, the Applicant does not specify what information or documents he wanted the Respondent to provide or state that he made requests which were ignored.

31. As there is no evidence that the Applicant asked the Respondent to provide additional information, evidence or contractor invoices, and as this section of the Code only requires the Respondent to provide clarity and transparency in accounting procedures, ensure that funds are protected and placed in separate accounts, the Tribunal is not persuaded that a breach has been established.

32. The second complaint is about the conversion from quarterly invoices to an annual invoice.

33. There appear to be several aspects to this complaint. The Respondent did not secure the agreement of the homeowners to the change before implementing it, the Applicant finds it more difficult to budget with the new arrangement, and

the process is less transparent because the budget issued at the start of the year is based on estimates and not actual expenditure. By comparison, the quarterly invoices were based on expenditure actually incurred. Only the last issue appears to be relevant to this section of the Code.

34. The Tribunal notes that the annual budget is based on the services provided each year by the Respondent. The Tribunal was told that the Respondent reviews the budget at the end of six months and provides an update. At the end of the year, a reconciliation is carried out and an accurate invoice or statement is provided. The credit or debit balance is then caried forward. The correspondence states that homeowners can pay quarterly or monthly by direct debit. The Tribunal also notes that the Code of Conduct only requires a property factor to issue invoices once a year (Section 3.4).

35. The Tribunal is not persuaded that the Applicant has established that the new arrangement lacks clarity or transparency. The quarterly invoices may have been more accurate, as they related to expenditure already incurred, but the Respondent explained how the new system works. Presumably, it has the advantage of ensuring that the Respondent is in funds before instructing or carrying out routine work. Non routine work is charged separately, but that may always have been the case. The homeowners are still able to spread the factoring costs throughout the year and they are still provided with an invoice of actual expenditure at the end of each year. The Tribunal is not persuaded that a breach of this section has been established.

Property Factor duties - failure to issue contractor invoices, full details of all charges and evidence of separate accounts.

36. As previously indicated, the Code does not require a property factor to routinely issue copies of contractor invoices and evidence of the existence of separate accounts and there is no evidence that either of these were requested by the Applicant. Ms Rae said that the invoices are on the portal, which the Applicant uses. The Tribunal is not sure what additional factual information or documents the Applicant is referring to as he does not provide details.

37. Property Factor duties are generally to be found in the title deeds to the property or the WSS. Neither party lodged a copy of the deed of conditions, and it was not claimed by the Applicant that his complaints were based on a failure to comply with this. The Tribunal reviewed the WSS and noted that it does not require the Respondent to send copies of contractor invoices unless a request is made. Nor does the WSS say that they will routinely provide evidence of the existence of separate accounts or provide more information about the charges incurred than is currently provided. The Code does only requires such information to be provided on request.

38. The Tribunal is not persuaded that a failure to carry out property factor duties has been established in relation to this complaint.

Property Factor duties - Conversion to an annual budget and invoice

39. The Applicant argues that the Respondent was not entitled to implement this change without securing the agreement of a majority of homeowners. The meeting in December 2023 was not quorate and no vote was taken.

40. The Respondent does not claim that they obtained a majority vote in favour of the change. However, their position regarding the matter is somewhat unclear. They wrote to all owners at the development on 6 December 2023. The letter said that they were moving to an annual budget invoice, that a meeting had been arranged, that the change was not optional but that the meeting would give owners the opportunity to discuss concerns and ask questions. The letter goes on to say that the Respondent wants the meeting to be quorate and that people should appoint a mandatory if they cannot attend. Ms Rae told the Tribunal at the CMD, that if a meeting is not quorate and there are no objections, the Respondent's practice is to implement the change. This suggests that they usually take a vote if the meeting is quorate. It is also not clear what happens if homeowners vote against the change or there are a number of objections raised at a non-quorate meeting. Ms Rae appeared to indicate that this might result in a delay while they work with the homeowners to secure their agreement. Ms Rae did not explain why they do this, if they are entitled to make the change without consultation or agreement.

41. The Applicant did not have the opportunity to attend the meeting and register his objection. Only two weeks' notice of the meeting was given, and the Applicant was out of the country and unaware of it. By the time he returned the meeting had taken place and the arrangement was in place. However, it appears that a further meeting took place in December 2024. The Applicant attended but does not appear to have taken the opportunity to speak to other owners and find out their views or raise his concerns about the new process.

42. The Applicant failed to demonstrate that the Respondent is not entitled to change the billing arrangements without a majority vote. There is nothing in the WSS about consultation and voting arrangements. It is likely that these are set out in the deed of conditions. However, as a general rule, deeds of conditions only apply to consultation and voting in relation to repairs, maintenance and improvement works as well as the appointment and termination of property factors. The WSS does not stipulate that any changes to the way in which the Respondent manages the development - including the billing arrangements – will only be implemented following consultation with (and the agreement of) the owners. The WSS sets out the Respondent's terms, but it is not a contract in the sense that the terms are negotiated and agreed. After he purchased the property, the Applicant was simply issued with the WSS and told that the Respondent was the property factor. It is arguable that consultation would be required for certain types of changes, such as a change to the services being provided. A change in the arrangements for the maintenance and repair of the common parts of the development would have to comply with the title deeds. The change which the Respondent has introduced is essentially an administrative one.

43. Although not persuaded that the Respondent was required to consult and secure approval for the change to billing, the Tribunal is of the view that there has been a failure to carry out property factor duties to a reasonable standard. The homeowners were only given two weeks' notice of a significant administrative change and of the meeting which had been arranged to discuss it. More notice should have been given, particularly when the meeting and change being discussed were happening close to the holiday period. As the Applicant pointed out, just because the other homeowners accepted the change, does not mean that they were happy with it. Had he been aware of the meeting the Applicant might have attended or appointed a mandatory. There would have been the opportunity to raise concerns, and other homeowners may have agreed with him. This might have resulted in a delay while the matter was further considered and investigated. On the other hand, given the evident lack of engagement by owners in the development, the Applicant may have been the only objector, and the change might have been implemented anyway

44. The Tribunal is therefore satisfied that the Respondent failed to carry out its property factor duties to a reasonable standard by giving inadequate notice of the change and failing to ensure that all interested owners had the opportunity to attend the meeting and/or raise any concerns that they had. The Tribunal is also satisfied that the Respondent's failure to update the WSS until four months after the change had been implemented is also a failure to carry out their property factor duties to a reasonable standard.

Proposed Property Factor Enforcement Order

45. The Applicant told the Tribunal that he wants the Respondent to revert to the previous billing arrangements. The Tribunal is not persuaded that it would be appropriate to make an order to this effect. However, the Applicant was effectively deprived of the opportunity to challenge the change at the relevant time and has been put to considerable inconvenience. The Tribunal is satisfied that an apology and a small award of compensation would appear to be appropriate.

The Tribunal therefore proposes to make a Property Factor Enforcement Order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

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.

Josephine Bonnar, Legal Member and Chair 5 March 2025