



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 17 of the Property Factors (Scotland) Act 2011 (“the Act”) and Rule 24 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (“the Rules”)

Reference number:

FTS/HPC/PF/23/0918

FTS/HPC/PF/23/1627

together referred to as "the Applications".

Re: Flat 0/2, 12 Carriagehill Drive, Paisley, PA2 6JG ("the Property")

The Parties:

Mr. Jonathan Branton, S02 SFM, B Block (DIO) Episkopi, BFPO 53, BF1 2AS ("the Homeowner")

and

McFie & Co Management Services Ltd, having a place of business at 5 Cathkinview Road, Mount Florida, Glasgow G42 9EA ("the Property Factor")

Tribunal Members

Nicola Irvine (Chairperson) and Elizabeth Dickson (Ordinary Member)

Decision

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 sections 3.2 of the Property Factor Code of Conduct 2021 (“the 2021 Code”). The Tribunal made a Proposed Property Factor Enforcement Order, which should be read with this decision.

Background

1. The Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for determinations that the Property Factor had failed to comply with the 2012 Code of Conduct for Property Factors (“the “2012 Code”) and the 2021 Code of Conduct for Property Factors (“the “2021 Code”).

2. A case management discussion (“CMD”) took place on 14 September 2023. Following that CMD, the Tribunal issued a note and notice of direction to parties. A hearing took place on 10 October 2024 and the Tribunal issued a note and notice of direction after that hearing. A further hearing was assigned for 16 January 2025 at 10am to take place by video call.
3. The Tribunal received an email from the Homeowner on 10 October 2024, which set out the part of the 2021 Code said to have been breached by the Property Factor. On that basis, the Tribunal proceeded on the basis of alleged breaches of the 2021 Code.

Hearing – 16 January 2025

4. The Hearing took place on 16 January 2025 at 10.00 by Webex video call. The Homeowner was present on the call and represented himself. The Property Factor was represented by Mr. John Walker.
5. The Tribunal invited the Homeowner to give evidence in relation to the summary set out in his email of 14 October 2024. His evidence is summarised as follows:-
6. He did not receive the Written Statement of Services (“WSS”) for years. He has owned the Property since 2013 and did not receive the WSS from the Property Factor until he asked for it by email on 16 May 2023. He was not provided with any information about the float or the fabric fund, also known as the sinking fund. He did not agree to contribute towards the fabric fund, although realises that he has contributed towards the fabric fund by paying his common charges account. He was not advised that after paying into the fabric fund, the money would no longer be available to him. He was given no information on the constitution of the fabric fund or the purpose of that fund. The Property was tenanted but the tenant has passed away and he is in a position to sell the Property. He has been told that if he sells the Property, he will not be paid his share of the fabric fund held at credit. He did not receive an annual statement in relation to the balance of the fabric fund. This breaches paragraph 3.4 of the 2021 Code. It was not clear to him what sums have been debited and credited to the fabric fund. He has not signed anything to indicate that he is in agreement with the operation of a fabric fund. The Property Factor has not been transparent with him and has not communicated well with him in relation to the fabric fund. The sums held in the fabric fund cannot be deemed as money owned by the building. There was no provision in the missives in relation to capital assets being owned by the building. He wants a decision affirming his contention that he is entitled to his share of the fabric fund back from the Property Factor. The title deeds make no provision for

the operation of a fabric fund. In terms of paragraph 3.6 of the 2021 Code, the Property Factor is obliged to return all funds due to him at the point of settlement of the final bill. However, he has been told that there will be no payment made to him in respect of the fabric fund in the event that he sells the Property.

7. The Tribunal invited Mr Walker to give evidence on behalf of the Property Factor and his evidence is summarised as follows:-
8. In 2013, the Property Factor sent the WSS to all homeowners, including the Homeowner, by post. The WSS was updated in 2017 and 2021 and these were issued to the Homeowner. Proprietors can decide to fund the common maintenance of the tenement in a number of ways. The proprietors decided in 2008 to establish a fabric fund. Rules for the operation of the fabric fund were agreed at the outset. The Property Factor implemented the agreement reached by proprietors of the property in June 2008 ("the 2008 agreement"). A copy of the instruction to the Property Factor dated 16 June 2008 has been lodged. It was accepted that the Homeowner was not asked to sign anything when he became a proprietor of the Property. The agreement reached was that the fabric fund would be held by a body corporate. None of the proprietors who have sold their property has received any payment from the fabric fund. The contributions to the fabric fund are collected from 4 proprietors through their common charges account and 2 proprietors pay directly into the original bank account which was set up for the fabric fund. When each proprietor pays their share of the fabric fund, those payments are credited to the Property Factor's client account. Those funds are transferred to a specific account for the fabric fund once all proprietors have paid. That is done on a quarterly basis. This has resulted in there being difference in the balance of the fabric fund but the correct balance is shown after the account is reconciled every quarter. The Property Factor recognised that the arrangement for reconciliation of the fabric fund balance should be done differently, so that all proprietors are given the correct information about the balance. If the Homeowner wants the Property Factor to approach the other proprietors in the tenement to suggest a disbursement from the fabric fund or to terminate the fabric fund, the Property Factor will do so. The Property Factor is happy to facilitate a discussion between the proprietors about the operation of the fabric fund. The Property Factor has never sent an annual statement regarding the fabric fund but it was accepted that this should be done. The Property Factor writes to proprietors from time to time when it is proposed that the fabric fund is used to fund common repairs or maintenance. The collective proprietors have control over the fabric fund. Interest is added to the fund and the Property Factor takes no sums from that fund. The fund is held on the basis that individual proprietors cannot access it, but rather the collective proprietors. There has never been any proposal to increase or decrease the contributions towards the fabric fund and it has remained at £25 per proprietor per quarter. The fabric fund has been deployed a

few times over the years to pay for larger repairs or maintenance of the building. The balance of the fabric fund is as set out in the statement already lodged by the Property Factor. Bank statements showing the balance of the fabric fund have not been sent to the proprietors. However, it was accepted that the point made about lack of transparency was a valid one and the Property Factor recognised that an annual statement should be issued to the proprietors. In the event that the Homeowner sells the Property, a final account would be sent to him and that would take account of the float of £150 paid by him. However, it would not take account of the fabric fund because of the rules of the fund as set up by the proprietors. These rules were decided by the proprietors and not imposed by the Property Factor. The Property Factor believes that it cannot disburse funds from the fabric fund to any individual proprietor without consulting the other proprietors.

Findings in fact

9. The Homeowner is the proprietor of Flat 0/2, 12 Carriagehill Drive, Paisley, PA2 6JG.
10. The Property Factor is the properly appointed Factor in respect of the Property.
11. The fabric fund was set up by the collective proprietors in 2008.
12. The obligation on collective homeowners to contribute to the fabric fund is not registered against Homeowner's title to the Property.
13. The Property Factor manages the fabric fund on behalf of the collective owners.
14. The Property Factor failed to provide transparent accounting to the Homeowner in respect of the fabric fund.

Tribunal's observations in relation to the sections of the Codes at issue

Reasons for decision

15. The Tribunal noted that the complaint was first raised by the Homeowner in September 2022. The evidence given by the Homeowner all related to alleged breaches of the 2021 Code. The Tribunal was satisfied on the basis of the information presented by both parties that some sections of the 2021 Code had been breached.
16. The first area of the 2021 Code said to have been breached relates to the WSS. There was a factual dispute between the parties in that the Property Factor's

position is that 3 iterations of the WSS were sent to the Homeowner, whilst he maintained that he never received the WSS until he asked for it in 2023. The Tribunal noted that the Property was tenanted. The evidence on behalf of the Property Factor was that the WSS were sent by post. It is therefore possible that the WSS was sent to the Property address but the Homeowner never received these. There was insufficient evidence to enable the Tribunal to find that the Property Factor had breached that section of the 2021 Code.

17. The Homeowner submitted that paragraph 3.4 of the 2021 Code had been breached. That paragraph provides "*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.*" The Property Factor issues quarterly statements detailing the charges made and a description of the work carried out. This paragraph of the 2021 Code relates to the obligation to provide details of the work carried out, rather than the duty to provide transparency for accounting procedures. The Tribunal found that there was no breach of paragraph 3.4 of the 2021 Code.

18. The Homeowner contended that paragraphs 3.6 and 3.7 of the 2021 Code had been breached. Those paragraphs provide:

3.6: Unless the title deeds specify otherwise, a property factor must return all funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill, following a change of property factor."

3.7: "In cases where a property changes ownership, the property factor must confirm the process for repaying any funds that are due and presenting the final financial information relating to the account. This must be provided within 3 months of the property factor being made aware of the actual date of change in ownership (the date of settlement) unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services or the property factor has not been provided with the specified period of notice informing them of the change in ownership). In cases where a property changes ownership, the property factor must confirm the process for repaying any funds that are due and presenting the final financial information relating to the account. This must be provided within 3 months of the property factor being made aware of the actual date of change in ownership (the date of settlement) unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services or the property factor has not been provided with the specified period of notice informing them of the change in ownership)."

These paragraphs are not relevant to the present circumstances because the Homeowner has not sold the Property. These paragraphs are engaged at the point that a homeowner sells a property. Although the Homeowner indicated that he may sell the Property, he has not yet done so. The Tribunal found that there was no breach of paragraphs 3.6 and 3.7 of the 2021 Code.

19. There was no dispute between the parties that the collective proprietors gave an instruction to the Property Factor in 2008 to set up a fabric fund. The issue between the parties related to the Homeowner's liability to contribute to that and the ability of the Property Factor to withdraw the Homeowner's share of the fabric fund upon sale. The Homeowner has not yet sold the Property and therefore it is hypothetical at this stage as to whether the Property Factor is obliged to account to the Homeowner in respect of the fabric fund at the point of sale.
20. The Homeowner was not a signatory to the 2008 agreement. A question arises as to whether the 2008 agreement is binding upon successors in title. Generally, a positive obligation to contribute towards a fabric fund is not automatically binding on successors in title. There are 3 situations which can exist which make such an obligation binding on successors in title, namely (a) where there is a specific obligation registered against the property title; (b) where the original title deeds included a condition which binds successors in title; or (c) where a common scheme is established binding all current and future proprietors. In the present case, situations (a) and (b) do not apply. The rules which apply to a common scheme are set out in the Title Conditions (Scotland) Act 2003. The rules state that a common scheme must be in writing, set out the rights and responsibilities of each proprietor and must be registered in the Land Register of Scotland. There is no evidence that a common scheme registered in the Land Register of Scotland. It therefore follows that the 2008 agreement is not binding on successors in title.
21. It appeared to the Tribunal that the Property Factor proceeded on the misapprehension that 2008 agreement was binding on successors in title. It appeared that the Property Factor genuinely believed that they were implementing the instructions provided by the proprietors in relation to the management of the fabric fund. Having examined the 2008 agreement and the title deed, the Tribunal considered that the Property Factor had no authority from the Homeowner to operate a fabric fund on his behalf.
22. Turning to the proposed order, the Tribunal took account of the fact that the Property Factor had engaged with the Homeowner and proposed a resolution whereby the Property Factor could approach all proprietors to take instructions about the fabric fund. However, such a resolution would overlook the fact that the 2008 agreement is not binding on successors in title.

23. The Tribunal has decided that the Property Factor requires to account to the Homeowner for his contributions towards the fabric fund and pay him any surplus due to him in respect of his contributions to the fabric fund.

Property Factor Enforcement Order (PFEO)

24. Section 19 of the Act states: -

(2) 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.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that 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, the First-tier Tribunal must make a Property Factor enforcement order.

25. The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties. Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Signed

Nicola Irvine, Chairperson

22 April 2025

