



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

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Reference number: FTS/HPC/PF/23/1370

Re: Property at 54D Sunnyside Road, Sunnyside Court, Coatbridge, ML5 3DG ("the Property")

The Parties:

Mr Niall McDonnell, 54D Sunnyside Road, Sunnyside Court, Coatbridge, ML5 3DG ("the Applicant")

Aquila Management Services, 98 High Street, Airdrie, ML6 0DX ("the Respondent")

Background

1. On 28th April 2023 the Applicant lodged an application in terms of Section 17 of the Property Factors (Scotland) Act 2011 being an application by a homeowner to enforce the Property Factors Code of Practice.
2. A Case Management Discussion was fixed for 14th September 2023, but was adjourned at the request of the Respondent as it had not had sufficient time to read the paperwork submitted by the Applicant.
3. On 3rd December 2023 the Respondent sent an email with a written response.
4. A Case Management Discussion ("CMD") took place by teleconference on 11th December 2023. The Applicant represented himself. The Respondent was represented by Paul Clark, Director.
5. The Chairperson outlined the scope of the application, and told the Applicant that the Tribunal's role was to determine if the Respondent had breached the paragraphs of the Property Factors Code of Practice he had referred to, and to determine if any monetary penalty should be imposed. The Chairperson

confirmed that the Tribunal could not award the outcomes which the Applicant sought in his application.

6. The Applicant confirmed that his position was as stated in his application. Mr Clark confirmed that the Respondent denied all of the alleged breaches.
7. On the basis that there were matters in dispute the Tribunal decided that the case required to go to a Hearing, and that given the number of documents that the Hearing should be in person.
8. The Tribunal issued Directions to the parties
9. The Applicant was required to provide:
 - a. A List of witnesses he intends to call.
 - b. A document listing the paragraphs of the Code the Applicant has alleged have been breached with the documents it intends to refer to in relation to each paragraph also listed.
10. The Respondent was required to provide:
 - a. A List of witnesses it intends to call.
 - b. A document listing the paragraphs of the Code the Applicant has alleged have been breached with the documents it intends to refer to in relation to each paragraph also listed.
 - c. Accounts showing the management of homeowner's funds since the Applicant bought his property
11. On 4th January 2024 the Respondent lodged its response to the Direction, giving details of the witnesses it intended to call and the documents requested.
12. On 4th January 2024 the Applicant sent an email to the Tribunal with documents in compliance with the Direction and also objecting to the Respondent's witnesses and documents, and sending copies of emails he had sent to both the Chief Constable and the Justice Minister, as one of the Respondent's witnesses was a serving police officer.
13. On 6th January 2024 the Respondent sent a further email to the Tribunal responding to the Applicant's email of 4th January 2024.
14. On 1st February 2024 the Applicant sent a further email to the Tribunal attaching documentation. The documentation was not relevant to the complaints before the Tribunal.

Hearing

15. The Hearing took place in the Glasgow Tribunal Centre on 28th March 2024. The Applicant represented himself. The Respondent was represented by Paul Clark, Director.

16. The Applicant had not brought any witnesses. The Respondent had brought Danny Spring and Christopher McGuigan.
17. The Tribunal had all the documents before it, and decided, given the obvious ill feeling between the parties apparent throughout the documents, to focus tightly on the points in dispute.
18. The Tribunal established some preliminary points with the parties. They agreed that the property in question is a two bedroom flat built in the early nineties, and is situated in the development factored by the Respondent; in the development each communal close has six properties and there are fifty seven flats in total; the Applicant's flat is on the middle floor; the titles to the property contain a Deed of Conditions; Mr Clark co-owns one property within the development; the Respondent took on the factoring of the development in August 2021 with Speirs Gumley having been the previous factors; the Applicant purchased his flat in November 2022.
19. The Applicant lodged his Application on 16th April 2023. The Tribunal made it clear that they could not consider anything alleged to have happened after that date. The Tribunal also made clear that it could only consider the paragraphs of the Code which were listed in the initial application, form C2, and not anything that had been added after that.
20. In the Application the Applicant complained that the Respondent had failed to comply with the following Overarching Standards of Practice:

OSP1. You must conduct your business in a way that complies with all relevant legislation.

OSP2. You must be honest, open, transparent and fair in your dealings with homeowners.

OSP3. You must provide information in a clear and easily accessible way.

OSP4. You must not provide information that is deliberately or negligently misleading or false.

OSP5. You must apply your policies consistently and reasonably.

OSP6. You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.

OSP11. You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

OSP12. You must not communicate with homeowners in any way that is abusive, intimidating or threatening.

21. The Applicant also complained that the Respondent had failed to comply with various sections of the Code. The Applicant's position was laid out in his letter to the Respondent dated 15th April 2023 and his submission of 4th January 2024. The Applicant's position was laid out in his submission of 4th January 2024.
22. The Tribunal took the parties through the complaints point by point. There were as follows:
23. **Para 1.5 The WSS must make specific reference to any relevant legislation and must set out the following:**
- D. Communication and Consultation***
- (13) how homeowners can access information, documents and policies/procedures that they may need to understand the operation of the property factor;**
24. In his letter of 15th April 2023 The Applicant's position was that the Homeowners had not been provided with notice of how they could access information, documents and policies/procedures.
25. In its Written Submission of 4th January 2024 the Respondent referred to section 7 of the Respondent's WSS (produced by the Applicant and at page 220 of the Tribunal's bundle) and to its revised WSS 2a.
26. At the Tribunal the Applicant made reference to the WSS at page 220 of the Tribunal's document bundle. This was the document which had been sent to him at the outset of his ownership. Mr Clark conceded that this was the wrong WSS and that there had been two updates since then. He said that the Applicant had been sent the correct one in October 2023. It had been an administrative error. The Tribunal considered it unfortunate that the wrong WSS had been sent. However, the Applicant did not specify the information, documents and policies/procedures that he thought he might need to access. The WSS sent to the Applicant stated that the Debt Recovery Process was available on request and it laid out the Complaints Procedure. The Tribunal did not consider that there was any breach of this paragraph.
27. **(16) the property factor's privacy notice and their registration details with the Information Commissioner's Office's Data Protection Public Register.**
28. In his letter of 15th April 2023 The Applicant's position was that the Homeowners had not been provided with copies of the Respondent's privacy notice and registration details with the ICO.

29. In its Written Submission of 4th January 2024 the Respondent's position was that the Applicant was aware that he could download this from the public register and that the privacy policy was available on the Respondent's website.
30. The Code is specific that the WSS must include this information and therefore the Tribunal does consider that the Respondent is in breach of this paragraph.

31. ***E. Declaration of Interest***

(17) a declaration of any financial or other interests which the property factor has in the common parts of property and land to be managed or maintained, for example as a homeowner (including where the property factor is an owner or acting as a landlord but not where it is undertaking letting agency work in respect of a property). If no interest is declared, then this must be clearly stated.

32. In his letter of 15th April 2023 The Applicant's position was that the Respondent had not declared any financial or other interests which they or their director had in the common parts of the property. In particular he alleged that he had not told homeowners that he co-owned a property in the development and he had not told them that he acted as a letting agent for some flats in the development.
33. In its Written Submission of 4th January 2024 the Respondent's position was that this was included in the WSS.
34. The Tribunal noted that there is no mention of this in the WSS. Notwithstanding, the Respondent is a limited company and the co-owner of the property is Mr Clark. They are separate legal entities and it follows that the property factor does not have a financial interest in the common parts of the property. However, in an email to the Applicant dated 12th November 2022, the Applicant having become the owner on 2nd November 2022 and having emailed the Respondent on 11th November 2022, Mr Clark makes clear that he is a co-owner of one of the properties in the development. The Tribunal does not consider that there has been a breach of this paragraph of the Code.

35. ***G. How to End the Arrangement***

(19) clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code. This information should also state any charges for early termination/administration costs;

36. In his letter of 15th April 2023 the Applicant's position was that the Respondent had not provided information on when and how a homeowner should inform them of an impending change of ownership.
37. In its Written Submission of 4th January 2024 the Respondent's position was that the WSS did deal with this and made reference to section 10. It said that it had communicated by email to the Respondent how to organise a meeting of owners in terms of the title deeds.
38. The Tribunal considered the terms of the WSS sent to the Applicant which has a section headed "Apportionment Fee" and mentions that if a person is selling their property their solicitor will normally ask for information. It also mentions that an administration charge will be levied. It is clear that the homeowner should ask their solicitor to contact the Respondent, and that the Respondent does not have a requirement for a reasonable period of notice. The paragraph in the WSS does state that there will be a charge. The Tribunal does not consider there has been a breach of this paragraph of the Code.
39. **(20) clear information that homeowners may (by collective or majority agreement or as set out in their title deeds) terminate or change the service arrangement including signposting to any relevant legislation, for example the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. This information should include any "cooling off" period or period of notice;**
40. In his letter of 15th April 2023 The Applicant did not mention this section. It therefore does not form part of the application.
41. **(21) 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.**
42. In his letter of 15th April 2023 The Applicant's position was that the Respondent had failed to provide a clear statement of how it would correspond with another property factor to assist with a smooth transition process.
43. In its Written Submission of 4th January 2024 the Respondent's position was that it was covered by section 10 of the WSS.
44. The Tribunal considered the terms of the WSS sent to the Applicant when he purchased the property. It does not address the requirements of this paragraph, and accordingly the Tribunal consider that this paragraph of the Code has been breached.

45. **2.1 Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.**
46. In his letter of 15th April 2023 The Applicant's position was that the Respondent had not established good communication across the complex with residents. He said that there was no appropriate consultation in decision making. He said that no appropriate consultation in decision making was evidenced by the installation of the car park lighting which had only been done in consultation with one resident in block 52. No community decision was made and no documentation was provided to affected homeowners.
47. In its Written Submission of 4th January 2024 the Respondent's position was that the renewal of the car park lighting had begun two years before the Applicant took ownership of his property. Renewal of the entire lighting system had previously formed part of the discussions with homeowners when the Respondent took over from the previous factor.
48. At the Hearing the Applicant said that he had begun emailing the Respondent on 9th November 2022. Email responses had been cordial. However, in early 2023 the communication started to take a different turn. The Tribunal noted that it had been a relatively short length of time between the Applicant taking ownership on 2nd November 2022 and lodging an extensive complaint with the Tribunal on 28th April 2023. The Tribunal also noted from the email correspondence lodged that in December 2022 the Applicant had sent a series of emails asking questions and highlighting repairs that he thought should be carried out. The Respondent responded to all of these within a reasonable timescale. The Applicant sent an extensive email to the Respondent on 17th December 2022, raising a number of points which would require careful consideration before answering. He did not think the Respondent's response had been quick enough. The Tribunal noted that the Applicant's email was sent a week before Christmas. The Applicant sent a further email on 13th January 2023, in which he said that he had been speaking with other residents and that he was seeking to call a meeting to discuss whether the Respondent was the most suitable property factor for the block. Given that the Respondent had answered all queries within a reasonable timescale, and given full answers to those queries, the Tribunal were surprised by the Applicant's desire to change factor less than two months after taking ownership. The Tribunal were unsurprised that the relationship took a sour turn.
49. The Applicant said that the Respondent actioned some small jobs around the property and the emails went back to being cordial. The parties met on site in January 2023 to discuss some issues and the Respondent sent the Applicant an email dated 16th January 2023 outlining the points to be actioned. On 28th February 2023 the Applicant sent a further email to the Respondent asking for an

update on some issues and highlighting a new issue of some waste in the car park. The Respondent replied the same day and there were some further emails. On 1st March 2023 at 1.37 am the Applicant sent an email to the Respondent asking for further information on a number of issues, including photographs of the garden area from many years before the Respondent became the factor, details regarding how funds were held, details of contracts with contractors and vetting information, and gas installation. The Respondent sent an email in reply on 1st March 2023 at 14.46 which addressed all of the points raised.

50. At the Tribunal the Applicant said that he was worried about commission received, and wanted copies of bank statements, he said he needed to be able to see accounts regarding collective funds. He said that as the contractors have keys to the communal areas due diligence required him to see the vetting. He said that this was where things really started to go downhill.
51. Mr Clark explained that there is no Residents Association at the development. This means if a large repair is required the Respondent has to get an estimate of the cost and write to all of the owners asking for their views. He said that when the Respondent took over as factor there was a meeting with residents where they agreed a one, three and five year plan. This was long before the Applicant moved in.
50. The Tribunal cannot see anything in the application or documents which would allow it to find that this paragraph of the Code has been breached. The Respondent responded within an appropriate timescale, with detail, and with forbearance, to each request sent by the Applicant.
51. **2.4 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.**
52. In his letter of 15th April 2023 The Applicant's position was that the Respondent had failed to provide information and documents that must be made available to homeowners such as financial statements and statements of services, despite these having been requested, and no clear justification had been given as to why there was a good reason not to provide.
53. In its Written Submission of 4th January 2024 the Respondent's position was that a statement was sent to the Applicant on 31st March 2023 giving all financial spend and information in writing including a bank summary. Statements are sent every six months and no statement was due until 31st March. The Respondent will not circulate bank statements for privacy reasons but offered to allow the Applicant to attend at the office to view the documents.
54. At the Hearing the Applicant said that if he is making payment for anything he wants to be able to see what the money is being spent on. He could not however, provide information to the Tribunal about what information and documents must be made available.

55. The Tribunal did not consider that there had been any breach of this paragraph of the Code.
56. **2.7 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.**
57. In his letter of 15th April 2023 The Applicant's position was that the Respondent had failed to respond to concerns and complaints received orally and in writing within the timescales confirmed in the WSS. He said that this was in relation to complaints he had made in November/December 2022.
58. In its Written Submission of 4th January 2024 the Respondent's position was that it had responded to all complaints and requests made by the Applicant. Some requests required a vote amongst residents before being carried out.
59. At the Hearing the Applicant said that he had covered this point in previous answers. He said that as time went on the Respondent's response times got slower and actions became less.
60. Mr Clark said that the Applicant had become the owner of his property in November 2022. Financial statements are sent out every six months and the next one was not due until 31st March 2023. He had explained in his email to the Applicant on 12th November 2022 that he could not forward him copies of the statements sent to the previous owner for data protection reasons. He said that he told the Applicant, again due to data protection and privacy reasons, that he could not send out copies of the bank statements for the development but he was happy for the Applicant to attend at the Respondent's office to view them.
61. The Applicant said that he had attempted to go to the office twice. The first attempt was after he had lodged his complaint in April 2023. He explained that he has his outgoing mail uplifted from his home by the Post Office. He had erroneously and prematurely given them the package of Tribunal papers to deliver to the Respondent. He went to the Respondent's office to retrieve them. Mr Clark would not give the papers back and ushered him out of the door. On the second attempt the office was closed. The Tribunal asked if he contacted the Respondent to make an appointment and he conceded that he had not. Mr Clark said that he had received the package but had not opened it. However, it had been delivered to him by Royal Mail and it was therefore now in his possession and he saw no reason to give it back. He said that he asked the Applicant to leave the office as the Applicant was becoming insistent and agitated.
62. The Tribunal did not consider there had been any breach of this paragraph of the Code. Having looked at the email trail the Tribunal were of the view that the Respondent had responded appropriately, and that the Applicant had been, at times, antagonistic. The Applicant would have been better served, if he was serious about accepting the Respondent's offer to view the documents, to have

arranged an appointment, as he would to visit any other professional providing a service.

63. 3.2 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.**

64. In his letter of 15th April 2023 The Applicant's position was that the Respondent had failed to instil confidence that it had protected homeowner's funds and had failed to provide clarity and transparency in accounting procedures. He said that it had failed to make clear the distinction between homeowners' funds and their own funds and fee income. He said that the failure was because they had failed to provide the information when requested to do so.

65. In its Written Submission of 4th January 2024 the Respondent's position was that it operates an account for the development that ring-fences funds and operates solely for that development. It has offered the Applicant the opportunity to inspect the account and statements in its office.

66. At the Hearing the Applicant said that he had requested the documents because he was concerned about transparency in the accounting for the funds. Mr Clark said that he had offered the Applicant the opportunity to come and see the documents and have everything explained to him.

67. The Tribunal are of the view that the Applicant had a reasonable offer to view the documentation, where he could have asked questions if he had any concerns. The Tribunal does not consider that there has been a breach of this paragraph of the Code.

68. 3.11 Homeowners' floating funds must be held in a separate account from the property factor's own funds. This can either be one account for all its homeowner clients or separate accounts for each homeowner or group of homeowners.

69. In his letter of 15th April 2023 The Applicant's position was that 120 days had passed since he had requested information and it had still not been provided.

70. In its Written Submission of 4th January 2024 the Respondent's position was that it referred to its answer to point 3.2.

71. At the hearing the Applicant said that he was unsure if funds were held in a separate account. He did not understand why the documentation could not be delivered digitally. He is a self-employed contractor and does not always have the time to make appointments. He would be able to leave work for a doctor or dentist appointment but not to visit the property factor.
72. Mr Clark said that he was not happy to provide the information digitally as there was information contained therein which was confidential to other homeowners and he was careful of breaching their privacy.
73. The Tribunal consider that there has been no breach of this section of the Code. The Applicant has been made a reasonable offer to view the documentation which he has not taken up.
- 74. 3.12 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.**
75. In his letter of 15th April 2023 The Applicant's position was that information had not been provided, despite being requested, to clarify the position.
76. In its Written Submission of 4th January 2024 the Respondent's position was that the properties in Sunnyside Road and Baird Street were all part of the same development.
77. At the Tribunal Mr Clark said that there was provision for a sinking fund to be set up but that one had never been set up. There was one account only for the development, which had £3000 in it. He had produced copies of the bank statements to the Tribunal to prove it existed.
78. As there is no sinking or reserve fund for the development the Tribunal do not consider there has been any breach of this paragraph.
- 79. 4.4 A property factor must have a clear written procedure for debt recovery which outlines a series of steps which the property factor will follow. This procedure must be consistently and reasonably applied. This procedure must clearly set out how the property factor will deal with disputed debts and how, and at what stage, debts will be charged to other homeowners in the group if they are jointly liable for such costs.**
80. In his letter of 15th April 2023 The Applicant's position was that the Respondent had not provided a clear procedure for debt recovery and that they did not apply the policy consistently and reasonably.
81. In its Written Submission of 4th January 2024 the Respondent's position was that the only debt on the site was that of the Applicant. The previous factor wrote off existing debt before they ceased to act by dividing it among the remaining

homeowners. There was no debt on the development when the Respondents took over as factors. The Respondent also made reference to the WSS.

82. At the Tribunal the Applicant referred to the Respondent's WSS at page 2, where it states that precise details of the debt recovery process are available on request. He said that this was not a clear written procedure for debt recovery. Mr Clark said that if he had been asked for it he could have provided it in written form. The Applicant established that he had asked for it and Mr Clark conceded that it had not been sent.

83. The Tribunal held that this paragraph of the Code had been breached.

84.4.9 A property factor must take reasonable steps to keep homeowners informed in writing of outstanding debts that they may be liable to contribute to, or any debt recovery action against other homeowners which could have implications for them, while ensuring compliance with data protection legislation.

85. In his letter of 15th April 2023 The Applicant's position is that the Respondent had failed to provide any documentation to keep Homeowners informed in writing about outstanding debts across the complex.

86. In its Written Submission of 4th January 2024 the Respondent's position is that there was no debt on the development apart from the Applicant's.

87. The Tribunal held that as the Applicant's debt would not have been actionable at the time this application was made there was no breach of this paragraph of the Code.

88.5.10 A property factor must notify homeowners in writing of the frequency with which property valuations will be undertaken to establish the building reinstatement valuation for the purposes of buildings insurance. It is good practice for re-valuations to be undertaken at least every 5 years and sums assured reviewed in other years using the BCIS Rebuilding Cost Index. The property factor must adjust this frequency of property valuations if instructed to do so, in line with the arrangements in any agreement with homeowners.

89. In his letter of 15th April 2023 The Applicant's position was that in the WSS it is stated that at no point will the Respondents carry out insurance revaluation unless stated in the Deed of Conditions, however the Respondents are the insurance provider for the building.

90. In its Written Submission of 4th January 2024 the Respondent's position is that a desktop survey is carried out every three years and insurances are regraded dependent on the surveyor's findings.

91. At the Tribunal the Applicant said that the information had not been made available and as a Homeowner he would have liked the opportunity to review it. He said that he did not know that the property was factored or that there was a

common insurance policy until he received a letter from the Respondent asking him to set up a standing order. On being asked if his solicitor had not made enquiries he checked his notes and said that he had been aware of the factor from the Home Report.

92. Mr Clark said that it is usual when a property is sold for the solicitor to request a letter confirming the factoring details and details of the common insurance policy.
93. The issue here is regarding notifying the homeowners of the frequency property revaluations. The WSS says no revaluations are carried out, but Mr Clark said that they are carried out. The Tribunal considers that this paragraph of the Code has been breached.
- 94. 6.2 Property factors may also agree, by contract, to instruct that specific maintenance duties are undertaken by specialist contractors on behalf of homeowners which contribute to fire safety. For example, the requirement in fire safety law to maintain any measures provided in communal areas for the protection of firefighters e.g. firefighters lifts, rising fire mains etc, or to ensure that common areas are kept free of combustible items and obstructions.**
95. The Applicant did not make any point in relation to this in his letter of 15th April 2023. He made extensive comments under 6.1, but as 6.1 is not included in the application form the Tribunal cannot adjudicate on it. In any event, most of the same points are covered under the complaint regarding paragraph 6.4.

96. 6.4 Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.

97. In his letter of 15th April 2023 The Applicant's position was that the Respondents had failed to complete inspections and repairs in appropriate timescales which could be noted from outstanding issues he alleged were still present such as:
Communal Heating in 54 block – first raised 9/12/22
Communal Area upkeep – first raised 13/1/23
Sunken Car Park Area – first raised 13/1/23
Doors and security issues – first raised 22/3/23
98. He also alleged that the timescales on responses for some issues exceeded the appropriate timescales noted by him as follows:

Outdoor lighting at 54 block – time between reporting and resolution 1 month, 4 days
Rear door at 54 block issues – time between reporting and resolution 82 days

Garden waste to be removed – time between reporting and resolution 56 days

99. In its Written Submission of 4th January 2024 the Respondent's position was that there was a broken small panel heater located on the ground floor of the Applicant's close. He said that all closes have similar heaters. Each was being billed for on the communal electricity account despite most being broken and providing no heating solution. They did not protect pipes or vulnerable material. Their electric meters had been removed at a saving to the site of approximately £2000 per annum.
100. The Respondent said that in relation to communal area upkeep only one other Homeowner had complained. They had been offered a meeting with the work persons to confirm what they were not happy with but had declined.
101. The Respondent said that in relation to the sink hole in the car park, an estimate of repair costs had been obtained previously and only two owners were in favour of incurring the repair cost while sixteen were against. He said that the Respondent would be happy to carry out such a repair but is not responsible for funding it.
102. In relation to the door and security issues the Respondent said that many of the issues were either outside the factor's remit, or had to be funded by the Homeowners. The Respondent said that a full repair and replacement had been carried out in relation to the intercom system.
103. In relation to the outdoor lighting the Respondent said the repair was completed in January 2023, after the festive period, in relation to the rear door a vote was taken among the homeowners on replacing the door, which replacement was not approved. The door standard and intercom were then fixed by the Respondent using cost savings from elsewhere, and the garden waste was uncovered as part of the gardener's job of cutting back the undergrowth. The gardener was asked to deal with the waste on his next visit rather than incurring for the Homeowners the cost of a special uplift.
104. At the Hearing each side elaborated on their position. The Tribunal was of the view that the Applicant did not seem to appreciate that there were other homeowners who needed to be consulted before repairs were carried out, it took time to collate their responses, and it took time to organise work. The Tribunal did not consider that there was delay in dealing with any of the requests made by the Applicant, not that matters had not been resolved. Some matters may not have been resolved to the Applicant's satisfaction, but that did not mean that they had not been resolved. The Tribunal did not consider that there had been a breach of this paragraph of the Code.
- 105.6.10 A property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit that is paid to them or anyone in control of the business or anyone connected with the factor or a person in control of the business, in connection with the contract.**

106. In his letter of 15th April 2023 The Applicant's position was that at no time had the Homeowners received notification that the Respondent's director, Paul Clark, had accepted financial benefit from the introduction of contractors to the development, notably from SAC Ltd.

107. In its Written Submission of 4th January 2024 the Respondent's position was that SAC were not a contractor on the site, they were not part of the Respondent and they were not employed by the Respondent or by Mr Clark. They were introduced to several Aquila properties throughout Scotland, mainly landlords and some other factored sites. SAC were grant funded, via ECO3 funding, to provide free gas mains installation, free internal wall insulation where it was required to raise EPC ratings, and free gas central heating systems to qualifying Homeowners. He said that the Respondent contacted Homeowners asking if they would be interested in the grants, and if they agreed SAC then contacted them. The Respondent said that Paul Clark had a working relationship with SAC where an introductory fee was paid to him as an individual where conversions to gas were made. Homeowners received this for free. Aquila received no funds and processed no transactions. No money was taken as a commission or a fee from any homeowner and no commission or fee was taken from the site funds. He said that any payments made had nothing to do with the contract between AMS and the Homeowners.

108. At the Hearing the Applicant said that he had been made aware that Mr Clark had received about £10,000 for introduction of Surveys & Certificates Ltd to source them heating installation under a government scheme. Another homeowner told him about it and he contacted SAC to see if he would be eligible for the scheme. He said that in the same conversation he got on to the subject of Mr Clark, and asked them how they had got involved in the site. They said that it was through the factor. The Applicant submitted a Freedom of Information request.

109. Mr Clark said that he had not been paid £10,000. He said that he was not just a property factor, but also a letting agent. He dealt with homes which are not energy efficient. There was a government drive to upgrade properties by bringing in gas and providing the installation. This site was at the end of the project and the grants ran out in March 2023. The Respondent, as property factor, approached all the Homeowners explaining the programme and asking if they were interested in speaking to SAC. If they said yes their details were passed to SAC and they then approached the Homeowner. A fee of £150 was paid for each sign up. Mr Clark said that no money ever went in to or out of the site's account. He said that the £150 fee paid for his time. He said that the gas was piped in for free and it was then up to SAC to speak to each homeowner about signing up for a gas supply to their flat.

110. The Tribunal considered the wording of paragraph 6.10 of the Code, which is quite clear. It says that a property factor MUST disclose IN WRITING to any Homeowner any commission, administration fee, rebate or other payment or benefit that is paid to them or anyone in control of the business or anyone connected with the factor or a person in control of the business, in connection with the contract. Mr Clark, in his evidence to the Tribunal said that he had approached the homeowners in his capacity as Property Factor. He said that the fee was paid to him as an individual. He is the sole director and in control of the business.

Contact with the Homeowners arose from the Respondent's contract with them as property Factor. It follows that the payment to Mr Clark by SAC should have been disclosed and therefor there is a breach of this section of the Code.

111.7.1 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.**

112. In his letter of 15th April 2023 The Applicant's position was that the Respondent had not applied its complaints procedure consistently and reasonably with timescales, that they do not have a two stage complaints process and that the right of appeal is from Mr Clark to Mr Clark. He also said that the WSS does not refer to the First-tier Tribunal, but does refer to the Homeowners Housing Panel.

113. In its Written Submission of 4th January 2024 the Respondent referred to section 7 of the WSS. He said that the Applicant was unrealistic in his expectations.

114. At the Hearing the Applicant said that no written complaints procedure had been provided to him. He said that the WSS did not include the complaints procedure.

115. Mr Clark said that the Respondent did not have a written complaints handling procedure.

116. It was late in the day by the time this point was reached at the Hearing. On examining the documents when reaching a decision the Tribunal noted that the

WSS did have a Complaints Procedure on the second last page. It does give the series of steps and timescales. It does have a two stage process. It does require the Homeowner to make the complaint in writing. It does not give details of the First-tier Tribunal, it refers to the FTT's predecessor, The Homeowner Housing Panel. It does not give details of 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.

117. The Applicant's point about the right of appeal being from a decision of Mr Clark to Mr Clark does not invalidate the complaints process. He is well aware that Mr Clark is the sole director of the company and the person in control. There is no one higher than him to whom an appeal could be made. Many small businesses are in the same position.
118. The Tribunal did find there to be a breach of this paragraph of the Code as the Complaints Procedure did not contain all the necessary points, and was inaccurate about the body to which a complaint should be made.
119. In relation to OSP 12, having examined all the documentation submitted the Tribunal could find no examples of the Respondent being abusive, intimidating or threatening. The correspondence began shortly after the Applicant moved in. The Respondent replied promptly and fully. The Tribunal noted that there had been a significant volume of correspondence in a short space of time after the Applicant took entry, and that the Respondent had shown patience and courtesy in dealing with it. The relationship between the parties seems to have deteriorated very quickly, for which the Applicant must accept his part. He could easily have made an appointment to attend at the Respondent's office and view the documentation he wished to see, and he could have raised other queries with the Respondent when there. Perhaps if he had done so the relationship would not have deteriorated.
120. The Respondent decided not to call his witnesses.

Findings In Fact

- a. the property in question was a two bedroom flat built in the early nineties and is situated in the development factored by the Respondent;
- b. in the development each communal close has six properties and there are fifty seven flats in total;
- c. the Applicant's flat is on the middle floor;
- d. the titles to the property contain a Deed of Conditions;
- e. Mr Clark co-owns one property within the development;
- f. the Respondent took on the factoring of the development in August 2021 with Speirs Gumley having been the previous factors;
- g. the Applicant purchased his flat in November 2022;

- h. The WSS states how a Homeowner can access information;
- i. The WSS does not contain a privacy notice or details of the Respondent's registration details with the ICO;
- j. The Respondent and Paul Clark are separate legal entities;
- k. The WSS makes clear that a Homeowner should ask their solicitor to contact the Respondent regarding change of ownership;
- l. The WSS does not address how the Respondent will co-operate with another property Factor to assist with a smooth transition process;
- m. The Respondent responded to all requests made by the Applicant within a reasonable timescale;
- n. The Respondent offered to show the documents requested at its office;
- o. The Applicant did not arrange a mutually suitable time to visit the Respondent's office;
- p. There is no sinking or reserve fund for the development;
- q. The Respondent failed to provide the Applicant with a written Debt Recovery Process when it was requested;
- r. There was no debt outstanding at the time of the Applicant's application;
- s. The WSS said that the Respondent did not carry out revaluations;
- t. Mr Clark said that the Respondent did carry out revaluations;
- u. Mr Clark is the person with control of the Respondent;
- v. Mr Clark approached Homeowners because he had their details in his capacity as person in control of the Respondent;
- w. The WSS does contain a Complaints Procedure.

Decision of the Tribunal

The Tribunal determines that the Factor has failed to comply with OSP 1, 4, 5 and 6 and sections 1.5, 4.4, 5.10, 6.10 and 7.1 of the 2021 Code of Conduct.

The decision is unanimous.

Property Factor Enforcement Order

121. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to comply with the Section 14 duty and has failed to carry out the property factor's duties, 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.”

122. The Property Factor has made errors and therefore, the Tribunal proposes to make a PFEO.

123. 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.”

124. The Tribunal proposes to make a PFEO to order the Property Factor.
125. Section 19 (2) of the Act states: - “In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so (a) give notice of the proposal to the property factor, and (b) allow the parties an opportunity to make representations to it.”
126. 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.
127. The decision is unanimous.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Chair of the Tribunal
29th May 2024