

Housing and Property Chamber

First-tier Tribunal for Scotland



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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended

Chamber Reference: FTS/HPC/PF/22/3985; FTS/HPC/PF/23/0884; FTS/HPC/PF/23/0885; FTS/HPC/PF/23/0888; FTS/HPC/PF/23/0889; FTS/HPC/PF/23/0890; FTS/HPC/PF/23/0891; and FTS/HPC/PF/23/1203

Property addresses: Property address: 28E, 30E, 28P, 28R, 30C, 30G, 30L, 30P and 30Q Diriebught Road, Inverness, IV2 3QY

The Parties

Dr Robert Anderson
Mrs Lesley Leslie
Mrs Anita Bennis
Mr Jamie Stranraer-Mull
Mr Fred Kelly
Mr Malcolm Petrie
Mr Jeffrey Geary
Miss Mhairi Dalgligh (“the Homeowners”)

First Port Property Services, Queensway House, 11 Queensway, New Milton, Hampshire, BH25 5NR (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mr M Scott (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with paragraphs 3.1 and 3.3 of the 2012 Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Background

1. By applications received in the period between 31st October 2022 and 15th February 2023 (FTS/HPC/PF/22/3985) and 20th March and 11th May 2023 (FTS/HPC/PF/23/0884; FTS/HPC/PF/23/0885; FTS/HPC/PF/23/0888; FTS/HPC/PF/23/0889; FTS/HPC/PF/23/0890; FTS/HPC/PF/23/0891; and FTS/HPC/PF/23/1203), the Homeowners applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs 1.1a(Ab), 1.1a(Ce), 2.1, 2.5, 3.1, 3.2, 3.3 and 6.9 of the Code. Details of the alleged failures were outlined in the Homeowners' applications and associated documents. All applications were in identical terms.
2. A Case Management Discussion ("CMD") in respect of application reference FTS/HPC/PF/22/3985 took place by telephone conference on 22nd May 2023. The Homeowner, Dr Anderson, was in attendance. The Property Factor was represented by Mr Andrew Grant. Ms Kirsty Nicol and Ms Holmes were also in attendance.
3. The Homeowner clarified that there were seven further Tribunal applications from other homeowners in the block of flats, all made after his application and in the same terms. Dr Anderson was the appointed representative for all applications.
4. Following discussion, the Homeowner agreed to lodge further representations. Mr Grant agreed to look into whether final accounts had been prepared for the development. The case was continued to a hearing.
5. On 1st June 2023, applications FTS/HPC/PF/23/0884; FTS/HPC/PF/23/0885; FTS/HPC/PF/23/0888; FTS/HPC/PF/23/0889; FTS/HPC/PF/23/0890; FTS/HPC/PF/23/0891; and FTS/HPC/PF/23/1203 were accepted.
6. The hearing and a CMD for the additional cases was scheduled to take place on 3rd August 2023.
7. By Direction dated 16th June 2023, the Tribunal requested parties' views on whether the CMD for the additional cases should be converted to a hearing to take place in conjunction with the hearing set down in the case FTS/HPC/PF/22/3985.
8. Parties confirmed their agreement to converting the CMDs for the additional cases to a hearing.
9. By email dated 27th June 2023, the Property Factor lodged further written representations.
10. By emails dated 18th and 25th July 2023, the Homeowner lodged further written representations.

The Hearing

11. A hearing took place at the Inverness Justice Centre on 3rd August 2023. The Homeowner, Dr Anderson, was in attendance, and represented the other Homeowners. The Property Factor was represented by Mr Andrew Grant and Ms Lindsay Holmes

Preliminary Matters

Additional Homeowners

12. Responding to questions from the Tribunal as to why all the applications were in the same terms, Dr Anderson explained that he was the chair of the homeowners' association. Five of the other applicants were also on the committee, and two applicants were not. His representations set out how each was affected. Some of the Property Factor's acts affected him, some affected the committee and some affected the homeowners. Mr Grant said there had been no complaints made to the Property Factor by the seven other Applicants. Complaints had been made on behalf of the committee.

Final Accounts

13. Responding to questions from the Tribunal, Mr Grant said that final accounts were produced in 2021, and it is the Property Factor's position that the accounts are accurate. They are not as Dr Anderson wants them to be. A 51-page document entitled *Response to the Submission to the First Tier Tribunal for Scotland* ('the Response') was given to homeowners in 2020 which shows the work carried out to explain the accounts. Mr Grant said the Property Factor had offered to have an independent audit of the accounts carried out at that stage, on the proviso that the Property Factor would bear the cost of the audit if they were found to have been at fault. The Response had not been lodged because the Property Factor only discovered it two days before the hearing.
14. Dr Anderson said he has the Response, which had been helpful in answering some questions. The final account was dated 15th October 2020 and the account was closed on 15th October 2021. In 2020, there was a balance of £6190. In 2021, there was a zero balance. Dr Anderson said the homeowners needed to know what the money was used for. It was Dr Anderson's position that a final audit was not necessary.

The Homeowners' position

Paragraph 2.1

You must not provide information which is misleading or false.

15. Dr Anderson said the estate manager did not have access to central finance, and the committee had been provided with false information. He said the Response referred to this matter, stating that the financial information presented to owners by the estate managers over a ten-year period had not

been the same as the financial information held by the Property Factor's central records. The Property Factor had stated in the Response 'First Port would like to apologise for involving Mr Anderson in an unreasonable amount of time and inconvenience and trusts that this report will address to his satisfaction the issues raised.' Dr Anderson said the false information meant the homeowners were unable to balance their accounts. In 2016 there had been a surplus of over £600 and the estate manager had said he did not know what to do with it and had asked the homeowners. When the Response was produced, it solved a problem from 2014 by showing that a figure had been double counted. It was Dr Anderson's position that, if the estate manager had been made aware of the correct financial position, the problems would not have arisen. This caused confusion and, in some years, there were deficits of over £2000.

Paragraph 2.5

You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

- 16.** Dr Anderson said there had been a delay in preparing the final accounts. The homeowners had been pushing the Property Factor to prepare the accounts at the time of the balance transfer to the new factor. The new factor had received a sum from the Property Factor but had been unaware of its origin, as the transfer had not been properly identified.

Paragraph 3.1

If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services.)

- 17.** Dr Anderson said it took the Property Factor over 18 months to inform him that funds had been transferred to the new factor. The last balance sheet provided was for contract termination on 12th October 2020 whereas the development account was closed a year later on 15th October 2021. The balance sheet provided was out of date in relation to the information required on the funds transferred.

Paragraph 3.2

Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

18. Dr Anderson said the funds due had not been returned in full. The Homeowners do not know what the full funds were. Deductions made from their balance were not valid. The closing account fee was £2100. A charge of £50 plus VAT was made to each of the 35 homeowners. Dr Anderson said he had discussed the situation with Roger Bodden at the time, and, although Mr Bodden had not said explicitly that the closing fee would not be charged, he had been told by Dr Anderson that the homeowners did not accept the charge.

Paragraph 3.3

You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

19. Dr Anderson said the Response showed that the Property Factor had made charges for Careline emergency support service, despite the homeowners having informed the Property Factor in March 2012 that it was no longer required, as it was not being used. No charge had appeared in the accounts for 2013 and 2014. A charge was discovered in 2019. Dr Anderson said the charges had been 'slipped in' over a two-year period as debits against the reserves. This showed that the Property Factor was not providing in writing a detailed financial breakdown of charges made and a description of the activities and works carried out.
20. Dr Anderson said it was only after four years of the contract between the parties that the homeowners began to get balance sheets that balanced. The previously mentioned issue of the sum of around £600 which the estate manager had been unable to identify was a failure under this paragraph of the Code, as it did not appear correctly in the accounts. Dr Anderson said his request to have the origin of the funds identified did not result in the provision of supporting documentation. It later transpired that the issue was due to double counting of the 2014 surplus.
21. Dr Anderson referred to an insurance claim for a leak which had been managed by the Property Factor in 2014. It was his position that the Property Factor told homeowners after the event that the claim had been rejected by the insurers. The cost to repair the leak was paid out of homeowner funds and it was over the delegated level. Dr Anderson had felt the insurance claim was valid, so he gathered information from the contractor and approached the insurance company. Their assessor agreed it was a valid claim. The insurer refunded the charge and excess, with a total of £5000 to be divided between the homeowners. Some of the homeowners could not be located, due to the passage of time, so there was money still sitting with the Property Factor that did not belong to them. Dr Anderson said the money should be transferred to the new factor, in case the missing homeowners made an approach to the committee in the future to claim their money. Responding to questions from the

Tribunal as to how this constituted a failure under this paragraph of the Code, Dr Anderson said the Property Factor was not making a clear distinction in the accounts to show that the money was not theirs.

- 22.** Dr Anderson referred to charges made for repairs to lights. The breakdown of specific costs for the Staircases in the 2019-20 annual accounts showed a charge of £400.51 for Lighting Repairs. Dr Anderson requested a breakdown of the charges and a description of the repairs. The information given did not correspond with the invoice, which showed that only two lights were fixed. In 2019/2020, there were further issues with lights in Staircase 30C-K. The committed were concerned that the Property Factor's charge of £400.51 was more than was justified for the work carried out. The Property Factor could not supply supporting documentation and invoices when requested.
- 23.** There was a further issue with lights in 2016/2017, when the Property Factor was unable to consistently provide documentation in relation to queries regarding LED replacement lights in the 28K-Q staircase.

Paragraph 1.1a(Ce)

The written statement should set out: *the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee*

- 24.** Dr Anderson said the Property Factor's Written Statement of Services stated that the Management Fee increase was to be agreed annually between the parties and up to the Retail Prices Index published for June. The Property Factor had failed to comply with this on more than one occasion, as stated in emails from Roger Bodden. The Property Factor had said they would amend this in the final accounts, but had failed to do so, until two years later. There was no indication of how the Property Factor arrived at the credit of £44.17, which was lower than the sum due

Paragraph 1.1a(Ab)

The written statement should set out: *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 consultation.*

- 25.** Dr Anderson said the Property Factor had exceeded the delegated level of £500 as indicated in the 2019/2020 account, which showed a charge of £1260 for roof gutter cleaning. He had queried this and been told by the Property Factor that the sum represented three charges of £440 for gutter cleaning.

Paragraph 1.1a (Fp)

The written statement should set out: *clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should*

state clearly any “cooling off” period, period of notice or penalty charges for early termination.

- 26.** Dr Anderson’s complaint in this regard was that homeowners had not received a copy of the Written Statement of Services. They relied upon the Owners Agreement, which did not mention a termination fee for closing the account. He said he had been given contradictory information on the termination procedure in respect of the length of notice to be given.

Paragraph 6.9

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.

- 27.** Dr Anderson referred to the failure of LED lights at numbers 20 and 21 in staircase 28K-Q. He had been advised by the estate manager in January 2017 that the lights would be replaced under warranty, however, a charge was made to the homeowners in the 2016/2017 account for the replacement. It was Dr Anderson’s position that there was double counting in the charges for lighting repairs and the homeowners had been overcharged. This had been pointed out to the Property Factor, and they had responded on 21st May 2020 by saying they were confident there had been no duplicate charging for lighting repairs.
- 28.** Dr Anderson said the ground maintenance schedule required the contractor to edge all grass areas during the first and last visit of the season. This was not completed in 2019/2020. In previous years, when there had been a failure to complete the work, a refund of one month’s fees had been paid by the contractor. No refund was made on this occasion, and there was no evidence of the contractor returning to rectify the shortcoming, despite an assurance from the Property Factor that this would happen. It was his position that the Property Factor had failed to pursue the contractor.
- 29.** It was Dr Anderson’s position that the Property Factor had failed to obtain a collateral warranty in respect of the situation with the lights. In addition to previous examples, in July 2019 five of the nine lights on staircase 30C-K failed. It was reported to the Property Factor that there should be no charge to the homeowners as the lights were under guarantee. The Property Factor did not seem to know if the lights were under guarantee. Dr Anderson confirmed this with the manufacturer and informed the Property Factor. It was Dr Anderson’s position that this confirmed that the Property Factor was not obtaining collateral warranties from the contractor. It later transpired that the problem was due to a disconnected wire.

The Property Factor's position

Paragraph 2.1

30. Mr Grant said that the 2014 issue in respect of the unidentified sum of around £600 was not an example of false or misleading information. It was an error. It was not hidden and there was no attempt to defraud. Ms Hughes said that every development has its own bank account. The money would have been in the development bank account. The funds would be reconciled at the year end. Responding to questions from the Tribunal, Ms Hughes agreed that she could not say exactly what had happened in this case, but what should have happened, based on the Property Factor's practices.

Paragraph 2.5

31. Mr Grant said they had informed the new factor that the funds had been transferred and this had not been passed on to the homeowners. The Property Factor accepts there was a delay in the funds reaching the homeowners, but they do not accept that they failed to keep homeowners informed.

Paragraph 3.1

32. It was accepted by the Property Factor that the timeline for the final service charge account being issued was outwith the time period stated in the Code.

Paragraph 3.2

33. Mr Grant said the final bill had been settled to 12th October 2020. It was presented to all owners upon the termination of the management services which demonstrated a surplus of £345.62. This also included and detailed a balance sheet for all owners to review showing monies held in the development bank account. A balance of £2,289.45 was transferred to the new factor. The Property Factor's position is that the information provided to homeowners detailed full transparency of their funds held.

34. Mr Grant explained that the closing fee is an administration fee to cover the closing of the account. It is mentioned in the contract between the parties that such a fee may be charged.

Paragraph 3.3

35. Mr Grant said he was unable to comment on the Careline system issue as he was unaware of the matter. He said an annual breakdown was given to all homeowners.

36. Mr Grant said he was unable to comment on the estate manager credit issue.

37. Mr Grant said the Property Factor does not manage insurance claims. They support homeowners to place insurance and to manage claims. They can liaise

with the broker if requested, but they do not make decisions about insurance claims.

Paragraph 1.1a(Ce)

38. Mr Grant said the Property Factor accepted there was an issue in this regard. The issue had been addressed and the fee had been refunded.

Paragraph 1.1a(Ab)

39. Mr Grant said the gutter cleaning was recorded as three jobs on the Property Factor's system, and the contractor was paid one sum. The Property Factor did not go over the delegated level of authority for each block. At this stage, Dr Anderson said there were only two blocks.

Paragraph 1.1a(Fp)

40. There was nothing further to add to previous discussion on this point.

Paragraph 6.9

41. Mr Grant said the Property Factor had tried to find further information in regard to the situation with the lights. They had been unable to find any documentation to answer the queries, and this may have been due to poor record keeping. It was not clear why the lights were not under warranty.

42. The Property Factor was unable to find any documentation to assist with the issue regarding lawn edging, but the Property Factor had continued to use the contractor. They were unable to say whether the service was inadequate or whether the contractor had been pursued.

Further discussion

43. There was some further discussion about the issue of the insurance funds and missing homeowners. Mr Grant said the Property Factor cannot pay this sum to the new factor. The Property Factor would pay it to any appropriate homeowner who requested their share.

Further documentation

44. As a response to a request from the Tribunal for further information following the hearing, the Property Factor provided the Response and a copy of the Written Statement of Services. On perusing the Response, it was clear to the Tribunal that it had been included in the application documentation.

45. There was further correspondence and representations from both parties regarding the Written Statement of Services. The Tribunal is unable to take any further representations or evidence into account following the hearing.

Tribunal Decision and Reasons

Paragraph 2.1

46. The Tribunal did not find that there had been a failure to comply with this paragraph. There were clearly issues in relation to the accounting system, which were referred to in the Response at pages 6 and 7. It is stated therein that there was confusion and miscommunication between Finance and the estate manager, the latter of whom is said to have presented accounts to the committee 'in good faith'. There was clearly discussion between the estate manager and the committee about the accounts at the time, and the committee were aware of the issues. This does not constitute the provision of false or misleading information by the Property Factor to the Homeowner.

Paragraph 2.5

47. The Tribunal did not find that there had been a failure to comply with this paragraph. The Tribunal noted that the matter complained of appeared to have taken place after the termination of the contract between the parties. Although Dr Anderson mentioned that there had been other instances of failures to respond to enquiries over the years, no evidence of these instances was put before the Tribunal.

Paragraph 3.1

48. It was accepted by the Property Factor that the timeline for the final service charge account being issued was outwith the time period stated in the Code. This was, therefore, a failure to comply with the Code.

Paragraph 3.2

49. On the information before it, the Tribunal was unable to find that there had been a failure to comply with this paragraph of the Code. There is a dispute between parties regarding the final account. It is the opinion of the Tribunal that this can only be settled by having the accounts independently audited. The Tribunal observed that this ought to have happened at an earlier stage at the instigation and expense of the Property Factor, and it ought not to have relied upon Dr Anderson's approval.

Paragraph 3.3

50. The Tribunal found there was a failure to comply with this paragraph of the Code in respect of supplying supporting documentation and invoices or other appropriate documentation on request, in respect of the light replacements and repairs. The Tribunal accepted that the Property Factor provided an annual detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. Although there were allegations in regard to the Careline system, no evidence was provided to indicate that the Property Factor had continued to charge homeowners for this service after its cancellation. The Tribunal did not consider that the matter of the Property

Factor holding funds from an insurance payout was relevant to this paragraph, and made no findings in that regard.

Paragraph 1.1a(Ce); & Paragraph 1.1a(Ab)

51. The Tribunal did not find there had been failures to comply with these paragraphs. Section 1 of the Code covers what is to be included in the Written Statement of Services. The complaints made under this section were not in relation to a failure to include required information in the Statement, but to a failure to comply with the Statement. These might more properly have been brought as complaints of failure to carry out property factor duties. However, the Tribunal noted that the Property Factor had dealt with paragraph 1.1a(Ce) and issued a refund, so it is unlikely that such a complaint would have been upheld by the Tribunal. Equally, in respect of paragraph 1.1a(Ab), there was insufficient evidence that the Property Factor had exceeded the delegated authority in respect of the gutter cleaning.

Paragraph 1.1a(Fp)

52. The Tribunal did not find that there had been a failure to comply with this paragraph. The Written Statement of Services includes clear information on how to terminate the service arrangement. The Tribunal did not find that there had been a failure to provide homeowners with a copy of the Written Statement of Services. There was insufficient evidence in this regard.

Paragraph 6.9

53. The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. There was insufficient evidence before the Tribunal to prove that the contractors appointed to deal with the lighting or the grass cutting had provided inadequate work or service, or that the Property Factor had failed to pursue the contractors. Collateral warranties would not be relevant in the situation described in respect of the lights. They are not the same as guarantees. The Tribunal observed that it was unsatisfactory that the Property Factor did not seem to know that the lights were under guarantee and that the homeowners had to make enquiries in this regard.

Findings in Fact and Law

54.

- (i) The Homeowners are heritable proprietors of the Properties.
- (ii) The Property Factor is registered as a Property Factor under registration number PF000095.
- (iii) The Property Factor provided factoring services to the development of which the Properties form part from 2009 until October 2020.

- (iv) The homeowners' committee has raised concerns about the clarity and accuracy of financial information provided by the Property Factor throughout the history of the parties' relationship.
- (v) The Property Factor failed to supply supporting documentation requested by the homeowners in respect of light replacements and repairs.
- (vi) The contract between the parties ended on 12th October 2020.
- (vii) The Property Factor delayed in making available all financial information to the homeowners following the termination of their arrangement.
- (viii) The Property Factor provided final accounts in October 2021.
- (ix) Disagreement continues on whether the final accounts are accurate.

Additional Homeowners

55. The Tribunal did not make any award of compensation in respect of paragraph 3.3 to the Homeowners, other than Dr Anderson. It was not clear that they had ever asked the Property Factor for any documentation, or suffered from any failure to provide the information. Neither did the Tribunal make an award of compensation in respect of any distress, frustration and inconvenience to the additional Homeowners. Their applications were verbatim copies of Dr Anderson's application, with the representations made in the first person by Dr Anderson. It was not clear to the Tribunal what, if any, input the additional applicants had to the issues discussed. They were not all committee members, and their applications contained no indication of the impact of the Property Factor's failings upon them. The Tribunal considered it was appropriate to make an order for compensation in respect of Dr Anderson, as it appeared the burden of dealing with these matters had largely fallen upon him, and any distress, frustration and inconvenience caused was directly to him.

Proposed Property Factor Enforcement Order (PFEO)

56. Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

57. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

58. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

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.

Legal Member and Chairperson
21st August 2023