

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber) Property Factors (Scotland) Act 2011 (“the Act”)

Statement of reasons for decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber (“the Tribunal”) (Rules of Procedure) Amendment Regulations 2017 (“the regulations”)

Chamber Ref: FTS/HPC/LM/20/2593

Re.: Rozelle Avenue Place and Drive, Waterside, Newton Mearns, G77 6YS (“**the land**”)

The Parties:-

Mr Peter Allish, 16 Rozelle Avenue, Newton Mearns, G77 6YS (“**the homeowner**”)

Hacking and Paterson Management Services, 1 Newton Terrace, Glasgow, G3 7PL (“**the property factor**”)

The Tribunal members: Simone Sweeney (legal chairing member) and Carol Jones (ordinary surveyor member)

Decision of the Tribunal

The Tribunal unanimously determined that the property factor has complied with sections 1.1 a A, 2.4 and 6.9 of the Code of Conduct for Property Factors (“the Code”) as required by section 14 (5) of the Act but failed to comply with the Property Factor’s duties as required by section 17 (1) (a) of the Act.

In terms of section 19(1) (b) of the Act the Tribunal proposes to make a Property Factor Enforcement Order (“PFEO”) and gives notice of that proposal and allows parties to make representations in terms of section 19 (2) of the Act.

Background

1. By application dated 14th December 2020, the homeowner applied to the Tribunal for a determination on whether the property factor had complied with sections 1.1 a A and 6.9 of the Code. The homeowner also alleged that the property factor had failed to comply with the Property Factor's duties at section 17 (1) (a) of the Act.
2. A notice of acceptance of the application was issued on 22nd December 2020 by a legal member of the Tribunal under Rule 9 of the regulations.
3. A written response to the application together with an inventory of productions was received from the property factor under cover of email dated 4th February 2021.
4. The application was referred to a telephone hearing before the Tribunal on 22nd February and continued thereafter to a further telephone hearing on 19th April 2021.
5. Following further procedure, the homeowner amended his complaint to include an allegation that the property factor had failed to comply with section 2.4 of the Code. Reference is made to the terms of the Tribunal's direction dated, 28th April 2021.

Hearing of evidence on 19th April 2021

6. In attendance at the telephone hearing on 19th April 2021 at 10am was the homeowner and Gordon Buchanan, Director, on behalf of the property factor.

Section 1.1 a A of the Code:-

"The written statement should set out:

A. Authority to Act

a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;

b. where applicable, a statement of any level of delegated authority, for example, financial thresholds for instructing works, and situations in which you may act without further consideration."

Evidence of the homeowner

7. In respect of section 1.1a A of the Code, the homeowner referred the Tribunal to the content of the property factor's written statement of services. Under the heading, 'Authority to Act' the written statement of services provides:-

"HPMS act as property factor to homeowners deriving delegated authority to do so through: Custom and Practice."

8. The homeowner submitted that describing its authority to act as 'custom and practice' was misleading and incorrect. The homeowner wanted an explanation from the property factor why they this phrase was adopted.
9. The homeowner explained that the property was part of a development built by Dickie Homes in the late 1990s. The house builders appointed David Watson Property Management to provide factoring services at the development. The homeowner referred to a letter which he had recovered from a neighbour who had lived at the development since its completion. The letter, dated 12th March 1998 confirmed that David Watson Property Management was originally appointed to manage the maintenance of the common areas and play areas in the development.
10. The homeowner submitted that any authority to act, which the property factor might have, could only have arisen from what he described as a, 'merger' with David Watson Property Management which he understood to have occurred in 2001. The homeowner was curious why this was never disclosed to owners at the development. He believed that it ought to have been disclosed within the written statement of services. To suggest that any authority to act arose from 'custom and practice' was misleading and incorrect. In the homeowner's opinion, the written statement of services ought to provide details of how the property factor had been, 'formally appointed' and did not do so in its current form.
11. The homeowner confirmed to the Tribunal that he was not disputing that the property factor had legal authority to act. Rather his complaint focused on the description provided in the written statement of services.

Response of the property factor

12. In response, Mr Buchanan insisted that the property factor had been fully compliant with section 1.1 a A of the Code. The obligations on the property factor arising from

the Act came into effect in 2012. The homeowner wasn't disputing that the property factor provided management services prior to that date. Mr Buchanan referred to the terms of the Code. This Code was produced by the Scottish Government. The notes to section 1.1 a Aa of the Code provide a list of examples of the basis of any authority which the property factor has to act. The list, though not exhaustive, includes, *inter alia*, "Operating as property factor by custom and practice – no formal appointment exists." Mr Buchanan insisted that adopting this description within their written statement of services meant that the property factor was compliant with section 1.1 a A.

13. Mr Buchanan explained that he was unable to provide records of the formal appointment of the property factor. He accepted that the property factor had merged with David Watson Property Management around the date referred to by the homeowner. However the time period by which the property factor required to retain any record of this information had now expired.
14. In 2012, the law introduced a requirement on property factors to issue a written statement of services to owners. That statement required the property factor to state the basis of any authority which they had to act on behalf of all homeowners. In keeping with the guidance and the accompanying notes to the Code produced by the Scottish Government, the property factor identified a description which they felt best described their relations with owners. In keeping with the footnotes on page 5 of the Code, the property factor chose the description, '*custom and practice.*'
15. Further, Mr Buchanan relied upon the fact that the homeowner was not challenging the property factor's legal authority to act. Rather, that the homeowner felt that a different description should be adopted in the written statement of services to better describe their legal authority. That did not indicate that there was a failure to comply with the Code.

Property Factor's duties: Failure to maintain a sinking fund

Evidence of the homeowner

16. The homeowner alleged that the property factor had not complied with the Property Factor's duties by failing to collect and administer a sinking fund at the development.

17. The homeowner explained that he had purchased the property in May 2016. In the course of the purchase, the homeowner had been advised that the title deeds provided that the common parts of the development were managed by the property factors and he was obliged to pay a float and fees to cover on-going costs.

18. The homeowner referred the Tribunal to the deed of conditions, specifically, conditions sixth and seventh. These provided,

“that the Factor shall set up a fund to be held by him to accumulate a sufficient sum to provide for the renewal of the landscaping of Common Ground (including trees, shrubs, plants, childrens’ play equipment and others) in the year Two thousand and Eleven and at the end of each fifteen year period thereafter and to require payment from each of the proprietors annually the sum of TWENTY FIVE POUNDS (£25) or such greater sum as he may deem necessary for the foregoing purpose; declaring that such payments shall not be returned to the proprietor on the sale of his dwellinghouse, and (Seventh) that the Factor shall have full power and authority to instruct and have executed from time to time such works for the repair, maintenance and renewal of the Common Ground as he in his judgement shall consider necessary.”

19. The homeowner alleged that the property factor had allowed the common areas and play areas to become neglected.

20. By way of example, the homeowner explained that, in 2018, he was walking through the common areas of the development with his four year old grandson. An overhanging branch narrowly missed catching his grandson’s eye. The homeowner submitted that the shrubs and plants had not been maintained by the property factor as required by the title deeds. It was at this point that he started to investigate the deed of conditions and first became aware of conditions sixth and seventh.

21. Moreover the homeowner referred the Tribunal to a selection of photographs lodged with his application (production 16). These photographs had been taken by the homeowner in November and December 2020. They showed areas of shrubbery in the common garden areas and the children’s playpark at the development.

22. The homeowner had attached written notes on the photographs with arrows highlighting what he identified to be weeds, moss and, '*stressed shrubs.*' On the photographs of the playpark, he had noted the ground surface to be '*decaying*' and '*uneven*', with, '*ponded water.*' The notes highlighted weeds, '*protruding bolts*' and '*missing play equipment*' in the playpark.
23. The homeowner had complained about the poor state of the common areas and enquired of the property factor how the sinking fund was being used to address these issues. This was communicated to the property factor by email of 28th June 2019 (homeowner's production 17).
24. A response was received from the property factor by email of 5th July 2019 (homeowner's production 19). Insofar as is relevant, this provided,
- "I have checked with our bookkeeping department and there is no sinking/garden fund in place for the development. There has been no payments for this by the co-proprietors at the development. This would have been a decision taken by owners, to not contribute to a sinking fund. Although the deed may state this as a condition, it is up to the owners at the development to decide if this is followed."*
25. When he asked for evidence of the owners' decision not to contribute to a sinking fund, the property factor responded by letter of 12th October 2020. The letter, insofar as is relevant, provided,
- "The homeowners decision not to have a fund is clearly evidenced by the absence of a fund. We hold no records relating to how this decision was reached."*
26. The homeowner referred again to the '*merger*' between the property factor and David Watson Property Management in 2001. He submitted that all assets, responsibilities and liabilities of the earlier company would have been assumed by the property factor. The homeowner believed that David Watson Property Management would have had a sinking fund in place but had no evidence to confirm the position.
27. If it is accepted that David Watson Property Management was managing such a fund, then it would have been for the property factor to have continued with the fund. The homeowner's position was that the property factor had neglected to do so

and had failed to comply with the property factor's duties, therefore. If there was no sinking fund in existence, then the property factor should have made that known to owners when they took over management of the development. The fact that there was no sinking fund in place was only disclosed to the homeowner in 2020 in response to his specific enquiry.

28. The surveyor member referred to the letter of 12th March 1998 which the homeowner had recovered from his neighbour. The surveyor member enquired whether this neighbour had paid into a sinking fund. The homeowner responded that he considered it unlikely that David Watson Property Management would not have begun to collect the money.
29. The homeowner submitted that, had the sinking fund been in place and managed effectively by the property factor, then major works to the play areas and common areas could have been avoided. Had the property factor maintained the sinking fund, in the way the deeds intended, then the costs of on-going maintenance would have been met.
30. The homeowner wanted to know what had happened to any monies ingathered by David Watson Property Management by way of a sinking fund. The deed of conditions stipulated that £25 was to be collected annually from each of the thirty eight owners at the development. The homeowner calculated that approximately £2,850 would have been in the fund by the time the property factor merged with David Watson Property Management in 2001.
31. The homeowner submitted that the property factor wrote to owners on 19th November 2020 offering a sinking fund. The letter was produced (production 15). Insofar as is relevant, the letter provided,

“Development Maintenance Fund We also invited you to let us know if you were in favour of commencing a maintenance fund for your development and similarly the feedback for this has not indicated you are in favour if this. If you would like to commence such a Fund you can also Vote for this via the My H&P App or Portal, or by contacting me by email or telephone.”

32. Within the written statement of services, the property factor lists the core services which it provides to owners. The document (homeowner's production 3) insofar as is relevant, provides,

"HPMS as Factor for the Land offer the following Core Factoring Services to the homeowners relative to the land/property which the homeowners share in common ownership and/or responsibility (common property):-...Collecting and administering homeowners' advance funds and sinking/reserve funds where appropriate."

33. Having failed to maintain a sinking fund from 2001, the homeowner argued that the property factor had failed to satisfy the terms of its own written statement of services. In failing to do so, the property factor had failed to comply with the Property Factor's duties.

Response of the property factor

34. Mr Buchanan was unable to respond to any comments by the homeowner about the practices of David Watson Property Management.
35. In response to the allegations that the property factor had failed to manage a sinking fund, Mr Buchanan submitted that the property factor had no evidence that such a fund ever existed or was administered by the previous property managers or that that owners paid into a fund in 1998.
36. In response to the allegation that the property factor had failed to comply with the Property Factor's duties by failing to manage a sinking fund at the development, this was denied by Mr Buchanan.
37. Mr Buchanan referred to condition sixth within the deed of conditions. He accepted its terms but argued that the property factor is not bound by the deed of conditions. Rather, the deed of conditions binds owners, only. Therefore there can be no breach by the property factor of something by which they are not bound.
38. It was rejected by Mr Buchanan that the deed of conditions requires the property factor to undertake the obligations provided in the deed of conditions on behalf of the owners. In his submission there is no requirement on the property factor to offer the sinking fund. Condition sixth does not place any obligation on the property

factor. The deed of conditions obligates the owners, only. It provides a framework for owners to maintain their development. Any duty on the property factor arises from their agreement with owners which is the written statement of services.

39. Reference was made to the third condition of the deed of conditions. It provides,

“THIRD Management of the Common Ground:- (A) a Factor or managing agents (“the Factor”) shall be appointed to have charge of and perform the various functions to be exercised in the care, maintenance and management of the Common Ground”

40. Mr Buchanan refused the suggestion that this section places any duty on the property factor. The deed of conditions binds only owners. Since 2012 the property factor’s services are based on the written statement of services. The property factor simply assists the owners in discharging their duties. The owners appoint a property factor and in doing so enter into a contract with the property factor.

41. It was admitted by Mr Buchanan that the property factor had written to owners in 2020 offering to operate a sinking fund on their behalf. He advised that only two of the thirty eight owners at the development had responded to this offer, positively. The offer remains open to owners should they wish to accept it.

42. Mr Buchanan submitted that the collective owners at the development have chosen not to operate a sinking fund since 2012. It may well have been that they chose not to do so in 1998 or thereafter.

43. In response to the surveyor member’s query whether any evidence exists from the time of the merger (eg financial statements) which reveals any monies having been paid into a fund from owners, Mr Buchanan advised that there was no such evidence within his organisation. The property factor would no longer have any requirement to hold records or evidence from the period 1998 to 2001 in any event.

Section 6.9 of the Code:

“You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.”

Evidence of the homeowner

44. The homeowner submitted that he complained to the property factor about common areas being in a poor state. The complaints were made between 2018 and 2020. The complaints were communicated by email and focused on failures to address moss, weeds, untrimmed shrubs and overhanging plants amongst other things. The homeowner expressed his concern about the contractor's standard of work and felt this fell below what was acceptable.
45. Notwithstanding the complaints from the homeowner about the poor standard of work in 2018, the property factor awarded the tender to the same contractor (AAW Landscapes) the following year.
46. In 2020 a new contractor was instructed to take over landscaping works at the development. However the homeowner continued to complain as he considered that the work continued to fall below a satisfactory standard. Moreover the homeowner felt that the charges applied by the contractor (£201.60 per month) did not provide value for money given that the area of landscaping is not extensive. The homeowner advised that the grass areas are predominantly weeds and moss as a result of neglect and poor workmanship by contractors over the years.
47. The property factor responded to advise that the contractor would be contacted and the homeowner's concerns investigated.
48. The homeowner submitted that the property factor had failed to pursue contractors to improve their service. He insisted that many owners had complained to the property factors about the same issue but the property factor had failed to act. Section 6.9 requires the property factor to pursue the contractor to '*remedy*' defects. The homeowner submitted that he had seen no evidence of remedial works.
49. The surveyor member of the Tribunal enquired what the homeowner believed should have been done by the property factor. The homeowner insisted that the property factor should have ensured that the works were '*remedied*' and looked for evidence of same. If there is no improvement then the contractor should not be paid.
50. The homeowner confirmed that he had not attended any meeting with the property factor about the issue. There were no telephone calls. He communicated complaints

and photographs by email which he considered sufficient and allowed him to keep a record of all communications.

51. Any updates which the homeowner received from the property factor were simply to advise him that contact had been made with the contractors. He has seen no improvement to the common areas.

Response of the property factor

52. Mr Buchanan denied any suggestion that the property factor had failed to comply with section 6.9 of the Code.
53. He confirmed that in 2018 the contractor undertaking landscaping works at the development was AAW Landscapes. This was a company independent of the property factor appointed on behalf of owners.
54. Mr Buchanan admitted that the property factor received complaints from the homeowner and that these began in 2018. All complaints were investigated and meetings were arranged at the development with the contractors and the property factor's officers. The complaints were handled by a property manager, Mr Fraser.
55. Mr Buchanan admitted that the work of AAW Landscapes was not of a satisfactory standard, that it did not improve and that the contract was not renewed.
56. Mr Buchanan submitted that the property factor asked the homeowner if he wished further action to be taken against AAW Landscapes, e.g. on the issue of costs. Mr Buchanan advised that the homeowner had not specified any action he wished the property factor to pursue against the contractor.
57. The Tribunal was referred to the property factor's inventory of productions, specifically productions 1 to 5. These were copy emails and letters between the property factor and the homeowner in relation to his complaints about the landscaping works.
58. In an email to the homeowner dated 22nd May 2020, the property factor's Mr Fraser addressed the homeowner's concerns about the new contractor and offered to pursue AAW Landscapes for any monies which the homeowner considered necessary. Insofar as is relevant, the email provided,

“...should you feel your development are owed a credit from AAW Landscapes, please confirm what you believe is required and we shall investigate this and pursue a resolution with AAW Landscapes...hopefully your new contractor can perform more to your satisfaction and given this is carried out across a season, a change of contractor is usually assessed at the end of the season. The difficult circumstances we are living through currently have probably not given Rutherglen Landscapes the start they would have hoped for...if there is further work to be done in the weeks or months ahead we shall support this to the fullest of our ability.”

59. Mr Buchanan explained that the practice of the property factor is to investigate all complaints against contractors, to attempt to address the issues and if the standard of service is not good enough, the contractor is changed. By adopting this practice, Mr Buchanan submitted that the property factor ensured compliance with section 6.9 of the Code.

Section 2.4 of the Code:

“You must have a procedure to consult with the group of homeowners and seek their written approval 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 you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).”

Evidence of the homeowner

60. Having amended his application, the homeowner alleged that the property factor had failed to comply with section 2.4 of the Code.
61. The homeowner alleged that the ground management work specification had been altered by the property factor without advising or consulting with owners beforehand.
62. The homeowner had requested from the property factor a copy of the relevant specification in the course of a complaint about landscaping works. The documents which the homeowner had received were lodged as productions 19 A and 19 B. The homeowner was unclear when he had received the documents.

63. Production 19 A showed the specification for ground maintenance work for 2016. Production 19 B was the specification for ground maintenance work for 2019. The homeowner submitted that there were differences between the specification documents. In practical terms this meant a reduction to the landscaping services provided at the development.
64. By way of example, production 19 A showed that the grass would receive weeding and feeding at all areas twice per season in 2016. Whereas production 19 B showed that these works would only be undertaken a minimum of once per season in 2019.

Response of the property factor

65. The property factor responded to the section 2.4 allegation by letter of 12th May 2021 from Mr Buchanan.
66. The property factor divided section 2.4 into two distinct sections, the first being,
“You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service.”
67. It was submitted that the property factor did indeed have a procedure for consulting with homeowners to seek their written approval before providing additional services. Mr Buchanan referred to the property factor’s written statement of services (homeowner’s inventory of productions number 3) and specifically sections 3.5 and 3.6 of the statement.
68. Section 3.5 sets out which ‘*additional services*’ are provided by the property factor at an additional cost.
69. Section 3.6 provides,
“Where a service is provided by HPMS which will incur additional fees, over and above those included within the Core Factoring Services, HPMS will consult homeowners in writing for consent prior to incurring expenditure.”
70. In his letter Mr Buchanan set out the property factor’s procedure in the following terms:-

- “1. Receive request, or identify need for ‘Additional Services’ from/for the group of homeowners.*
- 2. Consider, research and identify the expected additional resource and time requirements, resulting from request.*
- 3. Provide homeowners, in writing, a quotation for the Additional Services and request the group of homeowners confirm their agreement.*
- 4. Once the collective homeowners have agreed to the Additional Services quotation, provide written confirmation of the same to the group of homeowners.*
- 5. Commence provision of Additional Services.”*

71. Mr Buchanan submitted that neither the homeowner nor any other owners at the development have made any request for Additional Services. No charge has been incurred by them. Therefore the property factor has complied with this part of section 2.4.

72. With regard to the second part of section 2.4,

“Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).”

73. Mr Buchanan submitted that this part of the Code relates to works of a greater substance or value or emergency situations where the property factor may be required to provide additional resource out-with their core factoring services and additional fees would apply.

74. Again, Mr Buchanan relied on the fact that no additional services had been provided, no charges incurred by owners and therefore there was no evidence that the property factor had failed to comply with the second part of 2.4 of the Code.

75. The property factor relied upon the fact that section 2 of the Code does not relate to instruction of contractors to undertake repairs and maintenance.

76. Finally, in response to the allegation that the property factor had failed to consult with or advise the owners about the reduction to the contractor’s specification, Mr Buchanan referred to section 2.2 of the written statement of services.

77. Section 2.2 of the written statement of services provides,

“Where HPMS considers that consultation with homeowners is necessary or that written approval of homeowners is appropriate prior to instructing common works and services, HPMS will consult with all homeowners in writing seeking their views and/or instructions.”

78. The property factor did not consider it necessary for there to be any consultation with owners in relation to changing the specification for ground maintenance work in 2019. Moreover there was no evidence from the owners’ collectively that there was any concern about the property factor’s approach. Mr Buchanan submitted that this position had been intimated to the homeowner by letter dated, 12th October 2020.

Response of the homeowner to property factor’s letter of 12th May 2021

79. The Tribunal intimated the property factor’s submissions to the homeowner. By email dated 19th May 2021 the homeowner responded. He did not feel that the property factor had addressed his complaint and saw the letter to illustrate a failure on the part of the property factor to communicate effectively.

Findings in Fact

80. That the development was built circa 1998 and David Watson Property Management was appointed at that time to provide management services at the development.

81. That the property factor has provided management services to the development since 2001.

82. That the property factor has authority to act.

83. That the property factor issued to the homeowner a written statement of services as required by the Code.

84. That the written statement of services provided a statement of the basis of the authority of the property factor to act.

85. That the written statement of service provides that the property factor’s authority to act is based on custom and practice.

86. That the deed of conditions requires the property factor to accumulate a sufficient sum to provide for the renewal of the landscaping of Common Ground (including trees, shrubs, plants, childrens' play equipment and others).
87. That collecting and administering a sinking fund is included as a core factoring service within the property factor's written statement of services.
88. That the property factor issued the written statement of services in 2012.
89. That David Watson Property Management wrote to owners at the development on 12th March 1998 intimating an intention to create a sinking fund to cover the costs of landscaping of common ground.
90. That it is unknown whether David Watson Property Management created a sinking fund.
91. That it is unknown whether David Watson Property Management received money from owners.
92. That it is unknown whether any monies were transferred to the property factor.
93. That the property factor wrote to owners in 2020 enquiring whether they would like a sinking fund to be created and managed by the property factor on behalf of owners.
94. That only two owners accepted the property factor's offer.
95. That there is no sinking fund in operation at the development, presently.
96. That the quality of work being undertaken by AAW Landscapes between 2018 and 2020 fell below an acceptable level.
97. That the homeowner complained to the property factor between 2018 and 2020.
98. That the property factor investigated the complaints.
99. That the contract for landscaping works was provided to an alternative contractor.
100. That the specification for ground maintenance work for 2016 differed from the specification for ground maintenance work for 2019.
101. That the changes to the specification for ground maintenance work was not intimated to the homeowner in advance.

102. That the property factor has a procedure for consulting with owners to seek their written approval before providing work or services which will incur additional charges or fees.

Reasons for decision

Section 1.1 a A of the Code

103. The Tribunal determines that the property factor has complied with section 1.1 a A of the Code. The Code requires the property factor to provide a written statement of its range of services. The homeowner has a copy of this document and has lodged it before the Tribunal. Within that written statement the property factor is required to set out a statement of the basis of any authority you have to act on behalf of all the homeowners in the group. This has been provided as '*custom and practice.*' The Tribunal recognises that the homeowner would prefer the property factor to provide a history of property management at the development, including how the property factor came to take over the business of earlier property managers. However the failure to provide such a detailed explanation does not amount to a failure to comply with section 1.1 a A of the Code. The requirement on the property factor is to provide a statement, only. A description has been adopted which is provided in the footnotes at page 5 of the Code produced by the Scottish Government by way of an example. The Tribunal determines that the property factor has complied with section 1.1 a A of the Code, therefore.

Property Factor's duties: Failure to maintain a sinking fund

104. The property factor's position is that the deed of conditions places obligations on owners, only. Mr Buchanan's position is that any duties on the property factor arises from their agreement with owners. The property factor does not dispute the content of the burdens section of the title deeds. The deed of conditions provide for the appointment of the property factor. The third condition provides that the property factor will perform various functions in exercising the maintenance and management of the common areas at the development. The property factor accepts that it manages the maintenance of the common areas but submits that this is not because of any obligation arising from the deed of conditions. Rather, it is to assist

the owners in discharging their duties. But for the deed of conditions, there would be no basis for the property factor to provide or charge owners for services at the development. The deed of conditions at condition sixth, specifies that, '*the Factor*' shall set up a fund to provide for the landscaping at the common areas. The Tribunal rejects the position that this is not an obligation on anyone other than the property factor. No detailed explanation or authority is provided to support the property factor's position.

105. David Watson Property Management issued a letter intimating an intention to arrange a fund. The property factor offered to set up a fund to owners in 2020. Collecting and administering a sinking fund is included in the written statement of services as a core service. If the property factor's position is accepted, that the property factor's duties arise from the written statement of services, then it is unclear why the offer to set up a fund was not made in 2012 when the written statement of services was issued. The Tribunal determines that the property factor has failed to meet the standards set out in their own written statement. In doing so, the property factor has failed to satisfy the Property Factor's duties as required by section 17 (1) (a) of the Act.

Section 6.9 of the Code

106. The Tribunal accepts that the homeowner found the standard of service undertaken by contractors to common areas to fall below what was acceptable and that he communicated this to the property factor between 2018 and 2020. The Tribunal accepts that the property factor acted upon these complaints which resulted in the appointment of an alternative contractor. The homeowner does not dispute that he was asked by the property factor to advise whether he wished further action to be taken against the contractor but declined to respond. The evidence before the Tribunal is that the property factor pursued AAW Landscapes to remedy defects in the inadequate service reported by the homeowner. The Tribunal finds no evidence of any failure on the part of the property factor to comply with section 6.9 of the Code.

Section 2.4 of the Code

107. The homeowner complained that the property factor had reduced the specification for ground maintenance work in 2019 without advising or consulting with owners. He was unsure how to fit this complaint into the Code. The complaint had been intimated to the property factor prior to him bringing his application. Ultimately the homeowner brought the complaint under section 2.4 of the Code which places a duty on a property factor to have a procedure for consulting with owners and seeking their written approval when services or works are anticipated that will bring additional charges.
108. In response, the property factor has provided detail of their procedure by letter of 12th May 2021. The Tribunal accepts that, should additional services be required at the development, the property factor has a procedure to deal with same (they will write to owners, seek their agreement, provide written confirmation of the quote to owners and commence provision of the additional service). To that end, the Tribunal is satisfied that the property factor has complied with section 2.4 of the Code.
109. However, the Tribunal recognises that the homeowner's complaint was focused more on a failure to communicate effectively. The property factor recognised this, too, and responded accordingly by letter of 12th May 2021. The property factor's position is that the written statement of services provides consultation with homeowners "*where considered necessary.*" The property factor did not consider it necessary to consult with homeowners on changes to the specification for ground maintenance work in 2019.
110. The Tribunal considers that the changes to the works were of significance to the homeowner. The property factor was aware that the homeowner was concerned about the landscaping works from 2018 and had made complaints which the property factor had investigated and acted upon. The works were part of a service for which the homeowner paid a fee. He was entitled to know of the change to the service. The property factor admits that this change was not communicated to owners. The failure to communicate change to a service of significance to the homeowner fell below the standard expected of a professional property factor. The Tribunal determines that the property factor has failed to meet the Property Factor's duties in this regard.

Decision

111. In all of the circumstances narrated, the Tribunal finds that the property factor has failed to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.

112. The Tribunal determine to issue a PFEO.

113. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.

114. The Tribunal proposes to make the order in the following terms:

Within 28 days from the date of issue of this order, for the property factor to:-

- *Issue to all owners at the development a satisfaction survey inviting the owners to comment on the service provided by the property factor.*
- *Provide to the homeowner payment of £250 by way of compensation for the time, preparation and inconvenience he has experienced in bringing this application.*
- *To provide evidence of the above to the Tribunal's administration.*

Appeals

115. 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 within 30 days of the date the decision was sent to them.



Legal Chair, at Glasgow on 10th July 2021

