Housing and Property Chamber
First-tier Tribunal for Scotland

Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

Reference number: FTS/HPC/PF/21/2566

Re: Flat 13, 3 Braid Avenue, Cardross, Argyll and Bute, G82 5QF ("the Property")

The Parties:

Mr Alan Ferguson, Flat 13, 3 Braid Avenue, Cardross, Argyll and Bute, G82 5QF ("the Applicant")

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Glasgow, G73 1UZ
("the Respondent")

Tribunal Members:
Martin J. McAllister, Solicitor, (Legal Member)
Elaine Munroe, (Ordinary Member)
(the "tribunal")

Background

1. This is an application by Mr Ferguson in respect of the Property in relation to the Respondent's actings as a property factor. The Property is owned by the Applicant and his wife, Mrs Linda Ferguson. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). The application alleges that the Respondent has failed to comply with Sections 2.1 and 7.2 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code"). It also states that the Applicant considers that the Property Factor has not carried out the property factor's duties in terms of Section 17 (1)(a) of the 2011 Act. The application was dated 18th October 2021 and was accepted by the Tribunal for determination on 3rd November 2021. The application was accompanied by a numbered set of documents.

2. A case management discussion was held on 11th January 2022 and, prior to it, the Respondent submitted a paginated set of documents and an inventory together with written representations dated 14th December 2021. Subsequent to the Case Management Discussion, the Applicant submitted a copy of his title sheet.

The Hearing

3. A Hearing was held by teleconference on 16th March 2022 and, prior to it, the Respondent submitted further documents including a copy of a letter sent to homeowners in the development of which the Property forms part in which it intimated that it intended to terminate its management contract with homeowners and withdraw from acting as property factors with effect from 28th May 2022.

4. In its written representations the Respondent indicated that it did not wish to participate in an oral Hearing. Mr Ferguson attended and there was no appearance from the Respondent.

5. The tribunal set out the purpose of the Hearing and the procedure which it intended to adopt which was to go through the application, its accompanying documents and the written representations and hear evidence from the Applicant.

Matters in dispute and evidence

6. The issues which gave rise to the application are focused. The Property is a flat which is in a block of a development consisting of three blocks. The Applicant's flat is in Block 3 and he has lived in the Property since 2017. The Respondent has been property factor of the development since 2016. There was a disagreement between the homeowners, including the Applicant, and the Respondent with regard to the Deed of Conditions governing the development of which the Property forms part. The specific matter was in connection with the authority which was needed from homeowners for certain works to be carried out. The Respondent had considered that unanimous agreement was needed and the Applicant did not agree with this and sought legal advice on the matter from BTO Solicitors. A letter from the solicitors was sent to the Respondent on 27th October 2020. The Respondent accepted that it had been incorrect in its earlier view with regard to the number of owners who required to agree for certain works to be done.

7. The Applicant said that there had been three matters which some residents of the development wanted to be done and that timeous attendance to them had been thwarted by the attitude of the Respondent. He said that these matters were dealing with a muddy area of common ground, installation of a door closing system and erection of a fence along the boundary of the development and adjacent to the block of flats where his property is. He said that his overwhelming wish had been to get the issue of the required authority resolved and he said that, otherwise, "nothing would ever get done" in the development.

8. In its written representations, the Respondent referred to the complaint relating to "proposals made for improvement works within the development and the basis of the agreement required from the owners to allow works to proceed."

9. In relation to the issue with the fence, the Respondent's representations state that a proposal for a fence on common ground had been put to homeowners and that, since it was a material change, owners were advised that unanimous agreement

was required. The representations state that the matter went no further because agreement could not be reached.

10. In relation to a door closing mechanism for Block 3, the Respondent's representations state that it considered this to be a material change because the door *"never had an auto closer previously"* and that, as a consequence, unanimous agreement was required from homeowners. The representations state that the matter went no further at that point because agreement could not be reached.

11. It was a matter of agreement that a fence was erected by some owners without formal authority of the Respondent or other homeowners and the Applicant (who was not one of the owners responsible for its erection) said that this had been done to preserve the security of homeowners and particularly those on the ground floor flats.

12. There was some activity by the Respondent in calling a meeting of homeowners and its representations state that it was provided with a copy of BTO Solicitors' legal opinion on 27th October 2020 and that it wrote to all homeowners in the development on 9th November 2020 with regard to various matters. In relation to the fence, it informed them of the opinion of BTO and provided them with an extract of the letter from the solicitors. The letter to homeowners from the Respondent states: *"…..the opinion from BTO Solicitors states that consent is not required from all owners and that consent could be granted by the majority of votes at an owners' meeting."* The letter went on to state that the Respondent did not consider that consent for the fence had been formally obtained and that consent could be given retrospectively at a meeting of homeowners and it was suggested that this may be an agenda item that homeowners may want to consider. The letter also stated that, should any homeowner *"wish to contest the opinion from BTO Solicitors"*, independent legal advice could be obtained.

13. The representations of the Respondent state that it wrote to all homeowners in the development on 19th March 2021 informing them that their previous references to the requirement for unanimous agreement was incorrect and that the letter contained an apology: *"I have to inform you…….that the information provided to the owners in relation to 'unanimous agreement' was incorrect. The Deed of Conditions for Braid Avenue has a specific provision for fences and permission for the fence could have been obtained at a quorate meeting of the owners or if a proposal was made to the owners by correspondence being issued, at least 25 owners would require to give their consent. You will recall from our letter dated 9 November 2020, the relevant clause within the Deed of Conditions was also reported by BTO Solicitors who provided a legal opinion on behalf of an owner."*

14. Mr Ferguson said that he had sought the legal opinion to try and move things forward and that he had obtained it in a personal capacity, not on behalf of the homeowners in the development. He said that he felt that the Respondent should not have quoted part of the letter in its communication to homeowners.

15. Mr Ferguson was asked about whether he considered that homeowners, by a majority vote, could determine that any works be done in the development and he said that he considered that this was the case in respect of works to the common

areas. When asked about matters which might be constituted as improvements, he said that he thought that homeowners would take a "common sense approach."

16. It is useful to set out the terms of the BTO letter which was sent to the Respondent:

"We are aware that you appear to have indicated that every single proprietor of the whole development of flatted dwellinghouses requires to consent to the erection of the aforesaid fence that is being erected for the benefit of the development.

We have had an opportunity of rechecking the title deeds and in the Deed of Conditions recorded GRS Dumbarton 27 March 2003 by Glasgow City Council…… the relevant section that would therefore deal with the erection of the fence and common areas is effectively governed by Condition Twenty Third.

This very clearly determines that decisions made in respect of the open ground can be determined by a simple majority of the votes of the proprietors of the mandatories present and voting with one vote being exercisable in respect of each flat or dwellinghouse.

We can see absolutely no reference to the fact that all proprietors require to consent, which we believe is the argument that you have put forward to our clients in relation to the erection of this fence, which appears clearly to be for the benefit of the proprietors."

17. Mr Ferguson said that the opinion of BTO could have been framed in a more "helpful" way but nevertheless that it showed that the Property Factor had been wrong in taking the approach which it had in relation to getting authority for such matters as the fence.

18. Mr Ferguson said that the door closure system had been proposed by owners and that the Respondent had initially stated that unanimous consent of owners would be required before it went ahead. He said that it eventually conceded that the works be done but that there had been delay because if its initial stance.

19. Mr Ferguson said that the Respondent had not properly dealt with his complaint. The Respondent's position as outlined in its written representations was that the Applicant had not properly followed the complaints process. Mr Ferguson agreed that the letter from the Respondent dated 1st February 2021 was its response to his letter of complaint dated 18th January 2021. Mr Ferguson was referred to the last paragraph of the letter of 1st February 2021 and said that he had not previously noticed it: *"…..I trust the above clarifies my findings to your complaint. If you are not satisfied with this, you may escalate this to Head of Residential Management, Speirs Gumley Property Management, Red Tree Maenta, 270 Glasgow Road, Glasgow, G73 1UZ."*

20. Mr Ferguson was referred to the written statement of services provided to him by the Respondent and conceded that this contains a process where, if not satisfied with a response to a complaint, a homeowner had the right to escalate the complaint to the Respondent's Head of Residential Management. He said that he did not do this and said that the process was very complicated and that, in dealing

with the Respondent he was "learning to do everything from scratch." He said that he was aware of the terms of the written statement of services "after the event."

21. The written representations of the Respondent states that it does not agree that the matter in relation to the complaint was finished without the Applicant being advised that he had a right to apply to the Tribunal. The representations state that the complaints process had not been concluded and that, in any event, the written statement of services details the complaints procedure and also that, once the Respondent's final position has been confirmed, the homeowner has a right to apply to the First-tier Tribunal.

22. Mr Ferguson said that the Respondent did not comply with the property factor's duties. He said that, in his view, it did not require a solicitor to read the relevant Deed of Conditions and that the Respondent as property factor had a duty to interpret the Deed of Conditions and act accordingly. He said that "page one rule one" for an agent when taking on management of a development is to find out what the position is with regard to votes of homeowners which are required for any works to be done.

23. The Respondent's position is that it is not legally qualified to confirm that it agrees with the legal opinion provided by the Applicant's solicitor and had no reasons to obtain a separate legal opinion.

24. It was a matter of agreement that the Respondent had offered the sum of £300 to the Applicant in reimbursement of what he paid his solicitor for legal advice and £50 in additional compensation. Mr Ferguson said that he rejected the offer of compensation and then discovered that the offer to reimburse his legal fees had been withdrawn.

25. Mr Ferguson said that he had spent a considerable amount of time on the matter and that it had been stressful for him.

26. Mr Ferguson said the he thought a fair resolution would be for his legal fees to be reimbursed and, in addition, that he be paid compensation of £500 for distress and £640 in respect of the time spent by him in dealing with the matter. He also said that he feels that the Respondent should apologise to all homeowners for the mistakes which they made.

27. **Findings in Fact**

27.1 The Applicant is the co-owner of the Property.

27.2 The Applicant obtained legal advice with regard to the authority required for works to be carried out to the development where the Property is situated and the cost of this was £300.

27.3 The Respondent is the property factor of the development in which the Property is situated.

27.4 The Respondent provided incorrect information to the Applicant with regard to voting requirements for obtaining authority for works to be done in the development where the Property is situated.

28. **Findings in Fact and Law**

28.1 The Respondent has failed to comply with Paragraph 2.1 of the Property Factors (Scotland) Act 2011Code of Conduct for Property Factors.
28.2 In relation to the application, the Respondent has complied with Paragraph 7.2 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.
28.3 The Respondent has failed to carry out the property factor's duties as required to do so by Section 17 (1) (a) of the Property Factors (Scotland) Act 2011.

Reasons

28. The tribunal considered the alleged breaches of the Code

29. **Paragraph 2.1 of the Code:**

2.1 You must not provide information which is misleading or false.

30. Mr Ferguson was clear in stating that he had been provided with misleading information with regard to the votes of homeowners which were required to effect certain works.

31. The Respondent in its representations accepted that it had misled the Applicant and other homeowners: *"We have apologised to all development co-owners and accepted that misleading information was provided to them in relation to the proposal for the erection of a fence on common ground."* In its letters to homeowners dated 19th March 2021 it stated in relation to the proposal for a fence: *"I have to inform you that on both occasions, the information provided to the owners in relation to 'unanimous' agreement was incorrect. The Deed of Conditions for Braid Avenue has a specific provision for fences and permission for the fence could have been obtained at a quorate meeting of the owners or if a proposal was made to the owners by correspondence being issued."*

32. The tribunal noted the acceptance by the Respondent that it had misled homeowners including the Applicant but considered it useful to add comment. Matters concerning works to areas owned in common by proprietors of developments are not straightforward. In correspondence, the Respondent referred to the fence and the door closing system being "material changes" requiring unanimous consent. It is well established that there are difficulties in developments where improvements are proposed rather than maintenance or a repair. In Morcom v Campbell-Johnson [1956] QB106, it is stated at page 115 *"The test of whether work done is an improvement or repair is said to be 'if the work which is done is the provision of something new for the benefit of the occupier, that is properly speaking an improvement, but if it is only the replacement of something already there, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not improvement."*

33. It seemed to the tribunal that the issue that required to be determined by the Respondent, when considering whether or not a particular item of work was to proceed, was whether or not there was specific provision for it in the relevant Deed of Conditions and, if not, if it was an improvement or a repair. It is not clear if its reference to a "material change" was its determination of this. It initially resisted the proposal for a door closure system and stated that unanimous consent of proprietors would be required but such work would presumably fall into the category of replacing what was there with a "modern equivalent" as referred to in the case of Morcom.

34. The proposed fence was to be erected on common ground along a boundary of the development and the Respondent initially stated that unanimous consent of proprietors would be required. It changed its view following the letter from BTO solicitors which contained the legal advice which had been sought by the Applicant. This was after the fence had been erected by some proprietors in the development. The opinion contained in the letter from BTO states in reference to the Deed of Conditions relating to the development: *"This very clearly determines that decisions made in respect of the open ground can be determined by a simple majority of the votes of the proprietors of the mandatories present and voting….We can see absolutely no reference to the fact that all proprietors require to consent, which we believe is the argument that you have put forward to our clients in relation to the erection of this fence, which appears clearly to be for the benefit of the proprietors."*

35. The tribunal noted the opinion of the Applicant's solicitors but did not consider that this was completely correct in all aspects. Whether or not the fence was "clearly for the benefit of the proprietors" is irrelevant. The relevant consideration was whether or not the Deed of Conditions specifically allowed for it and, if not, if it was a repair or an improvement. In that regard, it is not considered that all decisions in relation to the "open ground" can be determined by a simple majority of owners. It depends on the work or works proposed for the "open ground." In relation to whether or not works were an improvement or otherwise, the tribunal did not consider that Mr Ferguson's view that proprietors would take a "common sense view" to be relevant.

36. The Deed of Conditions recorded GRS Dumbarton on 27th March 2003 is the deed which governs the development in which the Property is situated. It has provisions limited to when the developer still has ownership of part of the development and provisions relevant when the developer no longer has an interest.

37. The relevant parts of the Deed of Conditions:

    37.1 *(Fourth) Each Proprietor of a Dwellinghouse shall be bound (himself or jointly with the adjoining Proprietor in respect of any wall, fence, or hedge serving more than one Dwellinghouse) to erect so far as not already erected and maintain all boundary walls, fences or hedges pertaining to or serving his Dwellinghouse in a good and substantial condition …. and no further boundary, divisional or other walls or fences, trellis work, ornamental fencing or draughtboarding fencing shall be erected on the Area of Ground."* The latter

part of the clause states that no further fencing shall be erected but the earlier part puts an obligation on proprietors to erect boundary fencing.

37.2 *(Fourteenth) …. (f) the boundary walls surrounding that Block of Flatted Dwellinghouses and all other parts and pertinents of that Block of Flatted Dwellinghouses which are common and mutual to the Proprietors thereof…. Each Proprietor in a Block of Flatted Dwellinghouses shall contribute an equal share towards the expense of maintenance of the Block Common Property of that Block of Flatted Dwellinghouses, one share being payable in respect of each flat owned"*

37.3 *(Twenty Third) …. Twenty of the Proprietors present or represented by a mandatory shall be a quorum in respect of any matters to be discussed or decided in respect of the Open Ground and such matters shall be determined by a simple majority of the votes of the Proprietors or the mandatories present and voting, one vote being exercisable in respect of each flat or dwellinghouses.*

38. Interpretation of Deeds of Conditions are not straightforward and sometimes assistance is required from a solicitor. Often Deeds are poorly or inconsistently drafted and this creates its own difficulties. In the case of the Deed of Conditions affecting the Property, there is potential for doubt with regard to works such as the boundary fence but careful reading of it would provide an answer. It is considered that the Respondent should have first considered whether or not the Deed of Conditions provided for the erection of a boundary fence and thereafter decided the correct voting procedure for obtaining authority. What it did was state that it was not for it to interpret the Deed of Conditions and then state what its interpretation was. In an email to Mrs Linda Ferguson on 14th August 2020, the Respondent stated: "Our interpretation is that the erection of the fence is an addition to the common parts and that consent is required from all owners and should have been obtained prior to works starting. In an earlier document of the Respondent described by Mr Ferguson as the first report of the Respondent relating to Braid Avenue, it states: *"As the proposed fence was to be installed on common land, all owners had a legitimate interest in this proposal meaning that unanimous agreement was required for this proposal to proceed."*

39. It appeared to the tribunal that the Respondent did not have a clear view on this important matter. It has accepted that it misled the Applicant. It appears that it was not the case that the Respondent had the knowledge and deliberately kept it from homeowners. However, it is in the business of managing properties and should have ensured that it properly understood the Deed of Conditions relating to the development and communicated the correct information to the Applicant and the other homeowners. The tribunal determined the Respondent had failed to comply with this paragraph of the Code.

40. **Paragraph 7.2 of the Code**

7.2 When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

41. The Respondent has a complaints process which is detailed in its written statement of services. It details two steps: First Stage Complaints Handling and Final Stage Complaints Handling. The written statement of services states that, if a homeowner remains dissatisfied following Final Stage Complaints Handling, s/he has the right to apply to the First-tier Tribunal for Scotland and the address and email address of the Tribunal is provided.

42. The Applicant made a formal complaint to the Respondent on 18th January 2021. The Respondent's Mr Ross Moffatt, Associate Director, sent a detailed response on 1st February 2021 and the final paragraph of that letter signposted the Applicant what to do if he was not satisfied with the response and that was to escalate his complaint to the Respondent's Head of Residential Management. This is in line with the Respondent's written statement of services which states that escalation to the Head of Residential Management is the Final Stage Complaints Handling component of the Respondent's complaints process.

43. On receipt of the letter from the Respondent dated 1st February 2021, the Applicant wrote to Mr Moffatt on 17th February 2021 and raised various matters with him in relation to the letter of 1st February and the complaint in general.

44. The Respondent's position on this part of the application in relation to alleged breach of paragraph 7.2 of the Code is straightforward. It does not accept that the complaints process was concluded. Mr Ferguson accepted that he did not notice the final paragraph in the Respondent's letter of 1st February 2021 and he accepted that the complaints process was contained in the Respondent's written statement of services.

45. It might have been expected that, when the Respondent received the Applicant's letter of 17th February 2021, it should have responded to him drawing attention to the fact that he was not complying with the complaints process. On balance, the tribunal was persuaded by the fact that the Respondent's written statement of services set out a complaints process in a clear way and, in its letter of 1st February 2021, signposted the Applicant to the next step in the process if he was dissatisfied with the response contained in that letter.

46. The tribunal considered that, although it might have been helpful if the Respondent had pointed out to the Applicant that he was "off track" with the complaints process in his letter of 17th February 2021, it was not obliged to do so and was entitled to consider that it had provided clear information in its written statement of services and in its letter of 1st February 2021 as to the necessary steps to be taken in relation to the complaint. The Applicant was candid in stating that he did not notice the relevant paragraph in the letter of 1st February 2021 and that he noticed the relevant detail in the written statement of services "after the event."

47. The tribunal determined that the Respondent had not breached Paragraph 7.2 of the Code.

48. **The tribunal considered whether or not the Respondent had complied with the Property Factor's Duties.**

49. The source of the duties which the Respondent had to comply with is to be found in the Deed of Conditions. The Respondent was and is the property factor of the development. The Deed of Conditions in Clause Thirteenth states: *"There shall be appointed a Factor or Factors who will be responsible for instructing and administering the common repairs and maintenance of the Block Common Property.*

50. It appeared to the tribunal that a fundamental part of the duties of a property factor is to provide advice to homeowners with regard to works proposed in a development and the means by which authority for such works is obtained. Mr Ferguson rather succinctly described "the page one, rule one" duty of a property factor when taking on management of a development was to find out what authority was needed for works to be done. The Respondent accepts that it was wrong in the advice it gave to the Applicant and other homeowners in relation to the authority required for proposed works. The tribunal found that the Respondent had also failed to properly address the question of whether or not such works constituted improvements. It may have been the case that they did but that was irrelevant. The Respondent did not demonstrate that it had any process to address such issues.

Disposal

51. The tribunal determined that the Respondent had not complied with Paragraph 2.1 of the Code and had failed to carry out the Property Factor's Duties. Because of the Respondent's failures in relation to advice given to the Applicant and other homeowners in relation to the question of authority required for works in the development, the Applicant had spent £300 on legal advice and it seemed reasonable that he be refunded for this. He had also spent time on trying to resolve matters and it was clear from his evidence that he found the whole process quite stressful. It is considered that it would be reasonable for £500 to be paid to compensate the Applicant for the time involved and stress endured. The tribunal noted that the Respondent had already apologised to homeowners and saw no reason for it to take any further steps in this regard. The tribunal proposes that a Property Factor Enforcement Order be made requiring the Respondent to pay the sum of £800 to the Applicant.

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Martin J. McAllister, Legal Member
of the First-tier Tribunal for Scotland
24th March 2022