



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) in applications under section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Reference numbers: FTS/HPC/PF/21/0559 and FTS/HPC/PF/22/2067

Property at Flat 16, 31 Simpson Loan, Edinburgh EH3 9GG (“the property”)

Parties:

Professor Roya Sheikholeslami, residing at the property (“the homeowner”)

Speirs Gumley Property Management, Red Tree Magenta, 270 Glasgow Road, Glasgow G73 1UZ, registered number PF 000160 (“the factors”)

Tribunal Members:

James Bauld (Legal Member) and Robert Buchan (Ordinary, Surveyor Member)

Background and introduction

1. The Property Factors (Scotland) Act 2011 created a Code of Conduct for property factors which was introduced with effect from 1 October 2012.
2. That Code of Conduct was then revised and a new Code of Conduct was introduced with effect from 16 August 2021.
3. The new Code of Conduct extended and expanded the original Code and also introduced a set of overarching standards of practice.

4. In this decision The Codes of Conduct will be referred to as respectively the "original code" and the "revised code".
5. The homeowner has lodged two applications alleging that the property factor has breached both the original code and the revised code and has failed to comply with the terms of both codes.
6. Her complaints prior to August 2021 are based on the original code. The complaints subsequent to that date are based on the revised code.
7. By application dated 10 March 2021 (and given tribunal reference number FTS/HPC/PF/21/0559) the homeowner applied to the tribunal for a determination on whether the factors had failed to comply with the following sections of the original code
 - sections 1A, 1B, 1C, 1D, 1E and 1F;
 - sections 2.1, 2.2, 2.4, and 2.5
 - section 3.3
 - sections 4.1, 4.4, 4.8 and 4.9
 - sections 5.2, 5.3, 5.4, 5.5 and 5.8
 - sections 6.1.and 6.9
 - sections 7.1, 7.2 and 7.3
8. By application received on 28 June 2022 the homeowner applied to the tribunal for a determination on whether the factors had: failed to comply with the following sections of the revised code
 - Overarching Standards of Practice (OSPs) 1, 3, 4, 5 & 11 and
 - sections 2.4, 2.6, 2.7, 2.8 and
 - section 3.4

9. Additionally she alleged they did not follow duties under Clauses 9.6.1 - 9.6.4; 10.4.3 and 12.10 of the Deed of Conditions relative to the property
10. Although the terms of the relevant provisions of the two codes and the specifics of the alleged breaches under the two codes are slightly different, the general tenor of the homeowner's complaints are similar under each code.
11. Effectively she complains that the property factors failed in respect of those parts of both codes which relate to communication and consultation, the provision of information and dealing timeously with complaints.

Procedural history

12. Case Management Discussions ("CMD") were held on 16 November 2021 and 23 June 2022 and hearings took place on 31 March, 14 and 21 June 2022, 23 December 2022 and 21 February 2023. At the end of the first day's hearing on 31 March 2022 the factors said that they did not intend to appear at any future days of evidence and invited the tribunal to take their written representation into account in the determination as they had nothing further to add.
13. In response to letters advising of each continued hearing date, the factors confirmed their intention to neither appear nor be represented. They voluntarily waived their right to verbally challenge the evidence and representations by the homeowner or to make any further representations on their own behalf.
14. After the Hearing of 21 February 2023 the tribunal issued a note indicating that it was now satisfied that it had all the necessary information to enable the tribunal to consider the homeowners complaints and to issue a final decision.

The composition of the tribunal

15. The initial chairing and legal member of the tribunal was Mr David Preston ,

16. Subsequent to the hearing in February 2023, Mr Preston commenced the work involved in drafting the decisions in respect of these applications. Regrettably, Mr Preston became ill shortly thereafter and subsequently died.

17. Mr Preston was a much respected member of the Scottish legal profession, and his loss is felt deeply by his colleagues.

18. The president of the tribunal has required to take steps to allocate cases in which Mr Preston was involved to other legal members. Mr James Bauld was appointed as the legal and chairing member in respect of these applications.

19. He required to arrange to review and consider the case papers in this application. Parties will appreciate that these papers are extensive and voluminous.

20. Mr Bauld has had meetings with Mr Robert Buchan, the ordinary surveyor member, who originally sat with Mr Preston in considering these applications, and in hearing the various case management discussions.

21. Mr Bauld has been significantly assisted by Mr Buchan, in the preparation of this final decision. The tribunal has taken the decision to combine both applications into one single decision. The tribunal has determined that a Property Factor Enforcement Order (“PFEO”) should not be made at this stage and a proposal relating to further procedure is set out at the end of this decision.

22. Preliminary Matters

23. By way of explanation and clarification, this tribunal was dealing with two applications against the factor by the homeowner.

24. The tribunal has been required to consider significant volumes of paperwork produced by both parties in connection with this application.

25. In reaching its findings the tribunal had due regard to the whole written submissions from both parties as well as the documents provided by them in support of their positions solely in relation to these applications.
26. The factors were appointed in October 2019. The Homeowner has neither paid any management charges, service charges or fees to the factor, nor has any reason been given to the factors for non-payment of undisputed amounts at least, nor given any indication as to when or on what conditions any payment be made. Notwithstanding this, the homeowner has been active in sending emails to and making demands of the factor.
27. The response of the factor is that "It is our view this application to the First-tier Tribunal is vexatious and intended to frustrate the process of recovering the sums owed by the Applicant. Despite the requests for the provision of a substantial amount of data, it remains unclear why the Applicant continues to withhold all payments."
28. The homeowner complains that the factor has failed on various occasions to provide the information she requires and that this has caused her significant anxiety and distress.
29. The tribunal has noted the concerns of the factor as outlined above but is nonetheless required to consider the application on its merits and without regard to any indebtedness of the homeowner.
30. The application is to determine whether the factors have complied with their duties and with the relevant sections of the Codes. The factors are entitled to question the indebtedness and ask for or demand payment and to take legal action, which are not breaches of the Code. The relationship between a homeowner and a factor may be unique in that the factor cannot refuse to act on behalf of individual or groups of homeowners so long as they retain their appointment in respect of the development or property of which the individual's property forms part. Factors cannot provide any less of a service to any homeowner, regardless of the extent to which they may be in arrears with any

charges regardless of how difficult that may be. In all cases the Codes and the factor's own Written Statement of Services ("WSS") apply to and regulate the factor's conduct. Accordingly, factors require to have, and to implement, robust debt collection policies and procedures.

31. A significant portion of the factors' response to this application, dated 30 August 2022 related to a history of various efforts by them and their predecessors to recover sums allegedly due by the homeowner. This application does not require the tribunal to determine what specific sums might or might not be due to the factors. We are to determine whether the factors have complied with the Code and their obligations to the homeowner in response to her applications.
32. The total indebtedness of the homeowner to the factors is complicated by a number of issues. She was apparently sequestered by the factors' predecessors for outstanding sums due to them. The Homeowner has paid nothing to the present factors since their appointment. The present factors were appointed in 2019 and assumed responsibility as factors from 1 October 2019.
33. The basis on which they seek to recover indebtedness from the homeowner for sums due by her to their predecessors has not been made clear to the tribunal, particularly in view of the fact that she was sequestered in 2017 and, so far as the tribunal is aware was discharged from that sequestration on 23 June 2018.
34. In her written submissions, the applicant has indicated that there may still be ongoing legal proceedings seeking to appeal the original sequestration, the exact nature of which is unknown to the tribunal. The factors are clearly and understandably frustrated by the homeowner's lack of response to any demand for payment or explanation for non-payment, and this is evident from their responses to her.
35. Adherence to Code by the factor and the indebtedness of the homeowner are entirely separate and are not interdependent in any way. The factor is entitled to question the indebtedness of the homeowner and ask for/demand payment,

but the tribunal has no locus in that regard and can have no influence on whether the Homeowner pays or not, nor how much.

36. The Code applies to all property factors in relation to all homeowners whether they owe money to the factor or not and regardless of the level of indebtedness. Therefore, a property factor must continue to comply with the Code and respond to all enquiries. These enquiries do not have a bearing on the amount owed. A property factor is not entitled to withhold any of the services either under the Deed of Conditions or the Written Statement of Services due to indebtedness.
37. This may appear counter-intuitive to any business relationship, but property factors are in what may be a unique situation insofar as they must act on behalf of all owners and cannot be selective. They cannot refuse to act for any individual and continue to act for the remainder. It's 'all or nothing'.
38. Accordingly, property factors cannot ignore their responsibilities and obligations under their WSS or the Code in relation to individual homeowners.
39. Our function is therefore to ignore the indebtedness entirely and focus on the property factors' actions towards the homeowner in relation to the Code and WSS.

Issues raised by homeowner

40. Various complaints regarding the failure of the Factors to carry out their duties under the original code are made and similar issues were also raised with regard to matters covered by the revised Code. Accordingly, the Tribunal has decided to deal with these complaints together with the complaints under the revised code and this is addressed below.

41. It is hoped that the proposed resolution being suggested by the tribunal will deal with all matters under both versions of the Codes where the tribunal finds that the factor has failed to comply with duties under both versions of the Codes.

Complaints under the original Code

42. The Homeowner's first application has 18 pages of complaint and the supporting paperwork is voluminous. Generally, it is hard to disagree with the Factor's comment of the application being "vexatious and intended to frustrate the process of recovering the sums owed by the Applicant" in that, having written to the Factor with a complaint or query, the Homeowner then largely ignores the (many) replies and proceeds to generate yet further complaints or queries.

43. With regards to the complaint that **the Factor had failed in its duty to provide its Written Statement of Services per sections 1A, 1B, 1C, 1D, 1E and 1F of the code**, the Factor presented emails of the 21 October 2019, 31 March 2021 and 1 April 2021 providing the WSS to the homeowner and indeed was able to show during the hearing of the 31 March 2022 that the email sent back from the Homeowner to the Factor saying that the WSS had not been attached, included the attachment. Given the copious emails back and forth between the parties we do not accept the claim that the WSS was not received by the homeowner. The WSS and the many other replies from the Factor regarding the delegated authority, financial and charging arrangements, complaint handling procedure and termination arrangements have demonstrably been provided, in some cases in several replies, to the Homeowner.

The Factor failed its duties under Communications and Consultation per sections 2.1, 2.2, 2.4 and 2.5 of the Code.

44. In all of the documentation the Tribunal found no evidence of the factor providing false or misleading information, nor any intimidating or abusive

communications and the Homeowner failed to provide specific evidence of these claims.

45. The Tribunal is puzzled by the complaint that the Factor did not provide a procedure to consult with Homeowners as the Homeowner clearly has not suffered from an inability to communicate with the Factor. In any event, the means of contacting the Factor is clearly provided in the WSS.
46. There is evidence that on some occasions the Factor has not responded within agreed timescales and this part of the complaint is upheld.

The Factor failed in its duties under Financial Obligations per section 3.3 of the code.

47. Similar issues were also raised with regard to matters covered by the revised Code and so the Tribunal has decided to deal with this complaint regarding financial matters together with the complaints under the revised code and this is addressed below.

The Factor failed its duties under Debt Recovery per sections 4.1, 4.4, 4.8 and 4.9 of the code.

48. Similar issues were also raised with regard to matters covered by the revised Code and so the Tribunal has decided to deal with this complaint regarding financial matters together with the complaints under the revised code and this is addressed below.

The Factor failed its duties under insurance per sections 5.2, 5.3, 5.4, 5.5 and 5.8 of the code and the Factor failed its duties of Carrying out Repairs and Maintenance under 6.1 and 6.9 of the code

49. These two headings of complaint largely concern the various complaints regarding a possible building fault with the sliding doors at the property, a

report by Nu-Cairn on the doors and any building insurance. The homeowner appears to refuse to accept that the Nu-Cairn report was instructed before the appointment of the Factor and that Spiers Gumley does not have the report. Whilst the Factor could have been more helpful in perhaps contacting the contractor and obtaining a copy of the report they did respond on at least four occasions, namely 13 October 2019, 25 June 2020, 30 July 2020 and 7 August 2020 explaining the situation regarding the building warranty and offering to inspect the doors for themselves but the replies were largely ignored by the Homeowner.

50. At the case management meeting of the 10 November 2021, The Tribunal persuaded the Homeowner to allow the Factor to inspect the sliding doors. The Factor's finding of the inspection was disputed by the Homeowner.

51. The Factor advised that, as many other owners in the block had complained of similar issues, a loss adjuster was inspecting the building issues of the block on behalf of the building warranty insurer now being administered by the Financial Services Compensation Scheme and that it would be appropriate to await the decision as to whether or not required remediation would be carried out under the warranty.

52. In any event, the issue of whether or not a claim was intimated to the new build warranty provider pre-dated the appointment of Spiers Gumley and as the Homeowner had not afforded the Factor access to inspect the issue for themselves prior to the case management meeting, this complaint is not upheld.

The Factor failed to provide a written complaint procedure per sections 7.1, 7.2 and 7.3 of the code.

53. Regarding 7.2, the complaints procedure is laid out in the WSS and the Homeowner has demonstrated her ability to follow the procedure. Accordingly this complaint is not upheld.

54. Various complaints are made regarding access to gas and electricity meters and to information regarding the lift. These are disputed and the Tribunal are unable to determine these issues. However, particularly as there is a concierge in the block, it is hard to understand how the Homeowner felt unable to access her meters.

55. The Homeowner paid £25 to the Factor to obtain financial documents. The Factor clearly failed to provide the documentation at the time but they did provide the documentation at a later date following the case management discussion

56. Regarding 7.3, this is dealt with under the Financial complaints below

The Factor failed to follow the requirement of UK legislation (Equality Act 2010) and Scottish legislation (Mental health Act 2010).

57. This is not upheld as no evidence was provided of the Homeowner notifying the Factor of a specific requirement to make reasonable adjustments.

Complaints under the revised Code

58. The following issues were specifically raised by the homeowner in her application under the revised 2021 Code. As noted similar issues were also raised with regard to matters covered by the original Code. The tribunal acknowledges any failures of compliance with the current revised Code are almost certainly mirrored by similar provisions and complaints under the previous Code.

59. The headings below are based on the headings contained in the applicant's written submission dated 30 November 2022 and they are "numbered" following the numbering adopted by the applicant in those submissions. That numbering is not properly sequential.

Issue 1 – Illegible Documents

60. The homeowner complained that the factors had failed to provide documents to her in a legible format. She referred specifically to the Budget Statement for the period 1 January to 31 December 2022 which had been sent to her on 17 December 2021 [HO51-52]. The homeowner said that the factors had refused to provide these documents in larger fonts or in their original Word or Excel format as requested by her. She had raised this again with the factors in her email of 11 April 22 [HO14].

61. The factors addressed this in their email of 3 August 2022 [HO32] in which they referred to a "suite of documents" which had been left for the homeowner at the Estate Office but remained uncollected. Beyond that they relied upon the homeowner's ability to use the zoom function to enlarge documents and fonts as required. This did not satisfy the homeowner.

Issue 2 – Expenditure, Vouching & Financials for FYE 2021

62. The homeowner complained that on 14 April 2022 [HO.15] she asked for all common property expenditure vouching for the year ending 2021 and that despite further repeated requests did not receive the information for four months being 3 August 2022. Following receipt of the information sought she complained that: there were entries on the list for which no vouching was produced despite the factors having confirmed that the vouchers and receipts

were complete; and there were a number of anomalies which arose from the vouchers and the summary spreadsheet.

63. The tribunal noted that the homeowner had sought to impose time-limits on the factors for responding to her requests which generally were the same as, or greater than the response time indicated in the factors' WSS.
64. The homeowner provided details of the questions and enquiries about the vouchers and summary in items 2B – 2H of her letter of 30 November 2022.
65. The factors advised in their responses to the application that on 3 August 2022 [PF.1] they provided all outstanding responses to the homeowners' queries of 11, 14 and 26 April 2022 including 266 pages of vouchers and a summary spreadsheet of expenditure. They had written to the homeowner on 30 June 2022 [PF.4] to apologise for the delay in replying to her letters and advising that a full response would be provided by 27 July 2022 on Mr McKie's return from annual leave. The factors' response referred to the homeowners' indebtedness to them and explained some background to that. Reference was made to documents which had been left at the Estate Office but had been uncollected.
66. In the homeowner's response to the factors on 26 October 2022 [HO.54] in amplification of the points she made in her letter of 17 October 2022 [HO.46] she pointed out a number of anomalies between the vouchers and the summary and raised queries about the following:
 - number of entries in the summary which related either to individual flats or to other blocks.
 - Entries totalling £24837.44, described as "Estate Apportionment" under invoice ref "Internal Movement" for which there were no vouchers and she asked for an explanation of those descriptions.
 - The basis on which the apportionment of common expenditure for Block 4 was calculated.

- Who approved the factors' management fee and for details of any committee who might have approved them.
- An explanation of the calculation of the apportionment percentages of 3 items referring to herself and requested details of any formula on which they were calculated.

67. The factors wrote to the homeowner on 18 November 2022 [HO.61] in response to her letter of 17 October 2022 [HO.46]. They did not respond to the detailed points raised in the 26 October 2022 letter. The only subsequent correspondence from the factors that had been produced to the tribunal is dated 23 November 2022 and relates to the outstanding indebtedness due to the factors [HO.73].

68. Issues raised in homeowner's letter of 30 November 2023 in response to the factors' submissions dated 30 August 2022 and their productions (2B–2H)

69. Following receipt of and arising from the factors' response to this application which comprised their email of 30 August 2022 together with attachments and supporting documentation, the homeowner raised a number of further issues (2B–2H) in her letter of 30 November 2023 which was copied to the factors and to which they have made no further response. The tribunal has considered these issues together with the factors' representations of 30 August 2022.

Issue 2B – Not providing vouching despite repeated requests over last three years.

70. Arising from her examination of the vouchers and summaries produced by the factors on 3 and 30 August 2022 the homeowner's email of 30 November 2022 complained that, although claimed to be complete, they still lacked details, breakdown, and/or vouching for a number of items.

71. The homeowner questioned:

- the Estate Apportionment for £24,837.44 being paid to the factor;
- the Car Park service Charge in the FYE 2021 being paid to the factor; and
- the Management Fee of £25,317.50 per month and sought evidence of authority for approval of such management fee and how it is apportioned to block Q4.

72. The homeowner also raised issues relating to expenditure vouching for the period from October 2019 to December 2020 and referred to an assessment of these having been carried out by Peacock Johnston in their letter of 11 February 2022.

Issue 2C-2F

73. Having examined the vouchers, invoices and statements for the year 2021 the homeowner raised questions about a number of entries as detailed in her email of 26 October 2022 [HO55]. These further issues were referred to in the homeowner's response to the factors' representations in her email of 30 November 2022. A number of errors, and anomalies in these productions were pointed out. She also questioned the claim of £42922.33, excluding sums due pre-sequestration. These matters remain unanswered.

74. The homeowner refers to the letter from Peacock Johnstone dated 11 February 2022 [HO126] as being an assessment of the total of vouched expenditure for the period 1 October 2019 to 31 December 2020.

Issue 3 – Ms Mackay's 10 March 2022 letter – Q4 Annual Electricity Usage & Charges

75. On 26 April 2022 the homeowner wrote to the factors about the letter of 10 March 2022 regarding the Common Electricity Supplies in Q4 [HO.18] questioning the information therein regarding the total annual electricity usage in 31 and 28 Simpson Loan since 31 Simpson Loan has 29 residential units,

whilst 28 Simpson Loan has 34 and the consumption for number 31 appeared to be more than twice that of 28. She sought a response to that query on a number of occasions between then and 18 November 2023 when a response was sent by the factors [HO.61].

76. In their letter of 18 November, 2022 the factors explained that the respective blocks consume different amounts of electricity. There is a plant room shared between 28 Simpson Loan and 31 Simpson Loan which is linked to the meter in 31 Simpson Loan which explains the higher usage in that block. However, the factors advised that the cumulative sum of consumption for 28 and 31 is recharged to all Q4 co-owners to ensure that all Q4 owners bear their proportionate responsibility of electricity costs for all services, including the shared plant. By way of example, they also provided a review of the first quarter of consumption showing the cumulative totals across 28 and 31 Simpson Loan.
77. In her letter of 30 November 2022, the homeowner disputed the explanation and suggested that it was not consistent with the historical record. She offered evidence of this, if required by the tribunal. It is not for the tribunal to suggest what evidence a party should submit in support of their position.

Issue 4 – Mr MacDonald’s Communication re LED Lighting Charges

78. On 26 April 2022 [HO21] the homeowner, in common with others, responded to a letter from Mr Gary MacDonald of that same date [HO19]. The homeowner raised 9 issues on which she sought a response within 7 days. On 4 May 2023 Mr MacDonald responded to the issues [HO23]. His letter advised that the proposals had been discussed by the block committees; provided information regarding the quotations received; explained the methodology of sampling, together with details of savings effected, both financial and environmental; explained details of the specification referred to in his earlier letter; and further details of proposals relating to bin stores and basement areas.

Discussion of issues and determination.

Issue 1 - Illegible Documents

79. The tribunal accepted the position of the factors as being reasonable as it found no difficulty in enlarging the documents on screen. The tribunal considered the exchanges of emails regarding the apparent difficulties with the budget papers sent to the homeowner. The homeowner advised that she had difficulties with the font size and format as a result of "mental health or vision disabilities", but without any further explanation of the nature of the difficulties. In response the factors made suggestions which might alleviate such difficulties, which were rejected by the homeowner, still without explanation of what she required. On 13 January 2022 the factors sent the documents as A3. On 11 April 2022 the homeowner again requested the documents in a larger font size and in a legible form. It appeared to the tribunal that the factors had been unable to discern from this correspondence exactly what difficulties the homeowner was encountering, as did the tribunal. In order for reasonable adjustments to be made, it is necessary to be specific about the actual difficulties or the nature of the required adjustments, which would not necessarily require disclosure of details of personal illness.
80. On 21 February 2023 at a hearing in respect of one application (FTS/HPC/PF/21/0559) the homeowner advised that due to her limitations, she had difficulty in navigating the factors' website and found that her ability to access web pages through links was restricted due to the anxiety which this caused. This was the first indication of the nature of her difficulties or the fact that she was unable to access the factors complaints procedure which was available on their website through a link. The tribunal could not reconcile such difficulties with navigating websites and links with the problems she reported with font size or format in relation to this complaint. If this had been the intention behind this complaint, it should have made this clear to the factors from the outset.

81. The tribunal noted that in their email to the homeowner of 3 August 2022 [HO32] the factors referred to a suite of documents having been left for the homeowner at the Estate Office which remained uncollected. So far as the tribunal is aware, these documents relate to the provision of documents pertaining to the year January to December 2019, part of which pre-dated the factor's appointment to the development.
82. In reaching this conclusion, the tribunal had regard to the reasonable adjustments to which the homeowner referred in terms of the Equality Act and Mental Health and Treatment (Scotland) Act. It also had regard to her stated abilities as a university professor with decades of experience in using and teaching computers and computer programming. On balance and in the light of the homeowner's demonstrable abilities to analyse and interpret documentation the tribunal rejected the homeowner's complaint in this regard.

Issue 2 – Expenditure, Vouching & Financials for FYE 2021

83. The tribunal finds that the factors failed to comply with the timescales in their WSS for responses to communications from the homeowner.
84. The homeowner had requested the expenditure vouching on 14 April 2022 [HO15] as she was entitled to do, but this was not provided until 3 August 2022. An email of 30 June 2022 [PF4] apologised for the delay and advised that a response would be made by 27 July 2022. The tribunal recognises that the quantity of information and data which had to be processed to respond was comprehensive and would have taken some considerable time to compile. Nonetheless the Code, and the factors' WSS are clear that homeowners should be kept informed if the factors are not able to respond within the agreed timescale (Section 2.7). They failed to do so.
85. On 26 October 2022 the homeowner raised questions arising from her analysis of the vouchers and summary spreadsheet eventually provided, some of which had been raised previously on a number of occasions, but these continue to be

unanswered to date. The tribunal considers that these questions are perfectly reasonable and relate to the accuracy of the accounting for common parts expenditure.

86. The homeowner:

- identified entries for which no vouchers were produced;
- identified entries which had apparently been wrongly posted to the account which relate either to individual flats or different blocks;
- sought an explanation of the labels attached to some entries (“Estate Apportionment” or “Internal Movement”);
- requested minutes of committee meetings; and
- requested formulae and specifications used to calculate ‘the Annual Block Common Parts Expenditure attributable to a Mixed Block’ as set out in paragraph (ii) of the definition of ‘Relevant Proportion’ in the Schedule, Part 1 – Definitions of the Deed of Conditions.

87. The factors failed to provide any explanations or information as requested.

88. The tribunal finds that this amounts to a failure to comply with the Overarching Standards of Practice and paragraph 2.7 of the Code.

Additional issues raised in homeowner’s letter of 30 November 2023

Issue 2B

89. With regards to the points raised by the homeowner enumerated at paragraph 71 above, the tribunal finds:

90. Estate Apportionment for £24,837.44 being paid to the factor: such a figure appears in the Block Budget Summary [PF8-9] alongside which is the comment: “the Budget Figure is comprised of an apportionment of all of the relevant costs from the different schedules in the Estate Budget, VAT/IPT is applied where

appropriate". The tribunal had difficulty in identifying the point being made by the homeowner or the question being raised. However, the factors have not responded to this query either by pointing the owner to the comment in the Block Budget Summary or by seeking clarification as to what exactly she wanted.

91. Car Park service Charge in the FYE 2021 being paid to the factor: Similarly, the tribunal was unable to understand the issue being raised. The factors have not sought clarification or provided an explanation.

92. Management Fee of £25,317.50 per month and evidence of authority for approval of such management fee and how it is apportioned to block Q4.: The Block Budget Summary includes a Management Fee figure alongside the comment: "we have agreed a fee increase with QMC equivalent to 2.5% for the 2021 financial year. The overall annual fee of £253,175 for the Estate still remains less than the 2019 annual fee of £296,344 net."

93. The vouchers accompanying the factors productions include 11 invoices, for the months of January to July and September to December, all 2022 (although there is a duplicate invoice number 1205 for September), each in the sum of £25,317.50. The Budget Summary explains the apportionment of the management fee and confirms that it is a fee which has been agreed by QMC. The factors did not clarify this in response to the homeowner.

Issues 2C – 2F

94. These points have largely been dealt with by the tribunal under issue 2 above. They arise from the homeowner's analysis of the information produced by the factors in response to this application and highlight concerns which, in her view still have not been answered. She has: pointed out a number of errors and anomalies as detailed by her and asked the factors to clarify; asked for the basis on which the factors seek to recover legal fees from her; requested vouching

for entries for which none have been produced; and sought clarification of the calculation of apportionment percentages.

95. The tribunal does not regard the letter from Peacock Johnston of 11 February 2022 [HO 126] as helpful. It lacks specification of the points made and amounts to a summary of discussions between the homeowner and them.
96. The tribunal finds that such information has not been provided to date, which amounts to a breach of the Overarching Standards of Practice and paragraphs 2.4 and 2.7 of the Code, and of the factors' WSS.

Issue 2H

97. The factors' email of 27 October 2022 [HO57-58] sent an invoice for the re-registration of a Notice Of Potential Liability (NOPL) and directed the homeowner to contact them with any queries. On 28 October 2022 the homeowner contacted the factors and requested further information as detailed therein. The only subsequent emails from the factors are dated 18 and 23 November 2022. The 18 November 2022 email was in response to the issues raised on 17 October 2022 and that of 23 November 2022 related to the outstanding sums claimed by the factors. These emails were accompanied by a Statement of Account which, they say are 'post-sequestration'. However, the tribunal notes that these statements include entries for periods as early as January 2012. They also include charges entitled 'Direct Recovery Costs' with no detail or explanation of these entries. Neither email responded to the homeowner's request for information about the re-registration of the NOPL.
98. The tribunal determines that these issues, legitimately raised by the homeowner have not been addressed by the factors. The information has not been provided in a clear and easily accessible way; is either deliberately or negligently false; or has not been responded to at all. These issues represent breaches of the Overall Standards of Service and paragraph 2.7 of the Code.

Factors' Written Statement of Services:

99. The tribunal has not been given sight of evidence that the terms of section 1.2 of the Code have been complied with and accordingly finds that the factors have failed to comply with the requirement to provide the homeowner with a copy of their revised version of the WSS within 3 months as she only became aware of the changes in August 2022. It is further noted that the changes have neither been indicated on the Statement of Services or summarised separately.

Issue 3 – Ms Mackay's 10 March 2022 letter – Q4 Annual Electricity Usage & Charges

100. We reject this complaint, although we do find that the factors failed to respond, either substantively or with a holding acknowledgement within the appropriate timescale. The homeowner raised this issue in her email of 26 April 2022 [HO18] in response to the letter from Vicky McKay dated 10 March 2022 [HO6-9]. The factors took seven months to respond with their email dated 18 November 2022 [HO61] which was well outwith the timescales in their Written Statement of Service as well as those imposed by the homeowner. However, it was a full response and explanation, which the tribunal found to answer the questions raised.

101. The homeowner, in her letter of 30 November 2022 claimed that the explanation was not in accordance with an historical record which was not produced by her. The tribunal had made it clear that it required to be provided with all relevant documentation and correspondence in order that it could make a determination in relation to the issues and accordingly such a record should have been provided. In the absence of such further information the tribunal was unable to make a determination and found that the explanation provided was

reasonable in the circumstances relative to the current situation in regard to meterage in sections of the development.

Issue 4 – Mr MacDonald’s communication re LED Lighting Changes

102. The tribunal rejects this complaint. The information provided on 4 May 2023 was sufficient to deal with the homeowner’s questions. The letter of 26 April 2023 made it clear that in the absence of a majority of objections, the work would proceed. The factors responded to those homeowners who had raised questions and, so far as this complaint is concerned, did so satisfactorily. The tribunal is satisfied that the necessary procedures for carrying out a project of this nature have been carried out in accordance with the Deed of Conditions regulating such issues. Further the factors have satisfactorily explained the basis of their authority to do so and have complied with the requirements of paragraph 2.6 of the Code.

Complaints concerning Duties

103. The Homeowner further complained that the Factor did not follow their duties under Clauses 9.6.1 - 9.6.4; 10.4.3 and 12.10 of the Deed of Conditions relative to the property which contain the following provisions.

104. Clause 9.6.1 indicates that the Managing Agent will perform or procure the performance of the Services in an efficient manner and in accordance with the principles of good estate management: and

105. Clause 9.6.2 indicates that the Managing Agent will maintain all necessary books, accounts and records and account where appropriate to HM Revenue and Customs

106. Clause 9.6.3 sets out that if reasonably requested to do so by an Owner entitled to production, to produce to them, in the office of the Managing Agent,

the receipts or other evidence of any expenses paid, and any relevant VAT invoice.

107. Clause 10.4.3 says that If requested by any Owner, the Managing Agent will make available for inspection, at the office of the Managing Agent, receipted invoices in respect of such expenditure where such invoices have been rendered to the Managing Agent.

108. These issues have been dealt with under Issue 2 of the Code complaints in paragraphs 62 – 74 above where we find that the Factor has not answered various questions put to them regarding the accounts.

109. . Clause 9.6.4 states that the Managing Agent will ensure that all information (including computer records) relating to the Development or to the Owners is secure and comply with the Data Protection Act 1998 in relation to such information.

110. No evidence was produced to suggest that the Managing Agent has not met this duty.

111. Clause 12.10 relates to Information about management and contains the following.

112. Clause 12.10.1 says that any Owner may require the Managing Agent to allow him to inspect a copy of any document, other than any correspondence with another Owner, which relates to the management of the Development Common Parts or the Car Parks

113. Clause 12.10.2 says that any Owner of a Unit in a Block may require the Managing Agent to allow him to inspect a copy of any document, other than any

correspondence with another Owner of a Unit in the same Block, which relates to the management of the Block Common Parts of that Block.

114. Clause 12.10.3 says that if the document is in his possession or it is reasonably practicable for him to obtain a copy of it, the Managing Agent will comply with such a request, and inspection will take place at the office of the managing agent.

115. This refers to what became known as the “Nu-Cairn report” and has been dealt with in paragraphs 49-52 above.

Decision and discussion relating to whether a property factor enforcement order (PFEO) should be made.

116. The tribunal has determined that there are breaches of the Code of Conduct and, having come to that conclusion, the tribunal is required to determine whether it should make a property factor enforcement order in terms of section 19 of the 2011 Act

117. If the tribunal proposes to make such an order then it must, before doing so, give notice of the proposal to the property factor and allow parties an opportunity to make representations upon the terms of the proposed order

118. In making an order, the tribunal can require the property factor to execute any action the tribunal considers necessary and where appropriate make an order for payment to the homeowner as the tribunal considers reasonable

119. It would be entirely unjust if this tribunal made a payment order in favour of the applicant. The applicant is well aware that as an owner within this development she is required to contribute to the ongoing costs of repair and maintenance of the development. She has failed to pay those costs for a number of years.

120. Her failure to pay those costs is a significant factor in the complete deterioration of the relationship between the applicant and the property factor

121. The tribunal is required to determine cases taking into account its overriding objective to deal with the proceedings justly.

122. It appears to the tribunal that much of whole dispute between the applicant and the respondents hinges on the sums claimed to be owed by the applicant to the respondents. This tribunal does not have jurisdiction to determine the amount owed (if any) by the applicant to the respondent. That determination falls solely within the jurisdiction of the sheriff court unless the parties agree to some other form of resolution. Until that element of the dispute is resolved then the tribunal is effectively unable to reach a final conclusion on certain aspects of the alleged Code breaches.

123. It appears to the tribunal that the dispute between these parties will not be resolved unless and until a sheriff court action is raised by the property factor against the applicant in respect of the alleged unpaid accounts which have accrued since they became the property factor. As stated previously this tribunal has no jurisdiction to determine that issue

124. In this case the tribunal has noted that the homeowner has failed to pay any accounts rendered by the property factor and its predecessor for a number of years. The amounts which the property factor claims are outstanding are significant and extensive. This tribunal is not the forum to determine the liability for payment of accounts rendered by properly factors. That jurisdiction lies with the Sheriff court and was confirmed in an Upper Tribunal decision (**Richardson**

and others v Residential Management Group Scotland Ltd
(UTS/AP/23/0009 – UTS/AP/23/0013, decision dated 23 June 2023)

125. In this case the tribunal would find it unreasonable at this stage to make any order of compensation to the homeowner.

126. While the tribunal accepts that the property factor is required to comply with the Code whether or not a homeowner is paying their bills, the tribunal is not required to make compensation order in favour of a homeowner even if it determines that there have been breaches of the Codes.

127. In this case, in the absence of any order requiring compensation to be paid, the only order which the tribunal could make would involve a requirement on the property factor to provide certain items of further information which have been requested by the homeowner to clarify certain items which have appeared in accounts which have been rendered to her.

128. Given that the tribunal has already indicated that the dispute between these parties will not be resolved without the intervention of a court, the tribunal requires to consider whether there is any point in making such an order. The provisions of the 2011 Act do not require the tribunal to make an order where it has decided there have been breaches of the Code or Codes.

129. At present the tribunal is not minded to make any such order. If a sheriff court action is raised, then it will be a matter for the factors to produce all appropriate documents to the court to evidence any sums they claim relate to the outstanding indebtedness of the applicant.

Further procedure

130. Accordingly the tribunal is in a situation where it requires the parties to confirm which course of action should now be pursued.

131. Do the parties wish the tribunal to make no order at the present time and await the outcome of any future or ongoing sheriff court actions?
132. Do the parties wish further time to discuss, negotiate and attempt to resolve the issues between them without either the tribunal or the court making any formal determination?
133. Is there some other resolution which might be mutually agreed by the parties and which would avoid further tribunal procedure, further court procedure and save further time and energy of all the parties and avoid additional and increasing expense
134. Do the parties wish to attempt alternative dispute resolution with regard to the debt perhaps by using mediation?
135. At present the tribunal is of the view that no PFEO should be made.

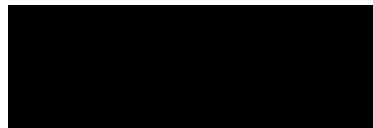
Further representations required

136. Parties are asked to make representations as allowed by section 19 of the 2011 Act and upon receipt of same the tribunal will decide on its final decision or any further procedure.
137. The tribunal would be willing to arrange a further hearing to discuss further procedure if parties thought that would be useful. The tribunal is aware and has noted the respondent's previously stated position but will leave the possibility of them returning and taking an active part open.
138. Such a hearing could now take place on a face to face basis at an appropriate location or via the WebEx video conferencing platform. This suggestion is made by the tribunal taking into account the overriding objective of the tribunal which is to deal with proceedings justly

139. The tribunal is willing to have a further case management discussion if parties believe that would be of assistance to discuss any representations made and to discuss the terms of any final order

Right of Appeal

In terms of Section 46 of the Tribunal (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.



..... **Legal Member**

07 August 2024

..... **Date**