



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

**Chamber Ref: FTS/HPC/PF/20/1503**

**272-280 Bell Street, Glasgow, G4 0SZ, 20-26 Great Dovehill, Glasgow, G1 5DN (“the Development”)**

**The Parties:-**

**Mrs Suzanne Caldwell, 6/1 274 Bell Street, Glasgow, G4 0SZ (“the Homeowner”)**

**Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Glasgow, G73 1UZ (“the Factor”)**

**Tribunal Members**

Ms Helen Forbes (Legal Member)

Mr Robert Buchan (Ordinary Member)

**Decision**

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Factor has failed to carry out its property factor duties in terms of Section 17 of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

**Background**

1. By application dated 9<sup>th</sup> July 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed in carrying out its property factor duties in relation to its procedures pertaining to the replacement of a car park gate at the Development. The Homeowner submitted copy correspondence between the parties and copy Written Statement of Services.
2. By decision dated 22<sup>nd</sup> July 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.

3. By email dated 8<sup>th</sup> September 2020, the Factor made written representations and lodged productions comprising copy correspondence with homeowners and contractors, and copy complaint of the Homeowner. The Factor indicated that they would not be attending the hearing set down for 1<sup>st</sup> October 2020.
4. A hearing took place by telephone conference on 1<sup>st</sup> October 2020. The Homeowner was in attendance. The Factor was not in attendance. The Homeowner outlined her case and it became clear to the Tribunal that new matters, which were intrinsically connected to the matter before the Tribunal, had arisen as a result of the productions lodged by the Factor, particularly in relation to costings for groundworks by Gavin Lawrie Surfacing Ltd. ("GLS"). The Tribunal considered that an oral amendment had been made to the Homeowner's written representations contained in her application, in terms of Rule 13 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, as amended ("the Rules"). Given that these matters did not, and could not have, formed part of the application, and that the Factor was not present to respond to any new matters, the Tribunal exercised its discretion under Rule 28 to adjourn the hearing to allow the Homeowner to lodge a written amendment to her application and to allow the Factor the opportunity to make written representations in response.
5. By email dated 13<sup>th</sup> October 2020, the Homeowner amended her application to include the new matter.
6. By email dated 11<sup>th</sup> November 2020, the Factor made written representations. The Factor stated that they did not intend to attend the next hearing.
7. By email dated 11<sup>th</sup> November 2020, the Homeowner responded to the Factor's written representations.
8. By email dated 12<sup>th</sup> November 2020, the Factor responded to the Homeowner's comments.

### **The Hearing**

9. The hearing was held on 17<sup>th</sup> December 2020 by telephone conference. The Homeowner was in attendance. The Factor was not in attendance.
10. The Tribunal considered the terms of Rule 29 of the Rules. The Tribunal determined that the Factor had been given reasonable notice of the time and date of the Hearing. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Factor upon the representations of the Homeowner and the material before the Tribunal
11. The Tribunal made the following findings in fact.

- i. The Homeowner is the owner and occupier of a property within the Development.
- ii. The Factor registered as a Property Factor on 1<sup>st</sup> November 2012 under registration number PF000160.
- iii. The Factor provides factoring services to the Development.
- iv. The Development suffered from unauthorised access leading to graffiti and drug use. The electronic car park gate was identified as a point of access and in a letter of the 15<sup>th</sup> March 2018, the factor wrote to residents advising that they were working with contractors to finalise a proposal for replacement of the gate. This was a specialised matter and relatively few contractors were capable of carrying out the work required.
- v. By letter dated 2<sup>nd</sup> July 2018, homeowners were informed by the factor that quotes had been received for the work. The recommended contractor was Lowland Doors (“LD”), with a cost of £22,917.60 including VAT, with civils work to be carried out by GLS at a cost of £4,740 including VAT. The share per homeowner was £337.28.
- vi. By email dated 2<sup>nd</sup> April 2019, GLS provided a further quote with a breakdown of their costs to the Factor in the sum of £5,780 plus VAT. This included costs for the installation of bollards. Thereafter, the share per homeowner increased by £31.38.
- vii. There was a delay in the ingathering of funds due to some homeowners failing to pay their share. By September 2019, all but five out of eighty-one homeowners had paid. LD were instructed to proceed.
- viii. LD asked for full payment in advance of the works being carried out. LD cited credit scoring issues with the Factor as a reason for asking for full payment in advance. Attempts by the Factor to negotiate an alternative payment agreement were unsuccessful.
- ix. In December 2019, an alternative quote was obtained from Ursa Gates Ltd. (“UG”) at a cost of £19,111.60 plus VAT.
- x. By email dated 19<sup>th</sup> February 2020, GLS provided an updated estimate to the Factor based on the requirements of UG at a cost of £11,500 plus VAT. This quote was not made available to homeowners. The Factor did not provide an explanation to homeowners for the increase in GLS’s costs. The Factor did not seek further quotations for the civils work, accepting the quote from GLS.

- xi. By letter dated 27<sup>th</sup> April 2020, which was emailed to homeowners, the Factor informed homeowners of LD's payment terms and the fact that a compromise was not reached. Homeowners were informed that UG had provided a quote of £36,733.92 including VAT. The letter referred to an attached quote by UG. No quote was attached. There was no breakdown of the costs to show the individual contractor costs for the gate and the civils work.
- xii. An increased payment of £84.94 was required from each homeowner.
- xiii. By email dated 28<sup>th</sup> April 2020, the Homeowner requested an explanation as to why the Factor had entered into a contract with LD given their unfavourable payment terms. The Homeowner requested that the Factor pay the shortfall between the two contractors.
- xiv. Following correspondence between the parties, the Homeowner made a complaint to the Factor. The complaint was not upheld and the Homeowner was informed of this by email dated 19<sup>th</sup> June 2020.
- xv. UG and GLS were instructed to carry out the work in June 2020.
- xvi. It became apparent to the Homeowner when perusing the Factor's productions submitted on 8<sup>th</sup> September 2020 that 1) the reason for LD's request for upfront payment was due to the Factor's credit rating; and 2) it was an increase in GLS's costs for the civils work, rather than a significantly higher quote for the gate from UG, that had caused the increase reported to homeowners on 27<sup>th</sup> April 2020.

## **SUBMISSIONS, EVIDENCE AND REASONS FOR DECISION**

12. The Homeowner's case involves two aspects relating to the replacement of a car park gate at the Development.

### **(ONE) LOWLAND GATES – PAYMENT TERMS**

#### **The Homeowner's position**

13. It was the Homeowner's position that the Factor failed in carrying out its property factor duties by failing to check LD's terms and conditions before entering into a contract for the replacement gate. Having seen the Factor's productions, the Homeowner considered that the poor credit rating of the Factor is detrimental to the Development and puts future projects at risk. The Homeowner is concerned that the poor credit rating means the Factor is not a fit and proper company to carry out property factoring services. The Homeowner submitted that the Factor should take steps to improve their credit rating, and that they ought to have argued matters further with LD in an

attempt to persuade them to accept the usual terms and conditions. The homeowners have been disadvantaged in terms of costs and delay.

### **The Factor's position**

14. The Factor's position, as set out in their submissions, was that they comply with the reporting requirements of Companies House. The limited nature of the filing requirements with Companies House may make it difficult for credit reference agencies to carry out accurate annual reviews of the company, which may affect the credit risk score. This score is not a true reflection of the business. The Factor's is a business which is financially robust. The Factor has no control over the varying payment criteria of contractors, and rarely do they encounter such difficulties. Recognising LD's concerns when they raised the credit risk issue, the Factor offered reasonable alternative payment terms, which could have satisfied the concerns, as follows:
  - a. To provide evidence that the funds were held in a separate bank account in the name of 'the Co-Proprietors of College Heights'.
  - b. To pay 50% on instruction, and remaining 50% on completion.
  - c. To allow LD to nominate a third party to hold the funds and settle invoices throughout and on completion.
15. The Factor submitted that no client project has been placed in jeopardy. This was a business decision by LD. LD included inaccurate information about County Court judgements in making their decision. There are no County Court judgements against the Factor. LD ought to have taken into account the homeowners' ability to pay. LD only changed their payment terms after receiving the purchase order from the Factor.

### **The Tribunal's decision and reasons**

16. The Tribunal did not find that the Factor had failed in carrying out its property factor duties in regard to this matter. No contract was entered into with LD on behalf of the homeowners. LD's payment terms were not explicit until after a payment order had been raised, therefore, the Factor could not have known about this matter at an earlier stage.
17. The Tribunal considered that it was unusual for a contractor to request full payment upfront, and that the Factor made reasonable proposals to LD in an attempt to satisfy LD's concerns. When those proposals were not acceptable to LD, the Factor made the correct decision in refusing to put the funds of the homeowners at risk by accepting LD's terms.

18. The Tribunal considered there was no compelling evidence before it to suggest that the Factor is not a financially robust company, or that future projects are likely to be put at risk due to the company's credit rating. The Tribunal took into account the fact that inaccurate information may have been used by LD in reaching their decision.

## (TWO) INCREASE IN GAVIN LAWRIE SURFACING LTD. QUOTE

### The Homeowner's position

19. It was the Homeowner's position that homeowners ought to have been told explicitly that GLS's quote had increased by 99% to £11,500.00 plus VAT. Instead, the letter dated 27<sup>th</sup> April 2020 from the Factor, implied that UG were charging more for the gate than LD. The Homeowner queried why no breakdown was provided similar to that provided in the letter of 14<sup>th</sup> April 2019, which broke down the costs of the gate and the civils work. The Homeowner pointed out that the Factor received a quote from UG two months before it received the updated quote from GLS. She had only seen those quotes because they were submitted by the Factor as productions to the Tribunal. It was her position that no actual quotes had ever been provided by the Factor to homeowners, and it was unusual that they purported to attach a quote to the letter of 27<sup>th</sup> April 2020. No quote was attached. The Factor had hidden GLS's extra costs by giving only one figure and implying the increase was with UG.

20. The Homeowner submitted that there appeared to be no difference in the gate quoted for by LD, and the gate fitted by UG, therefore, no extra civils work ought to have been involved. It was her concern that GLS's costs increased due to the time taken by the Factor in attempting to negotiate their way out of payment terms imposed on them because of their poor credit rating, and then having to look for a new contractor.

21. The Homeowner submitted that if GLS were not going to honour their original quotation, the Factor ought to have invited further contractors to tender, or revert to a contractor that had originally quoted for the work. If the Homeowner had been informed of the increase in GLS's costs at the time, she would have asked that the Factor invite further contractors to provide competing quotes.

### The Factor's position

22. It was the Factor's position, as provided in written representations, that the majority of homeowners will generally want to understand the total cost of a proposal, and they took the decision to quote the total cost, which included the associated work by GLS. This is not unreasonable, nor does it lack transparency. The Factor did not consider that it was essential to provide a breakdown of the contractor's quotes, to specifically show the associated work

being carried out by GLS. Had this been queried by any owner at the time of the proposal, further information would have been supplied. No such request for this type of information was made by the Homeowner at the time of the proposal.

23. The Factor disagreed that there was no extra work involved from GLS. GLS was asked to liaise directly with LD and UG, respectively, to establish the scope of work required from them. Any difference in specification was based purely on what had been requested by UG. There was a difference in specification from GLS in that production 4, the email dated 2<sup>nd</sup> April 2019, states “Excavate for and install concrete bases”, whereas production 16, the email dated 19<sup>th</sup> February 2020, states: “Excavate for and install concrete bases and associated ductings, for new gate entry system...excavate and reinstate tarmac and monobloc surfaces.” If it is the case that Gavin Lawrie Surfacing initially ‘under-specified’ the work required, based on information provided to them by LD, that is not a matter in which the Factor had direct control, as they were not directly involved in the discussions between contractors.
24. A period of 21 months passed between both proposals; 3½ months had been associated with payment term negotiations with Lowland Doors, and 3½ months as a result of ingathering new Contractor costs. The remaining 14 months were solely due to the time associated with ingathering funding from the homeowners.
25. The specification of civils work was dictated by the gate installation contractor on each occasion. From the initial costs obtained from GLS, they proved to be more competitive, and it therefore made sense to ask them to quote with UG. The co-owners did not challenge this approach when the proposal was made, and this specific point was not queried by the Homeowner at the time of the proposal.

### **The Tribunal's decision and reasons**

26. The Tribunal found that the Factor had failed in carrying out its property factor duties by (i) failing to be open and transparent with homeowners in its letter of 27<sup>th</sup> April 2020; (ii) failing to investigate the increase in costs by GLS; (iii) failing to inform homeowners about the increase in costs; and (iv) failing to allow homeowners the opportunity of obtaining competitive quotes for the increased works.
27. The Tribunal considered that the terms of the letter of 27<sup>th</sup> April 2020 were misleading, as the wording suggests that the increase in costs was attributable to UG, when, in fact, it was attributable to GLS. There was a considerable increase in GLS’s costs, and this information ought to have been provided explicitly to homeowners. The Factor’s position was that an attachment to the letter clarified matters. In actual fact, there was no attachment. The UG quote only became available to the Homeowner as part

of the Tribunal process. The Factor's position that the Homeowner ought to have asked for clarity at the time, and questioned the Factor's approach in continuing to use GLS, is disingenuous, given that the letter makes no reference to any increase in GLS's costs, and, without the attachment, the Homeowner had no reason to suspect the increase in costs was attributable to anything other than an increase in the quote from UG.

28. The Tribunal took into account the letter dated 14<sup>th</sup> April 2019, and the fact that the costs of the gate and the civils works were provided separately therein. This directly contradicted the submission made by the Factor that it was their practice to provide the total cost to homeowners, without a breakdown.
29. The Tribunal noted that there was a difference in the wording of the two emails from GLS which were lodged by the Factor, in terms of the work to be carried out, but it considered that the increase in costs was so great, it was incumbent upon the Factor to make enquiries in this regard. The Tribunal noted that GLS communicated directly with the Factor in providing the quote. There was no reasonable explanation before the Tribunal as to why the Factor did not make any enquiries of GLS regarding the increase.
30. The Tribunal considered that, had the Factor notified homeowners of the difference in GLS's costs, it is likely that homeowners would have queried the increase and asked the Factor to obtain competitive quotes. The works have now been undertaken. While it is impossible, on the information before the Tribunal, to know whether costs might have been reduced had a different approach been taken, at least homeowners would have had sufficient information to make an informed decision on the way forward.
31. The Tribunal noted that the Homeowner stated in the Application that she would like the matter resolved as follows: *Spiers Gumley should look to fund the extra cost and learn from their mistake*. The Tribunal was not in a position to make such an order on the information before it. There was insufficient evidence to indicate that a lower quote for the civils work would have been obtained if the Factor had notified homeowners of the increase in the costs attributable to GLS.
32. There was insufficient information before the Tribunal to attribute any increase in GL's costs to delays by the Factor. The Tribunal accepted that much of the delay in this case was caused by homeowners failing to make payment.

## **Observations**

33. The Tribunal considered that it would have been of assistance to have had the attendance of a representative of the Factor at the hearings.

## **Proposed Property Factor Enforcement Order (PFEO)**

34. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
35. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failure to carry out its property factor duties.
36. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
37. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

## **Right of Appeal**

38. 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.

**29<sup>th</sup> December 2020**