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

In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

George Svachulay, Flat 29, 32 Peffer Bank, Edinburgh EH16 4FG ("the Applicant")

Ethical Maintenance CIC, 239 Castle House, 1 Baker Street, Stirling KK8 1AL ("the Respondent")

Re: Flat 29, 32 Peffer Bank, Edinburgh EH16 4FG ("the Property")

Chamber Ref: FTS/HPC/PF/24/5860

Tribunal Members:

John McHugh (Chairman) and Nick Allan (Ordinary (Surveyor) Member).

DECISION

The Respondent has failed to comply with its property factor's duties.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner of Flat 29, 32 Peffer Bank, Edinburgh EH16 4FG ("the Property").
2 The Property is located within a residential development of flats and associated common areas known as Aspect ("the Development").
3 The Development consists of three separate residential blocks, being originally known as Aspect 1; Aspect 2 and Aspect 3. Two of the blocks are now known by their postal addresses being 32 Peffermill Bank ("the Block") and 3 Drybrough Crescent ("the Drybrough Block").
4 The Property is located within the Block.
5 The Respondent was at all relevant times the property factor responsible for the management of common areas within the Development.
6 The Respondent provides factoring services in respect of the common areas.
7 The Respondent provided a Written Statement of Services setting out the services which it provides to homeowners such as the Applicant.
8 A Deed of Conditions by Aspect Scotland Ltd dated 14 March 2006 applies to the Development. It allocates responsibility for the payment of maintenance costs by apportioning some costs across all homeowners in the whole Development. Others are apportioned by block or by stair.
9 The costs of maintaining the roof and the lift of the Block are apportioned among homeowners within the Block.
10 The Drybrough Block was constructed before the Block. It has a different type of roof construction from that of the Block.
11 In early 2024, the roof of the Drybrough Block was badly damaged by a storm.
12 No damage to the roof of the Block was observed but there was a concern that the roof of the Block may have been damaged and that a survey should be instructed.
13 Some homeowners in the Development have failed to make payment of their shares of maintenance costs or to engage in voting on maintenance and repair issues. This has resulted in the Respondent being unable to progress repairs and maintenance as it would like.
14 The Block Roof survey revealed that the roof safety system was in need of repair.
15 This discovery led to further quotes being obtained and further owners' votes on using a different method of inspection than was originally intended and on whether to repair the roof safety system.
16 The Block roof repair works have been considerably delayed by a combination of the time taken by the Respondent to deal with the matter; the need to carry out voting; and the failure by homeowners to provide sufficient funding to carry out the roof works.
17 The roof works have not yet been completed.
18 The sole lift serving the Block failed on 4 July 2024.
19 The lift repair was urgent.
20 It required an expensive replacement part.
21 A quotation for the lift repair was obtained on 16 July 2024.
22 The Respondent issued an invoice for the lift repair costs on 23 August 2023

23 Homeowners' contributions originally intended for payment in respect of roof repairs were diverted to the lift repair cost allowing the lift repair to be carried out.
24 The Respondent imposes a regular charge for its core factoring services.
25 The Respondent's regular charge amount is calculated by it having regard to the time which it has spent serving the requirements of the Development in the previous year.
26 The Respondent does not include the cost of complaints handling when calculating its charges.
27 The Respondent has made invoicing errors by including additional fees for items which should have been included as core factoring items in the regular charge. It has remedied these mistakes.
28 The Applicant has, by his correspondence, including by his email of 25 October 2024, informed the Respondent of the reasons why he considers the Respondent has failed to carry out its property factor's duties.
29 The Respondent has unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A Hearing took place by Webex video conference on 29 May 2026. The Hearing had originally been scheduled to proceed in person but was changed at the request of the Applicant and with the agreement of the Respondent to a Webex hearing.

At the beginning of the hearing, the Tribunal offered the parties a chance to have a discussion to see whether matters might be agreed between them. The Respondent was prepared to do so. The Applicant advised that he had lost trust in the Respondent's processes and felt that a determination by the Tribunal was required and so declined the opportunity.

The Applicant was present. The Respondent was represented by its Kevin Wilkinson.

A Case Management Discussion had previously taken place on 21 January 2026 and parties had been directed to lodge their written submissions and any documents they intended to rely upon in advance of the Hearing.

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (as revised) as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Regulations".

The Respondent is a Registered Property Factor and has a duty under section 14(5) of the 2011 Act to comply with the Code

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent.

<u>REASONS FOR DECISION</u>

<u>The Legal Basis of the Complaints</u>

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties. He does so by making reference to section 17 of the 2011 Act, the Respondent's undated Written Statement of Services ("the WSS") and the Deed of Conditions by Aspect Scotland Ltd dated 14 March 2006 ("the Deed of Conditions").

The Code

The Applicant does not complain of failure to comply with the Code.

<u>The Matters in Dispute</u>

The Applicant complains in relation to the following matters:

1. Delay in progressing Essential Repairs.
2. Mismanagement of Decision Making Processes.
3. Inappropriate Charging.
4. Failure to Meet Data Protection Obligations.

<u>1 & 2 Delay in Essential Repairs & Mismanagement of Decision Making Processes.</u>

Issues 1 and 2 are closely related and may sensibly be addressed together. The background to the complaint is that the Applicant and other homeowners had been concerned when a storm had caused major damage to the neighbouring Drybrough block in early 2024. Their concern was that, although no symptoms of damage were obvious, damage of a similar kind might have been caused to the Block's roof.

The Respondent was instructed on 20 February 2024 to obtain a survey of the Block's roof.

For the purposes of the Hearing, the Respondent had produced a table showing the history of the matter. The Applicant broadly agreed with the content of the table other than that he thought some of the calculations of number of days between the listed events were slightly out. To the extent that may be true, there appears to be little consequence. The table shows that on 3 May 2024 the Respondent requested a quotation for carrying out the new survey from a roofing company known as NSS. A quotation was received from NSS by 8 May 2024 and a vote of the homeowners in the Block took place on 21 May 2024. On 28 May 2024, the Respondent requested payments from the owners. The final payment was received on 3 July 2024 and

NSS was instructed to proceed with the survey. On 23 July 2024, NSS reported that the survey had had to be paused because the roof safety system had been found by them to be unsafe and in need of repair.

On 12 August 2024 NSS provided a quotation to perform a survey of the roof safety system. On 19 August 2024, the Respondent requested payments from the owners for carrying out the survey. By 19 September 2024, the last payment had been received. On 30 September 2024, NSS provided a report on the roof safety system and a quotation was requested for carrying out the necessary repairs.

On 11 October 2024, NSS submitted a quotation for repair of the roof safety system at a cost of around £14,000. On 20 December 2024, an owners meeting was convened to discuss the roof repairs. Insufficient votes were obtained to approve the works. Instead, NSS were invited to carry out a roof survey using a platform. This meant that they did not require to go on the roof and that the roof safety system was not required to be used. This method was significantly cheaper than the cost of repairing the roof safety system.

When the survey was ultimately carried out, it identified the need to remedy the roof safety system urgently. It identified various other less urgent repairs as being recommended. The Respondent had been unable to collect sufficient funds from homeowners in the Block to carry out repairs to the roof. An aggravating factor had been that the lift which serves the Block stopped working on around 4 July 2024. It was the only left serving the block and there was a degree of urgency in addressing the problem. In contrast, the issues with the roof were not having any direct effect upon the owners' enjoyment of their property. It was decided to allocate funds already paid by owners to the Respondent for the purposes of roof works but which were being held pending the remaining owners paying to the left repair.

The issue of the repair had continued until July 2025 without being resolved and the owners eventually resolved to take control of the issue from the Respondent and deal with the roof repair issue themselves.

The Applicant is concerned that the whole length of time taken was excessive. His concerns are that it was not known whether there might be a serious problem with the Block roof similar to the neighbouring Drybrough Block. He felt that the issue should have been advanced more quickly. The Applicant was asked to identify the periods of time during which he thought there had been delay of a kind which would constitute a breach of the property factor's duties. He had some difficulty in doing that in that he considered the whole time taken demonstrated unacceptable delay. When pressed, he identified the earlier stages of the project as being of greatest concern. In particular, he felt that the owners within the Block were paying the same amount of factoring fees as owners within the Drybrough block and yet the Respondent had chosen at the early stages after the damage had been done by the storm, to focus its attentions on the Drybrough block and delayed advancing the process of obtaining a survey of the Block roof.

The Applicant had a particular complaint that the Respondent ought not to have returned to the homeowners for a second vote when it became apparent that repairs were required to the roof safety system. The additional cost of surveying the roof safety system was relatively minor and the Applicant accordingly considered that the proper course should have been for the Respondent to respect the decision of the owners to proceed with the roof survey.

Mr Wilkinson acknowledged that there had been some delay on the part of the Respondent in dealing with the block roof survey particularly initially. He had identified in his table an apportionment of the various reasons for delay. He identified that 156 working days' worth of delay was attributable to the Respondent. He explained that that delay was longer than the Respondent would have liked. The Respondent had limited resources. Those resources had, particularly at the initial stages, been concentrated upon the Drybrough Block because that block had sustained obvious and serious damage. The roofing membrane was damaged and hanging off the building This contrasted with the Block where there were no obvious signs of damage nor were there any complaints of water ingress. The situation at Drybrough was urgent but the Respondent's assessment was that there was no similar urgency in respect of the roof of the Block. The Respondent was aware that the type of roof construction of the roof of the Block was different from that of the Drybrough Block and this provided a reasonable basis to conclude that it was unlikely that the same type of damage as had been caused by the storm to the Drybrough Block roof would exist in the Block roof.

Mr Wilkinson explained that another important consideration was that at the Development there is a long history of many homeowners failing to engage in votes or to contribute their shares of factoring costs. Owners frequently complain about decisions to carry out works and are reluctant to pay. He therefore rejects the idea that because there was only a relatively small change in the works and cost, that there was a need to go back to the owners for a further vote. He considers that some owners would have objected and complained that the works carried out were different to those which they had authorised. He observed that the then property manager has since been replaced with a more senior and capable person. The owners (including the Applicant) had taken control of the roof project themselves but he understood that they had not yet been able to complete the works.

We have been unable to identify a breach of the property factor’s duties in relation to the roof. While it is true that the issue has taken longer to resolve that it might have done, there have been various reasons for that, many not connected with the Respondent’s actions or inaction. We accept that the Respondent was entitled to ensure that it had authority by going back to the owners for a further vote before changing the scope of its works. There have been instances where the Respondent could have moved quicker but we have not identified any particular deadline or specified timesacale which it has failed to meet. Clause 9 of the WSS says: *“EM endeavours to acknowledge all enquiries and complaints within 24 hours and then strives to address the matter as quickly as we can. How long this takes will depend on its nature, but more than 95% of enquiries are resolved the same day. If a matter*

cannot be adequately resolved in that time, then an indication of when a response will be made will be given."

The absence of any urgency in the matter informs our decision in this respect. No owner was experiencing any interference with their use and enjoyment of their property while the issue was outstanding; there was no reason to assume that the roof was seriously damaged in a similar way to the roof of the Drybrough Block.

We therefore identify no breach of the property factor's duties in relation to the matter of the Block roof repairs.

The sole lift serving the Block failed on 4 July 2024. It was the subject of a maintenance contract with Schindler. Schindler identified that a new part was required and that the new part was not within the scope of the maintenance contract. A quotation for the lift repair was provided for a sum in excess of £14,000. The owners resolved that funds held by the Respondent should be used to deal with the lift repair.

At the Hearing, Mr Wilkinson had initially thought that the Respondent's lift repair invoice had been issued to owners on 23 July 2024. He checked his records and explained that this had been an error. The correct invoice date was 23 August 2024. We accept that Mr Wilkinson's error as to the date was an innocent one.

The typical effect of delaying the issue of the invoice for the lift works would be to delay the instruction of the repair. We consider that the delay in issuing the invoice represented a delay which was not in keeping with the WSS Clause 9 (noted above). The lift repair was of an urgent nature and the delayed invoicing would risk delay to the works going ahead or at least make it more likely that funds intended for the roof would have to be diverted to ensure the repair could be instructed quickly. In practice, the use of funds originally earmarked for the roof meant that the lift repair was not significantly delayed. Nonetheless, the delay in issuing the invoice for a matter of this kind was a breach of the Clause 9 obligations and therefore a breach of the Respondent's property factor's duties.

<u>3 Inappropriate Charging.</u>

The Applicant complains that the Respondent has inappropriately charged for complaints handling.

The Respondent has a relatively transparent process for setting its regular factoring fee for each development which it factors. It totals the number of hours worked in providing factoring services at the development in the first year and then uses that data to determine the appropriate factoring fee for the second year. Although it sets the second year's fee using that information, the second year's fee is not directly related to the number of hours worked in the first year. The Applicant had been provided by the Respondent with a spreadsheet which showed all of the activities

carried out over the year by the factor. Each activity was allocated a "tag" (ie description) by the Respondent. There was no tag for complaints. There was however a tag for "Customer Care". Some of the entries under the heading "Description" showed that complaints were included under that tag.

The Applicant is concerned that the spreadsheet apparently shows complaints being allocated as Customer Care and then forming the basis of the factor's charges for the following year. Mr Wilkinson explained that at the time the spreadsheet had been produced, there was no tag specifically for complaints. This has since changed and the Respondent now has a specific tag to deal with complaints. However, the practice which was followed prior to that change had been for those items within Customer Care which contained the word "complaint" in the description to be excluded from the calculation which informed the charge for services for the following year. Mr Wilkinson therefore explains that the cost of complaints handling did not impact up on the charges imposed.

The Applicant had some concern that some of the entries were not labelled as complaints but thought that they ought to have been since the description provided indicated that a homeowner had had to contact the factor to raise a concern. He thought that such instances were complaints.

It was apparent that there was some difference in terminology between the Applicant and the Respondent. The Applicant was characterising contacts received from owners raising concerns as being complaints whereas the Tribunal considers that such contacts are the daily business of a property factor. The owner of a factored property may often contact the factor to make reports of various concerns such as that stair cleaning had not happened on a designated day or that a light was broken. While there may be a degree of dissatisfaction on the part of a homeowner making such a report, such contacts are not properly complaints. The kind of contacts which are properly regarded as complaint handling of a type for which a property factor should not charge are formal complaints which can usually be identified by having been the subject of a factor's formal complaints process.

We therefore do not see any evidence that complaints have been included in the Respondent's calculation which informs its charging decision nor have we seen any evidence that the ultimate fee which the Respondent had decided to charge included any amounts reflecting the cost of complaint handling.

The Applicant also complained that the Respondent had included as additional charges activities which should properly have been included within the Respondent's charges for its core services. He advised that he had identified from invoices sent to him by the Respondent certain instances where this had occurred including charges being made in respect of monitoring the safety of the water supply. On another occasion, the Respondent had continued to bill for the services of a security contractor after they had ceased working at the Development. Mr Wilkinson accepts that there had been instances of the mistaken inclusion in the Respondent's bills of items as additional fees where they should have been included in the normal factoring charge. These errors have been rectified once identified and were simply

accidental. The Applicant explained that he has a lack of faith in the Respondent's accounting process both because of these errors and because of the way in which he considers that the Respondent has dealt with complaint costs as noted above. In the circumstances, he considers that it would be appropriate for the Respondent to be asked to provide a full audit of its charges since it began factoring the Development in 2021.

The parties are agreed that the incorrect billing identified by the Applicant has been rectified by the Respondent. We therefore considered that there was no breach of the property factor's duties in this respect.

We therefore identify no breach of property factor's duties in respect of the matters raised under this heading 3.

4 Failure to Meet Data Protection Obligations

The Applicant complains in respect of the mistaken release of some owners' details via a provider of software employed by the Respondent.

The Tribunal considers that it does not possess the jurisdiction to determine this question. The Tribunal has the jurisdiction to determine whether there have been breaches of the Code or of property factor's duties. This does not extend to making a determination as to the breach or otherwise of data protection legislation. The Applicant may have the option of pursuing the matter by other routes if he so chooses.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document. The proposed PFEO requires crediting of a sum of money to the Applicant's factoring account. We consider that the sum reflects the relatively minor breach of property factor's duties identified.

APPEALS

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first

seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

JOHN M MCHUGH

CHAIRMAN

DATE: 1 June 2026