



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

Statement of Decision with Reasons under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and Rule 17 (4) of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Reference number: FTS/HPC/PF/23/3408

Re: Property at 33 Broomyhill Place, Linlithgow, West Lothian, EH49 7BZ (“the Property”)

The Parties:

Mr Steven McDade, 33 Broomyhill Place, Linlithgow, West Lothian, EH49 7BZ (“the Applicant”)

Hacking & Paterson Management Services, 103 East London Street, Edinburgh, EH7 4BF (“the Respondent”)

Tribunal Members: Alison Kelly (Legal Member) and Helen Barclay (Ordinary Member)

Background

1. On 22nd September 2023 the Applicant lodged an application in terms of Section 17 of the Property Factors (Scotland) Act 2011 being application by a homeowner to enforce the Property Factors Code of Practice.
2. Along with the application the Applicant lodged a copy of his Property Factor Code of Conduct letter, which he sent to the Respondent on 8th September 2023, and various emails between himself and the Respondent.
3. The case was accepted by the Tribunal on 12th October 2023.
4. A Case Management Discussion was fixed for 15th January 2024.

5. On 17th November 2023 the Respondent sent a written response and enclosed a copy of the Revised Terms of Service and Delivery Standards and various documents in relation to the corresponding they had had with the Applicant.

Case Management Discussion

6. The Case Management Discussion (“CMD”) took place by teleconference. The Applicants represented himself. The Respondent was represented by Ms Epton, Associate Factoring Director.
7. Reference is made to the Case Management Discussion Note issued by the Tribunal, but it was agreed at the CMD that the paragraphs of the Code in question were paragraphs 2.1, 2.3, 3.2 and 3.4, and a breach of the Property Factor duties in that the Applicant said that he considered that the Respondent had breached a duty by not carrying out a float review since 2012. He thought that this was in breach of their written statement of services.
8. The Tribunal decided that the case required to proceed to a hearing. The parties confirmed their agreement to it taking place by way of Webex.

Matters Subsequent to CMD

9. The Tribunal issued Directions to each party.
10. The Applicant was directed to lodge copies of the annual statements sent to him by the Respondent for at least the last five years, and a copy of the title deeds. On 17th January 2024 the Applicant sent an email to the Tribunal with a copy of the Land Certificate for his property and copies of the last four quarterly invoices. He explained that he does not receive annual statements.
11. The Respondent was directed to lodge a copy of the Terms of Service and Delivery Standards applicable at the date of the AGM and at the time the float was increased. The Respondent sent this by email on 17th January 2024.

Hearing

12. The Hearing took place by teleconference on 23rd May 2024. The Applicant represented himself. The Respondent was represented by Ms Epton, Associate Factoring Director.

13. The Chairperson introduced everyone and confirmed that she would go through the CMD Note to clarify what was in issue, then each party would be asked their position on each paragraph of the Code which was alleged to have been breached.
14. It was agreed by both parties that the Tribunal were to deal with paragraphs 2.1, 2.3, 3.2, 3.4 and one alleged breach of the Property Factor duties.
- 15.2.1 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.**
16. The Applicant said that he felt that this paragraph of the Code had been breached. The Respondent had taken a decision to unilaterally increase the float by 75%. The letter of 21st July 2023 setting the AGM and providing the Agenda came completely out of the blue. There had been no AGM or meetings since 2019. There was no advance notice that the Respondent had already made the decision to increase the float. The Homeowners had been presented with a fait accompli. The Applicant said he had attended the AGM, and that it was poorly attended with only around seven of forty two homeowners being present or represented. He said that there should have been advance notification that the issue was going to be discussed. He was of the view that the AGM had only been called to deal with the increase in the float. He did point out that in the twelve years that he had owned the property the relationship with the Respondent had been very good and that the development was well managed.
17. Miss Epton said that the AGM had not been called for the purpose of increasing the float. She had been responsible for the development in the past and in 2019 an AGM had been held and it was agreed that they would have one annually. Unfortunately the covid pandemic stopped that from happening. She said that the Respondent's Property Manager had contacted the Applicant in June 2023 about the possibility of an AGM, and asking him for suggestions regarding a venue. She said that a letter of advance notice had been sent out on 27th June 2023. As this letter had not been lodged as a production the Tribunal were not prepared to consider it. Miss Epton

confirmed that the letter had not included an Agenda, so the Homeowners would not have known about the float increase at that time. Miss Epton said that the Respondent had carried out a global review of common charges and floats across all the developments they managed, and it considered that it was relevant to include it in the Agenda and the Factor's Report. She said that the Respondent derived its authority to increase the float without a vote of the Homeowners from paragraph 4.6 of its Terms of Service and Delivery Standards.

18. The Tribunal considered that there had been a breach of this paragraph of the Code. The paragraph sets out the requirement for good communication. The fact that the Respondent sent out an Agenda and notice of an AGM, by post, five days before the AGM was to take place is not good communication. Presumably the Respondent would want as many Homeowners as possible to attend and given the experience in the area of factoring that the Respondent has it must have known that very short notice does not encourage high attendance. In addition, given that there was to be a 75% increase in the float it would have been prudent for the Respondent to give some indication of this in the covering letter sending the Agenda.
19. **2.3 The WSS must set out how homeowners can access information, documents and policies/procedures. Information and documents can be made available in a digital format, for example on a website, a web portal, app or by email attachment. In order to meet a range of needs, property factors must provide a paper copy of documentation in response to any reasonable request by a homeowner.**
20. The Applicant said that he had not been provided with any justification for increasing the float. He had been no review since 2012. He would have expected to see a clear accounting, or details of the float level. The float should only have been increased as a last resort. He did, when asked by the Tribunal, confirm that he had been given documents which he had asked for and he had accessed the Respondent's portal.
21. Miss Epton said that she could not reconcile the Applicant's complaint here with the wording of the paragraph. The Respondent's Terms of Service and Delivery Standards at section 5.9 clearly sets out how a Homeowner can access information.
22. The Tribunal agreed with Miss Epton. The Applicant's argument did not fit in with this paragraph of the Code and there was no breach.
23. **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.
24. The Applicant said that he would expect to receive clear accounts to show why raising the float by £150 was justified. He had not seen any accounts which showed this, and the quarterly invoices did not show the balance held on the float. He said he want to see figures for the full year to show why the increase came about. He said that float increases should be incremental. There had been no issues with running the development and the Homeowners had never been asked for additional payments.
25. Miss Epton said that no annual statement is issued but the quarterly statements give full details of all payments made on behalf of the development. She said that the float funds are held in a pooled account and not in a separate account for the development. There is no reconciliation statement. She said that the Homeowners all know what the Respondent holds by way of the float, the quarterly invoices show what has been spent, and it is easy to see if on a quarterly basis charges are exceeding what is held in the float.
26. The Applicant referred to the Factor's report which came with the letter from the Respondent of 1st August 2023. He said that after the AGM he had changed his view on the increase in the float because of the sentence which said "Currently, the development is in arrears by £260.74, which currently means there is no cause for concern". He could not understand why the float was to be increased when there was no cause for concern.
27. Miss Epton explained that the Report was badly worded. The paragraph referred to whether or not any of the Homeowners were in debt with regard to paying their share of the common charges. She conceded that the sentence was not clear in its meaning.
28. The Tribunal did consider that this paragraph of the Code had been breached. It was accepted by Miss Epton that the wording of the Factor's report in relation to debt was unclear, and the Tribunal could see how it could be misinterpreted. The quarterly statements do contain a breakdown of charges made and a detailed description of the activities and works carried out, but no document is produced to provide clarity in relation to the float. From what Miss Epton said the Homeowners are expected to be able to calculate this themselves. It is reasonable to expect, particularly when a decision has been made that the float needs to be increased by 75%, to provide a full accounting to the Homeowners to explain why it is necessary, and to account annually for the funds held in the float.
29. **3.4 A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial statement showing a breakdown of charges made and**

a detailed description of the activities and works carried out which are charged for.

30. The Applicant said that he received quarterly invoices but they did not give him information about why the float needed to be increased. They did not tell him anything about the financial position of the development. Having looked at the invoices he still could not understand why the float needed to be increased.
31. Miss Epton reiterated what she had said about the quarterly invoices, which she said are clear and detailed.
32. The Tribunal did not consider that this paragraph of the Code had been breached. The quarterly statements do contain a breakdown of charges made and a detailed description of the activities and works carried out.

33. Breach of Property Factor's Duties

34. The Applicant said that there had been a breach of the Property Factor's duties. A float review had not been carried out since 2012. He thought that this was in breach of their written statement of services.
35. Miss Epton had previously said that reviews had been carried out, but there had been no increase since 2012. Review and increase were two different things.
36. The Applicant said that the Homeowners did not know that reviews were being carried out.
37. The Tribunal did not consider that there was any breach of duty. Clause 4.6 of the WSS says that "The Property Float is reviewed from time to time to ensure availability of funds to meet common works and service costs". Miss Epton said that reviews had been carried out, but an increase had not been deemed necessary before now. There was no breach of the wording of the Clause.

Findings In Fact

- i. The Applicant owns the property at 33 Broomyhill Place, Linlithgow, EH49 7BZ which forms part of a larger development;
- ii. The Respondent provides factoring services to the Homeowners in the development;
- iii. The Respondent sent letters dated 21st July 2023 to each Homeowner advising of the date for the AGM and enclosing an Agenda;
- iv. The Factor's Report was not included with the letter;

- v. The Agenda included an item “Financial Status – Float Increase”
- vi. The AGM took place on 26th July 2023;
- vii. The Applicant attended the AGM;
- viii. The AGM was not quorate;
- ix. The Respondent derived authority to increase the float from Clause 4.6 of the WSS;
- x. The WSS sets out how the Homeowner can access information in accordance with paragraph 2.3 of the Code;
- xi. The Factor’s Report was badly worded in relation to debt and therefore not clear;
- xii. The quarterly invoices made no reference to the float and how much is held;
- xiii. The Respondent does not carry out a regular reconciliation in relation to the float;
- xiv. The quarterly statements contain a breakdown of charges made and a detailed description of the activities and works carried out.

Decision

- 38. The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor:

Has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct 2021 Sections 2.1 and 3.2, being

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.

and

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.

Property Factor Enforcement Order

39. 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.”
40. The Property Factor has made errors and therefore, the Tribunal proposes to make a PFEO. The Applicant, in his application to the Tribunal, in the section headed “What would help to resolve the problem(s)?” stated- “*I would like any legitimate increase to the Float to be reasonable and not excessive*”. The Tribunal’s remit is to determine whether or not the Respondent has breached the paragraphs of the Code included in the application, and any alleged breaches of the Property Factor’s duties. The Tribunal does not have authority to reverse the decision to increase the float.
41. 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.”
42. The Tribunal proposes to make a PFEO to order the Property Factor to provide reconciliation statements for the Float for the last three financial years. The Tribunal does not consider that the Applicant has suffered any loss and therefore does not consider that a monetary penalty is required.

43. 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.”
44. 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.
45. 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.

Alison Kelly

**Legal Member
27th May 2024**