

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 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules").

Reference numbers:

FTS/HPC/PF/22/0234

FTS/HPC/PF/22/0793

FTS/HPC/PF/22/0795

Re: Property at 3 Queens Court, Perth, PH2 0ES ("the Property")

The Parties:

Mrs. Kathleen Pringle residing at the Property ("the Homeowner") per her representative, Mr William Pringle also residing at the Property ("the Homeowner's Representative")

Abbey Forth Property Management Limited having an office sometime at Balcairn, Viewfield Terrace, Dunfermline KY12 7HY and now Laich House, 5, Castle Court, Carnegie Campus, Dunfermline KY11 8PB ("the Property Factor")

Tribunal Members

Karen Moore (Chairperson) and Kingsley Bruce (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Property Factor :-

- (i) has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2011 ("the 2011 Code") at Section 1 at 1.1;
 - Section 2 at 2.3, 2.4 and 2.5;
 - Section 3 at 3.2, 3.5a and 3.6;
 - Section 6 at 6.6;

Section 7 at 7.1;

- (ii) has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2021 ("the 2021 Code")
 - at Section OSP at OSP3, OSP10 and OSP11;
 - Section1 at 1.1 and 1.G(21);
 - Section 2 at 2.4, and 2.7;
 - Section 3 at 3.7;
 - Section 6 at 6.9 and
 - Section 7 at 7.1 and
- (iii) has failed to comply with the Property Factor's Duties.

Background

1. By three separate applications all received on 16 March 2022 ("the Applications") the Homeowner's Representative on behalf of the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Codes of Conduct for Property Factors and had failed to comply with the Property Factor's Duties.
2. The Applications are as follows:
 - i) Application Form C and given Chamber reference FTS/HPC/PF/22/0234 which complained of breaches of the 2011 Code and the 2021 Code at Section 1 at 1.1, A(1), C(8) and G(21); Section 2 at 2.3,2.4, and 2.7; Section 3 at 3.2 and 3.12; Section 6 at 6.9 and Section 7 at 7.1
 - ii) Application Form C1 and given Chamber reference FTS/HPC/PF/22/0793 which complained of breaches of the 2011 Code at Section 1 at 1.Aa; Section 2 at 2.5; Section 3 at 3.5; Section 6 at 6.6 and Section 7 at 7.1 and
 - iii) Application Form C2 and given Chamber reference FTS/HPC/22/0795 which complained of breaches of the 2021 Code at Section OSP at OSP3,OSP10 and OSP11; Section1 at 1.1, A(1), C(8) and G(21); Section 2 at 2.4, and 2.7; Section 3 at 3.2; Section 6 at 6.9 and Section 7 at 7.1.
3. Each Application comprised detail of the nature of the alleged breaches, copy correspondence and documentation between the Parties, a statement summarising the Homeowner's position and copy formal intimations of the complaints to the Property Factor. A copy of the Homeowner's title sheet to the Property, PTH8484, which contains the title conditions relating to property management was provided by the Homeowner.
4. On 28 March 2022, a legal member of the Chamber with delegated powers of the Chamber President accepted the Applications and referred them to the Tribunal.

A case management discussion (CMD) was fixed for 9 June 2022 at 10.00 by telephone conference call.

CMD

5. The CMD took place on 9 June 2022 at 10.00 by telephone conference call. The Homeowner did not take part and was represented by Mr. Pringle, the Homeowner's Representative. Mr. Stuart Dalziel of the Property Factor took part.
6. The Tribunal explained that, in terms of Rule 17 of the Rules, the purpose of the CMD was to explore how the Parties' dispute may be efficiently resolved by identifying the issues to be resolved, the facts which are agreed, any issues which require to be addressed between the Parties, to determine if a hearing or further procedure is necessary and the evidence required at any hearing.
7. The Tribunal noted that although there are three Applications covering both the 2011 Code and the 2021 Code, the matters complained of all arise from the Property Factor's general conduct during its tenure as property manager. The Tribunal also noted that the Applications overlap each other in respect of the complaints raised. In particular, the Property Factor failed to issue a Written Statement of Services when it should have done, failed to handle personal data appropriately, failed to deal with correspondence and complaints in respect of common works appropriately or timeously, failed to account properly for funds which it held on behalf of the Homeowner and failed to deal with transferring its tenure to another property factor in terms of both the 2011 Code and the 2021 Code and in terms of the title deeds. The Tribunal dealt with the three Applications as one conjoined application.
8. Mr. Pringle briefly outlined the main complaints of the Applications. Mr. Dalziel of the Property Factor fairly and unequivocally advised the Tribunal that the Property Factor accepted the complaints as set out in the Applications and so did not oppose them. He stated that the service provided by the Factor fell short of what the Homeowner might expect, accepted the Property Factor had not provided a Written Statement of Services when it should have done so and had not followed its procedures in respect of correspondence and complaints. He agreed with Mr. Pringle that the Property Factor had transferred its role as property factor to another company without prior notification to the Homeowner, under explanation that the Property Factor had taken legal advice and had entered into a non-disclosure agreement restricting it from telling anyone about the transaction.
9. The Tribunal explained that in terms of Rule 17 (4) of the Rules, the Tribunal may do anything at a CMD which it may do at a hearing including making a decision. The Tribunal adjourned briefly to decide if it could make a decision on the information before it. The Tribunal took into account the detailed information provided in the Applications and the submissions made by Mr. Dalziel. The Tribunal had regard to Rule 2 of the Rules and the application of the Overriding Objective and took the view that, as the Applications were not opposed and as

the Tribunal had sufficient information, it was appropriate to proceed to determine the Applications at the CMD. Having so decided, the Tribunal advised the Parties that it would proceed on that basis.

10. The Tribunal then heard the Parties more fully on the heads of complaint and breaches as outlined in the Applications. The Homeowner's position on each head of complaint is set out fully in the Applications. Mr. Pringle explained the position further when it was appropriate to do so. The Property Factor's position was submitted by Mr. Dalziel from his knowledge of dealing with Property.
11. Both Mr. Pringle and Mr. Dalziel explained that the Property Factor had been appointed following an owners' meeting in October 2018 and took up its role in March 2019. No formal contract was entered into. Both agreed that the Property Factor, by written intimation dated 28 October 2021 and issued on 4 November 2021, transferred the role of property factor to James Gibb Limited, who now manage the Property. The Property Factor's tenure crosses over both the 2011 Code and the 2021 Code.

Written Statement of Services

12. Both the 2011 Code and the 2021 Code at Section 1 impose a duty on the Property Factor to provide a Written Statement of Services (WSS) within four weeks of the property factor providing services and both set out the information which the WSS must contain. Both Codes imposes a further duty of compliance with that Code. The Property Factor accepts that it did not provide the Homeowner with its WSS until September 2020 when it provided the version of the WSS relevant and in force at that time. The Homeowner's complaint in all three Applications is that she was not aware of the contractual terms and conditions of the contract with the Property Factor in respect of its authority to act, the financial and charging arrangements and how the contract could be terminated and so was at a disadvantage in her dealings with the Property Factor. Mr. Dalziel accepted fully that the Homeowner had not received the WSS timeously under explanation that he thought it had been issued to the owners' association along with minutes of a meeting but accepted that this did not comply with the Codes. Mr. Dalziel further advised that, following another tribunal case, written statements of services had been issued to all of the Property Factor's customers excepting Queens Court, being the development of which the Property forms part which, had been overlooked and none was issued to that development.
13. Mr. Pringle advised the Tribunal that the effect of the failure of the Property Factor to comply with the Code and issue the WSS was that the Homeowner was not aware of the contractual terms of the Property Factor's appointment and was not aware of her rights in respect of challenging the Property Factor nor was she aware of her right of recourse to the tribunal. Had the Homeowner been aware of her rights sooner, she would have been able to take action more swiftly.

14. Application Form C2 (reference FTS/HPC/22/00795) which relates to the 2021 Code makes further specific complaints under Section 1 at C(8) and G(21).
15. Section 1 at C(8) states “*any arrangements relating to payment by homeowners towards a deposit, float or floating fund, confirming the amount, payment process and repayment policy (at change of ownership or where the service is terminated by homeowners or by the property factor)*”. Application Form C2 (FTS/HPC/22/0795) sets out that the WSS issued by the Property Factor does not contain a provision in compliance with this part of the 2021 Code.
16. Section 1 at G(21) states “*a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared.”*”. Application Form C2 (FTS/HPC/22/00795) sets out that the WSS issued by the Property Factor does not contain a provision in compliance with this part of the 2021 Code.

Communications and Consultation

17. Both the 2011 Code and the 2021 Code at Section 2 impose duties on the Property Factor to communicate and consult with homeowners fully and without delay. The 2011 Code at Section 2 at 2.3, 2.4 and 2.5 impose duties to provide contact information, have procedures for consulting with owners and obtaining consent before providing work and services and having and adhering to prompt timescales for dealing with enquiries, all of which should be in the WSS. The 2021 Code at Section 2.4 imposes a duty to make documents and information available to homeowners on request and at Section 2.7 imposes a duty to respond to enquiries and complaints as quickly and as fully as possible, and to keep the homeowner informed if they are not able to respond within the agreed timescale. Mr. Dalziel accepted fully that the Homeowner had not received the information requested by her or on behalf promptly and that correspondence had not been dealt with promptly under explanation that staff shortages and dealing with the business transfer to James Gibb Limited had impacted adversely on the Property Factor's ability to deliver a satisfactory service, for which he apologised.

Financial Obligations

18. Section 3 of both Codes impose duties relating to financial obligations and accountability. The 2011 Code at Section 3.2 states “*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” at section 3.5a states “Homeowners’ floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners” and the 2021 Code at Section 3.12 states “In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners. A property factor must only transfer funds from one such account to another in line with the arrangements in any agreement with homeowners to do so.”

19. The Applications set out that the Homeowner paid £250.00 to the Property Factor in respect of a reserve funds for contemplated work. Mr. Pringle explained that £1,000.00 had been requested by the Property Factor who agreed to receive payment by four instalments of £250.00, of which the Homeowner had paid the first instalment. The Homeowner had not been refunded this sum and does not know who had control of it. From the Applications, the Homeowner states that the £250.00 was tendered for specific works and on the basis that if the works were not carried out by October 2021, the £250.00 would be refunded. The works had not been carried out and the £250.00 had not been refunded. The Property Factor’s final invoice and email form part of the Applications. The invoice shows a balance brought forward of £874.83 and a closing balance of £911.53 due to the Property Factor and asks that payment is made to the Property Factor. The email states that the Property Factor will transfer the funds to James Gibb Limited. Also forming part of the Applications are Mr. Pringle’s correspondence to the Property Factor requesting an explanation for the final invoice and asking for refund of the £250.00 paid to account. The Applications also note other accounting inaccuracies which had been raised with the Property Factor and not resolved. Mr. Dalziel accepted that the Homeowner, and her co-owners, had not been advised of the transfer of services to James Gibb Limited until after it had taken place and that a final invoice was not issued until an email was sent on 8 November 2021. Mr. Dalziel accepted that the payment of £250.00 had been received and explained that this sum had been transferred to James Gibb Limited. He accepted that this transfer of payment had been made without the Homeowner’s consent or knowledge. He accepted that funds had been transferred without authority and that Mr. Pringle’s correspondence had not been answered, under explanation that the non-disclosure agreement prohibited the Property Factor from providing information on the business transfer. Mr. Dalziel apologised for falling short in this regard and advised that the Property Factor could provide a detailed accounting.

Carrying out repairs and maintenance.

20. Section 6 of both Codes impose duties relating to repairs and maintenance. The 2011 Code at Section 6.6 and the 2021 Code at Section 6.9 both state that documentation relating to any tendering process should made available if so requested by a homeowner. The Applications show that numerous requests for contract information had been made on behalf of the Homeowner and had gone unanswered, save for limited information provided in July 2019. The Homeowner

raised issues with the Property Factor concerning project work and work to common property being a gate and tree felling. The Homeowner queried both the quality of the work and the accounting for the gate and the tree felling works. Mr. Dalziel explained to the Tribunal that his understanding was that the owners' association was aware of the contract details as members of the association, Mr. Howell and Mr. Carson were part of the project management team. Mr. Pringle refuted this and explained that the owners' association members had taken an interest in the projects but were not actively working on it. Mr. Dalziel accepted this and explained that four projects, for which the £1,000.00 per homeowner had been requested, were contemplated. He explained that works had not all been completed and that there were no specifications for the works. He accepted failings in this regard.

Complaints resolution.

21. The 2011 Code at Section 7.1 states "*You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors*". The 2021 Code at Section 7.1 states "*A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.*" The 2021 Code goes on to set the criteria to be contained in the complaints' procedure. Mr. Dalziel accepted that the Property Factor had not provided the Homeowner with its complaints' procedures.

Overarching Standards of Practice.

22. The 2021 Code imposes Overarching Standards of Practice (OSP) with which the Property Factor must comply. Application Form C2 (FTS/HPC/22/00795) sets out three complaints in respect of the OSP.
23. OSP3 which states "*You must provide information in a clear and easily accessible way*" and OSP11 which states "*You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure*" are dealt with under the foregoing headings as part of the Property Factor's overall conduct and a breach of these was accepted by Mr. Dalziel.
24. OSP10 states "*You must ensure you handle all personal information sensitively and in line with legal requirements on data protection*". The Homeowner's complaint in this regard relates to the transfer or sharing of the Homeowner's personal data to James Gibb Limited. As set out in the foregoing paragraphs, Mr. Dalziel, on behalf of the Property Factor, accepted that the Property Factor had transferred its business of which the Property formed part to James Gibb Limited without the knowledge or consent of the Homeowner, or any of her co-owners, and accepted that this transfer of business information included the personal data of the Homeowner in respect of her personal contact details, banking details and

details of her factoring account, under explanation that the Property Factor was prohibited from obtaining consent by the non-disclosure agreement with James Gibb Limited. Mr. Dalziel agreed with Mr. Pringle that the transfer to James Gibb Limited was not a purchase or transfer of the whole of the Property Factor's business but was limited to its Perth portfolio being twelve developments, including Queens Court of which the Property forms part.

Property Factor's Duties.

25. The Applications set out the Homeowner's complaints as to the general way in which the Property Factor acted in complying with the Code, the WSS and the title deeds. These are the Property Factor's failure to comply with duties as agent for the Homeowner in its application and compliance with data protection regulations, its failure to comply with the WSS in respect of (i) dealing with correspondence and complaints appropriately or timeously and (ii) accounting properly for funds held on behalf of the Homeowner and its failure to comply with the title deeds when transferring its tenure to another property factor.
26. With regard to failing to comply with the WSS, the facts of these matters are dealt with at length in the foregoing paragraphs and so are not repeated in detail here. The WSS states at "*Maintenance, servicing, repairs and projects*" that the Property Factor will tender for projects and Mr. Dalziel accepted that this did not happen. With reference to correspondence response times, Mr. Dalziel accepted that these were not complied with.
27. With regard to failing to comply with data protection regulations, Mr. Dalziel accepted that the personal data of the Homeowner was shared with a third party, James Gibb Limited, without her authority or consent.
28. With regard to complying with the title deeds in respect of authority to act and the extent of that authority, the Applications comprise a copy of the Homeowner's title sheet to the Property, PTH8484, which contains the title conditions relating to property management and factoring in Deed of Conditions registered on 9 June 1976 ("the DoC"). Condition Ninth of the DoC states that a factor "*may*" be appointed "*by a decision of a meeting ...of proprietors of the several houses*", the "*several houses*" being the eighteen houses in the development of which the Property forms part. Condition Tenth of the DoC sets out the way in which owners' meeting are to be held and the extent of factor's powers. Condition Tenth (Tertio) gives the factor full powers as if it were the owners "*excepting any rights and powers relating to the appointment of the Factor*". Mr. Dalziel accepted that the owners were not consulted in respect of the transfer to James Gibb Limited and the decision to transfer was made by the Property Factor as a business decision. He confirmed that not all of the business was purchased or acquired by James Gibb Limited and that a portfolio of twelve developments in the Perth area were transferred to consolidate the Property Factor's business. He confirmed that

the Property Factor had taken legal advice, including advice on the terms of the title deeds, had acted in good faith and that it had signed a non-disclosure agreement prohibiting it from advising the owners in advance of the change of factor.

29. With regard to complying with the WSS in respect of the transfer to James Gibb Limited, the WSS at “*Termination of agreement*” states the Property Factor “*has the right to terminate...services in line with the Deed of Conditions*”. There is no right in the WSS for the Property Factor to assign its contract or appoint a new factor. Mr. Dalziel accepted that no meeting was called to terminate “*in line with the Deed of Conditions*”.
30. Mr. Pringle advised the Tribunal that the effect of the failure of the Property Factor to comply with the DoC in respect of the transfer of business to James Gibb Limited is significant as the Homeowner and her co-owners were denied the right to decide if they wished James Gibb Limited to act as factor and were denied the right and opportunity to negotiate terms and conditions with of that appointment. Mr. Pringle pointed out that, in terms of the DoC, it is discretionary and not mandatory that a factor is appointed and so the Homeowner and her co-owners were denied the right and opportunity to decide if they wanted to continue with a factor or to self-manage their properties.

Summing Up

31. The Tribunal invited the Parties to make any further comments. Mr. Pringles stated that while he had patience and sympathy with Mr. Dalziel’s position, the lack of the WSS and the Property Factor’s actions in selling off part of its business had prejudiced the Homeowner and left her in a difficult position with the new factor being imposed and uncertainty in respect of finances. Mr. Dalziel again apologised and explained that failing to issue the WSS was an oversight.
32. The Tribunal adjourned briefly to discuss the submissions and information before it and returned to advise the Parties that it was minded to uphold the Applications and, if so, was minded to consider making a Property Factor Enforcement Order (PFEO). Before making the PFEO, the Tribunal, in terms of Section 19(2) of the Act would give the Parties an opportunity to make representations which might be in writing or, of either Party wished, at a hearing for that purpose.

Findings in Fact.

33. The Tribunal had regard to the Applications in full and to the oral submissions and statements made at the CMD, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.
34. The Tribunal found the following facts established:
 - i) The Parties are as set out in the Application;
 - ii) The Homeowner is a homeowner in terms of the Act;
 - iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 and 17 of the Act, being the duty to comply with the statutory

- codes of conduct and the duty to comply with the Property Factor's Duties;
- iv) The Property Factor had been the appointed property factor for the development of which the Property forms part ("the Development") from March 2019;
- v) The Property Factor did not issue the Homeowner with the WSS until September 2020;
- vi) The WSS does not fully comply with the 2011 Code;
- vii) The WSS was not updated to comply with the 2021 Code;
- viii) The Property Factor did not deal with correspondence from the Homeowner's Representative promptly or fully;
- ix) The Property Factor did not advise the Homeowner of its complaints' procedure;
- x) The Homeowner paid £250.00 to the Property Factor for specific works on the basis that, if the works were not carried out by October 2021, the £250.00 would be refunded;
- xi) The specific works have not been carried out and the £250.00 payment has not been refunded;
- xii) The Homeowner asked the Property Factor to confirm where and how the £250 payment was being held and the Property Factor failed to do so;
- xiii) By email and, in particular, email dated July 2021, the Homeowner's Representative requested the Property Factor to provide tender and specifications in respect of planned works at the Development and the Property Factor failed to provide these;
- xiv) The Property Factor had no contractual or ostensible or delegated authority to transfer or otherwise sell its interest and role as property factor for the Development in terms of the title deeds or in terms of the WSS;
- xv) The Property Factor did not comply with the WSS in terminating its interest and role as property factor for the Development;
- xvi) The Property Factor ceased to act as property factor for the Development at the end of October 2021;
- xvii) The Property Factor was not entitled to assign its interest and role as property factor for the Development in terms of the WSS;
- xviii) The Property Factor transferred or otherwise sold its interest and role as property factor for the Development to James Gibb Limited;
- xix) James Gibb Limited now act as property factor for the Development regardless of their right to do so;
- xx) The Property Factor issued a final invoice to the Homeowner showing a debit balance brought forward of £874.43;
- xxi) The Homeowner's account with the Property Factor was not in arrears at the time of issue of the final invoice;
- xxii) The Property Factor has failed to explain why the final invoice has a debit balance to the Homeowner despite being asked to do so and
- xxiii) The Property Factor shared the Homeowner's personal data with James Gibb Limited without the Homeowner's consent or authority to do so.

Issues for Tribunal

35. The issues for the Tribunal are: has the Property Factor breached those parts of the 2011 Code and the 2021 Code as complained of in the Applications and has the Property Factor failed to comply with the Property Factor's Duties.

36. Core to these issues is the Property Factor's failure to issue the WSS at the appropriate time and the competence of the way in which the Property Factor transferred or otherwise sold its interest and role as property factor for the Development to James Gibb Limited.

Decision of the Tribunal with reasons.

37. Section 19 of the Act states: "*(1) The First-tier Tribunal must, in relation to a homeowner's application referred to it ... decide (a) whether the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and (b) if so, whether to make a property factor enforcement order.*" Having heard the Parties, the Tribunal proceeded to make a decision in terms of Section 19 (1)(a) of the Act.

38. The 2011 Code at Section 1 at 1.1, imposes a duty on the Property Factor to provide a Written Statement of Services within four weeks of the property factor providing services. Mr. Dalziel accepted that the Property Factor did not provide the WSS until more than a year after it was appointed. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.

39. The 2011 Code at Section 2 at 2.3 states "*You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out-of-hours emergencies including how to contact out-of-hours contractors.*" As the Homeowner did not have a copy of the WSS until September 2020 and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.

40. The 2011 Code at Section 2 at 2.4 states: "*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).*" As the Homeowner did not have a copy of the WSS until September 2020 and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.

41. The 2011 Code at Section 2 at 2.5 states: "*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*

(Section 1 refers).” Mr. Dalziel accepted that the Property Factor did not respond promptly. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.

42. The 2011 Code at Section 3 at 3.2 states: “*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.*” Mr. Dalziel accepted that the Property Factor did not refund overpayments to the Homeowner. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.
43. The 2011 Code at Section 3 at 3.5 states: “*Homeowners’ floating funds must be held in a separate account from your own funds. This can either be one account for all your homeowner clients or separate accounts for each homeowner or group of homeowners.*” The Homeowner requested evidence that the £250 payment was being held in funds separate to the Property Factor’s funds. The Property Factor failed to demonstrate this and, and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.
44. The 2011 Code Section 6 at 6.6 states: “*If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.*” The Homeowner requested tendering process documents for works carried out at the Development. The Property Factor failed to demonstrate that it had complied with this request and, and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.
45. The 2011 Code Section 7 at 7.1 states: “*You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.*” As the Homeowner did not have a copy of the WSS until September 2020 and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.
46. The 2021 Code at Section OSP at OSP3 states: “*You must provide information in a clear and easily accessible way.*” Mr. Dalziel accepted the Property Factor’s failings in respect of communication and accepted that the Property Factor had not provided an updated WSS. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
47. The 2021 Code at Section OSP at OSP10 states: “*You must ensure you handle all personal information sensitively and in line with legal requirements on data protection.*” Mr. Dalziel accepted that the Homeowner’s personal data was shared with a third -party, James Gibb Limited, without the Homeowner’s consent. The

Tribunal accepts that the Property Factor had entered into a contract with James Gibb Limited for the sale or transfer of parts of its business and accepted that the Property Factor acted on advice and acted in good faith with regard to that contract. However, the terms of data protection legislation are precise and the duties on data controllers and processors are onerous, and, the Tribunal had no evidence before it to show that the Property Factor's contract with James Gibb Limited overrode its data protection duties. The Property Factor is an agent of the Homeowner and its powers of authority are set out in the DoC in which there is no authority to exempt it from its data protection duties. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.

48. The 2021 Code at Section OSP at OSP11 states: "*You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.*" Mr. Dalziel accepted that the Property Factor did not respond promptly. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2011 Code.
49. The 2021 Code at Section 1 at 1.1, imposes a duty on the Property Factor to provide a Written Statement of Services within four weeks of the property factor providing services. Mr. Dalziel accepted that the Property Factor did not provide the WSS until more than a year after it was appointed. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
50. The 2021 Code at Section 1 at A(1) states that the WSS must contain "*a statement of the basis of the authority the property factor has to act on behalf of all the homeowners in the group. Property factors operating under a custom and practice arrangement with no formal appointment should clearly indicate this arrangement to homeowners in the WSS. Where this is the case, homeowners and property factors may wish to consider formalising their appointment*". The WSS provided to the Homeowner in September 2020 complies with this part of the 2021 Code and so the Tribunal decided that the Property Factor complied with this part of the 2021 Code.
51. The 2021 Code at Section 1 at C(8) states that the WSS must contain "*arrangements relating to payment by homeowners towards a deposit, float or floating fund, confirming the amount, payment process and repayment policy (at change of ownership or where the service is terminated by homeowners or by the property factor) (see section 3 of the Code: Financial Obligations)*" The WSS provided by the Property Factor in September 2020 complies with this part of the 2021 Code, although the Property Factor failed to show that it followed the procedures and complied with the DoC. Accordingly, the Tribunal decided that the Property Factor complied with this part of the 2021 Code.
52. The 2021 Code at Section 1 at G(21) states that the WSS must contain "*a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed,*

property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared.” The WSS provided by the Property Factor in September 2020 has a brief statement relating to transfer of funds to a new factor and so does not comply with this part of the 2021 Code. Accordingly, the Tribunal decided that the Property Factor has not complied with this part of the 2021 Code.

53. The 2021 Code at Section 2 at 2.4 states: “*Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is good reason not to.*” The Homeowner requested tendering process documents for works carried out at the Development. The Property Factor failed to demonstrate that it had complied with this request and, and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
54. The 2021 Code at Section 2 at 2.7 states: “*A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.*” Mr. Dalziel accepted that the Property Factor did not respond promptly. Accordingly, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
55. The 2021 Code at Section 3 at 3.2 states “*The overriding objectives of this section are to ensure property factors: protect homeowners' funds; provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor; make a clear distinction between homeowners' funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor's own funds and fee income.*” The Homeowner requested evidence that the £250 payment was being held in funds separate to the Property Factor’s funds. The Property Factor failed to demonstrate this and, and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.
56. The 2021 Code at Section 6 at 6.9 states: “*If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available if requested by a homeowner.*” The Homeowner requested tendering process documents for works carried out at the Development. The Property Factor failed to demonstrate that it had complied with this request and, and as no submission was made to the contrary, the Tribunal decided that the Property Factor did not comply with this part of the 2021 Code.

57. The 2021 Code at Section 7 at 7.1 states: “*A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request. The procedure must include: The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process. The complaints process must, at some point, require the homeowner to make their complaint in writing. Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded. How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf. Where the property factor provides access to alternative dispute resolution services, information on this.*” The WSS provided by the Property Factor in September 2020 has a brief statement relating to complaints handling and no submission was made to show that the Property Factor has a compliant process. Accordingly, the Tribunal decided that the Property Factor has not complied with this part of the 2021 Code.
58. With regard to Property Factor’s Duties, all of the evidence before the Tribunal supports the Homeowner’s position as set out in the Applications. Mr. Dalziel accepted that the Property Factor did not comply with the WSS, did not comply with data protection regulations and did not comply with the title deeds when transferring its tenure to another property factor. The evidence before the Tribunal and accepted by Mr. Dalziel is that the Property Factor exceeded its authority in its transfer or otherwise sale of its interest and role as property factor for the Development in terms of both the title deeds and in terms of the WSS. The Property Factor failed to act as agent for the Homeowner at common law and acted in its own interest as a business owner. Accordingly, the Tribunal decided that the Property Factor has not complied with the Property Factor’s Duties.

Property Factor Enforcement Order (PFOE)

59. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to carry out the Property Factor’s Duties and has failed to comply with the Section 14 duty, the Tribunal then proceeded to consider Section 19(1) (b) of the Act which states “*(1) The First-tier Tribunal must, in relation to a homeowner’s application referred to it ... decide ... whether to make a property factor enforcement order.*”
60. The Tribunal had regard to the fact that, although the Property Factor’s breaches of the 2011 Code and the 2021 Code are many, they emanate from the same issues being routine failures in communication and service level over the duration of the Property Factor’s tenure. The failure to comply with the Property Factor’s Duties to some extent also emanates from the breaches of the Codes and so, the Tribunal is mindful not to penalise the Property Factor for this duplication of failings. These failings and breaches have caused the Homeowner unnecessary

stress and worry about her financial dealings with the Property Factor and the extent of the personal data shared by the Property Factor and have caused the Homeowner's Representative inconvenience and time spent chasing the Property Factor for replies, for which the Homeowner and the Homeowner's Representative ought to be compensated. Further, it appears to the Tribunal that some of the issues and information requested on behalf of the Homeowner remain unanswered and the Homeowner is entitled to receive this information. The Homeowner is also entitled to know the extent and nature of the personal data shared by the Property Factor.

61. With regard to Property Factor's Duties when transferring its tenure to another property factor, the Tribunal considers that this a serious failing with a significant impact on the Homeowner. The Tribunal agrees with Mr. Pringle that the effect of this failing is that the Homeowner and her co-owners were denied the right to decide if they wished to appoint a factor, if they wished James Gibb Limited to act as factor and were denied the right and opportunity to negotiate terms and conditions with James Gibb Limited. The Homeowner and her co-owners now find themselves in the position that a property factor has been unlawfully imposed on them. The Tribunal accepts that the Property Factor had taken legal advice and may have acted in good faith on that advice. However, the Tribunal does not know on what basis that legal advice was given. The Tribunal accepts that Property Factor signed a non-disclosure or confidentiality agreement with James Gibb Limited but does not know the content of that agreement or if it precluded the Property Factor from disclosing the basic fact that it sought to transfer or sell its contract with the Homeowner and her co-owners. It is the Tribunal's view that a professional property factor and agent, acting diligently and with a duty of care to its principal would be aware of the extent of its agency authority and would realise or be advised that it would be unwise to sign a non-disclosure or confidentiality agreement precluding disclosure to the principal. The Tribunal is of the view that, on the balance of probabilities, the Property Factor made a financial gain in the transaction with James Gibb limited, although it might be difficult to assess how much of that gain can be attributed to this matter. The Tribunal is of the view that the Homeowner is entitled to redress in respect of the Property Factor's failings in this particular matter.

62. Therefore, the Tribunal proposes to make a PFEO.

63. Section 20 of the Act states: "*(1) A property factor enforcement order is an order requiring the property factor to (a) execute such action as the First-tier Tribunal considers necessary and (b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable. (2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made. (3) A property factor enforcement order may specify particular steps which the property factor must take.*"

64. The Tribunal proposes to make a PFEO to order the Property Factor to provide the Homeowner with the information requested on her behalf and not yet

provided to her and to make reasonable payment to the Homeowner to compensate the Homeowner and the Homeowner's Representative for inconvenience, stress and time spent.

65. With regard to the matter of the transfer to James Gibb Limited, the Tribunal is aware that two sets of third parties, being the co-owners at the Development and James Gibb Limited, have an interest in this matter and their interests may limit the enforceability of any PFEO which the Tribunal might consider as the Tribunal is unable to compel third parties. However, the Tribunal is of the view that the Homeowner is entitled to information relating to the transfer to James Gibb Limited and that the Property Factor should be ordered to provide as much information as it is possible to provide and that the Homeowner should be awarded a reasonable payment for the effect of this matter on her in this regard.
66. The Tribunal is unable to advise the Homeowner and her co-owners on the action they might take in respect of James Gibb Limited acting as factor and the Homeowner and her co-owners should seek their own advice in this regard.
67. Section 19 (2) of the Act states: - *"In any case where the First-tier Tribunal proposes to make a property Respondents enforcement order, it must before doing so (a)give notice of the proposal to the property Respondents, and (b)allow the parties an opportunity to make representations to it."* The Tribunal, by separate notice intimates the PFEO it intends to make and allows the Parties fourteen days to make written representations on the proposed PFEO. It is open to the Parties to request a hearing on the proposed PFEO if they so wish.
68. The decision is unanimous.

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.

Karen Moore



Chairperson

4 July 2022

