

Statement of Decision with 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/23/1545

Re: 7/16, Powderhall Rigg, Edinburgh, EH7 4GG (“the Property”)

The Parties:

Mr. Yu You residing at the Property (“the Homeowner”)

Charles White Limited, having a place of business at Citypoint, 65, Haymarket Terrace Edinburgh, EH12 5HD (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) Carol Jones (Ordinary Member)

Decision

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

- (i) has not 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 at Written Statement of Services at 1.5A (3); Communications and Consultation at 2.6 and Repairs and maintenance at 6.7. and
- (ii) has failed to comply with the Property Factor’s Duties.

The First-tier Tribunal declined to make a Property Factor Enforcement Order.

Background

1. By application received on 16 May 2023 (“the Application”) the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the 2021 Code of Conduct for Property Factors (“the “Code”) and had failed to comply with the Property Factor duties.
2. The Application comprised the following documents: - (i) application form in the First-tier Tribunal standard application form, Form “C2”, (ii) copy statutory intimation letter to the Property Factor in respect of the Code and Property Factor Duties (iii) copy

correspondence between the Parties (iv) copy of the Property Factor's Written Statement of Services (WSoS) and (v) copy title sheet for the Property.

3. The Application complained of the following breaches of the Code:- Written Statement of Services at 1.5A (3); Communications and Consultation at 2.6 and Repairs and maintenance at 6.7. The Application also complained of a breach of property factor duties in respect of the Property Factor's failure to comply with the 2021 Code and the title deeds.
4. A legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion (CMD) was fixed for 25 August 2023.
5. The CMD took place on 25 August 2023 at 14.00 by telephone conference call. The Homeowner was present on the call and was not represented. The Property Factor was represented by Mr. D. Hutton and Mrs. S. Wilson, two of their directors. The outcome of the CMD was that a Hearing of evidence was fixed in respect of the Property Factor's power and authority to instruct repair work and the categorisation of the repair work as emergency in respect of health and safety concerns.

Hearing

6. The Hearing took place on 15 December 2023 at 10.00 by telephone conference call. The Homeowner was present on the call and was not represented. The Property Factor was represented by Mr. D. Hutton and Mrs. S. Wilson, two of their directors.

Code Breaches

7. The Tribunal heard firstly from the Parties in respect of the Code breaches complained of by the Applicant. These are:
 - 1.5 A(3) which states *"The WSS must make specific reference to any relevant legislation and must set out the following where applicable, a statement of any level of delegated authority, for example the financial thresholds for instructing works and the specific situations in which the property factor may decide to act without further consultation with homeowners."*
 - 2.6 which states *"A property factor must have a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of condition or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner."*
 - 6.7 which states *"It is good practice for periodic property visits to be undertaken by suitable qualified / trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure that a property is maintained appropriately. If this service is agreed with homeowners, a property factor must ensure that people with*

appropriate professional expertise are involved in the development of the programme of works.”

8. The Homeowner explained that his issues with the Property Factor all arose from the way in which the Property Factor had exercised their power and authority to instruct repair work to the lift at the building of which the Property forms part. With reference to the particular sections of the Code cited, he accepted that the Property Factor’s WSoS complies with the Code but maintained that the Property Factor did not ensure that these sections of the Code were followed fully. He accepted that the Property Factor has the requisite procedures but maintained that, with regard to Sections 2.6 and 6.7 in particular, the Property Factor did not apply these properly. With regard to the regular inspections, the Homeowner stressed that had these inspections been carried out properly the repair would not have been necessary as the issue with the lift ropes would have become apparent sooner. He noted that no inspection reports were provided by the Property Factor.
9. Mrs. Wilson of the Property Factor maintained that the Code and the procedures had been followed. With regard to Section 2.6 of the Code and the instructions from the proprietors, Mrs. Wilson explained that meetings were held every 8 weeks with the Owners’ Association Committee who had power to instruct the Property Factor. With regard to Section 6.7 of the Code, she explained that repair and maintenance was carried out by Schindler Lifts and that British Engineering Services carried out 6-monthly independent inspections. It was during an independent inspection by British Engineering Services that the rope fraying issues became known and British Engineering Services switched off the lift as a matter of health and safety. Mrs. Wilson explained that the rope repair was raised at the next available Owners’ Committee meeting and approval was given for the work to be carried out.

Property Factor Duties

10. The Tribunal then heard from the Parties in respect of the Property Factor Duties. The breach of duties complained of were the Property Factor’s failure to comply with the Code and the title deeds.
11. The Homeowner maintained that the Property Factor had exceed their authority in terms of the title deed affecting the Property, being Deed of Declaration of Conditions, recorded G.R.S. (Midlothian) 4 May 2001, by Bryant Homes Scotland Limited (“the Deed of Conditions”). The Homeowner stated that the Property Factor had not followed the process set out in that Deed of Conditions. He pointed out that Clause 5.2.8 of the Deed of Conditions sets out the way in which common repairs should be instructed. The Homeowner stated that Clause 5.2.8 (v) (e) limits the Property Factor’s delegated authority to £100.00 per flatted property and £5,000.00 for the development and that the lift repairs instructed by the Property Factor exceeded these amounts. The Homeowner stated that the Property Factor should have called a meeting of proprietors and taken a vote before instructing the repairs.
12. The Homeowner stated that the Property Factor could not rely on Clause 5.2.8 (v) (e) (2) as there was no emergency or urgency for the repair work and stated that the time

taken to have the repair carried out was such that the Property Factor could have followed the strict terms of the Deed of Conditions and taken a vote of the proprietors.

13. The Homeowner stated that he was aware that the lift had been switched off but only became aware of the cost of the repair when he received the Property Factor's invoice. He stated that he did not know that the Owners' Association Committee ("the Committee") had instructed the repair and stated that in his view, the Committee did not and could not instruct the repair but could only consider it. He stated that the Deed of Conditions provides that 20% of the "concerned proprietors" must approve repairs above the delegated limit and that this approval had not been obtained. He stated that the Committee has no authority to override this. He furthermore said that while the Property Factor did communicate that a repair was necessary this did not equate to authorisation.
14. Mrs. Wilson of the Property Factor maintained that the correct processes had been followed. She explained that the Property Factor took instructions from the Committee in line with the Deed of Conditions who had the power to authorise works. Mrs. Wilson explained further that the delays were not in instructing works but in the work being carried out as parts had to be obtained from abroad and there had been hold-ups with Customs. She stated that the Property Factor had kept the proprietors, including the Homeowner, fully informed throughout and that the lift ropes were replaced on the same day that they were delivered to the contractor.
15. With regard to inspections and reports, Mrs. Wilson stated that inspection reports were not circulated and that the independent inspector's report of June 2022 was the first which mentioned the frayed ropes. She stated that it was the independent inspector's engineers who disabled the lift. Mrs. Wilson stated that the Property Factor dealt with the repair as both a routine repair authorised by the Committee and an "emergency" repair in terms of Clause 5.2.8 (v) (e) (2). Mrs. Wilson stressed that some proprietors had been housebound and unable to attend medical appointments during the time that the lift was out of operation.
16. On behalf of the Property Factor, Mr. Hutton stressed that the Deed of Conditions did not limit the Property Factor's power to carrying out "emergency" work but gave the Property Factor full discretion to instruct work, including major work, if the Property Factor considered it necessary to "instruct and have executed such work which shall include a major work as he considers necessary for the interim protection or safety of any subjects or any person" and that this was the basis of the Property Factor's power to instruct the works without further consultation.
17. With regard to the time line of events, Mrs. Wilson advised the Tribunal that the inspection was carried out by a British Engineering Services on 15 June 2022, the lift was disabled by them on that date, Schindler provided a quote for the work on 13 July 2022, the Committee meeting was held on 22 July 2022 and the works were instructed

after that. The lift was repaired in August 2022 and the invoices were issued on 1 December 2022.

Findings in Fact.

18. The Tribunal had regard to the Application in full, to the submissions and productions lodged, to the submissions made at the CMD and at the Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities. The Tribunal had the benefit of the Deed of Conditions as lodged by the Homeowner.

19. The Tribunal found the following facts established:

- i) The Parties are as set out in the Application;
- ii) The Property Factor's WSoS complies with the Code;
- iii) The Deed of Conditions at Clause 5 sets out the process and procedure for common repairs;
- iv) The Deed of Conditions at Clause 5 provides that the Committee is entitled to instruct the Property Factor on behalf of the owners of the development of which the Property forms part ("the Development");
- v) The Deed of Conditions at Clause 5.2.8 (v) (e) limits the Property Factor's delegated authority to £100.00 per flat property and £5,000.00 for the Development;
- vi) The Deed of Conditions at Clause 5.2.4 – 7 sets out that, for works costing in excess of these delegated limits, the work should be instructed by a majority of proprietors at a meeting convened for that purpose;
- vii) The Deed of Conditions at Clause 5.2.8 (v) (e) (2) states that the Property Factor is entitled to instruct and have executed work, including major work, as is considered necessary for the interim protection or safety of any subjects or any person;
- viii) The Property Factor engages Schindler Lifts to carry out repair and maintenance of the lift;
- ix) The Property Factor engages British Engineering Services to carry out biannual independent inspections of the lift;
- x) British Engineering Services carried out an inspection of the lift on 15 June 2022;
- xi) At that inspection, British Engineering Services found that the lift ropes were frayed and so disabled the lift;
- xii) The Property Factor attended a Committee meeting on 22 July 2022 at which the lift repair was discussed;
- xiii) Following the Committee meeting, the Property Factor instructed Schindler Lifts to carry out the repair to the lift;
- xiv) The lift repair was delayed due to issues with obtaining parts from abroad;
- xv) The lift repair was carried out in August 2022;
- xvi) The lift repair was a full repair and not a temporary or interim repair;
- xvii) The cost of the lift repair was £7,012.80 which equates to £350.64 per

- property in the Development;
- xviii) The Property Factor attempted to make an insurance claim without success;
 - xix) The cost of the lift repair was notified to the Homeowner on 9 November 2022;
 - xx) The Homeowner's share of the cost of the lift repair amounting to £350.64 was invoiced on 1 December 2022;
 - xxi) There are owners in the Development and in the block of which the Property forms part who were inconvenienced by the lift being disabled;
 - xxii) The majority of owners in the Development and in the block of which the Property forms part made payment of their respective shares of the lift repair.

Issues for the Tribunal

20. The issues for the Tribunal were did the Property Factor comply with their procedures and did they act within their powers in instructing the lift repairs.

Decision of the Tribunal with reasons

21. From the Tribunal's Findings in Fact, the Tribunal found that the Property Factor had not failed to comply with the Code as the WSoS is compliant with the Code.
22. From the Tribunal's Findings in Fact, the Tribunal found that the Property Factor had failed to comply with the Property Factor Duties.
23. The Tribunal noted that the Deed of Conditions at Clause 5.2.8 (v) (e) limits the Property Factor's delegated authority via the Committee to £100.00 per flat property and £5,000.00 for the Development. Clause 5, in earlier sub-clauses, sets out that works in excess of these amounts should be instructed by a majority of owners at a meeting and sets out how that meeting should be convened and conducted. There was no evidence that any of the proprietors convened a meeting to authorise and instruct the lift repair. Therefore, the Property Factor did not have authority to instruct the repair in terms of Clause 5.2.8 (v) (e).
24. The Tribunal noted that the Deed of Conditions at Clause 5.2.8 (v) (e) (2) allows the Property Factor a power to instruct work in excess of these monetary limits if the Property Factor "considers it necessary for the interim protection or safety of any subjects or any person". The Tribunal noted that this is the power on which the Property Factor founds their authority. At the time the lift repair was instructed by the Property Factor, the lift had been disabled and was not in use. The Property Factor submitted that certain owners were inconvenienced, some greatly, by the lift having been disabled. However, the Property Factor did not submit any evidence that to show that the lift repair was necessary for the interim protection or safety of the subjects or any person.
25. The Tribunal noted that Mr. Hutton of the Property Factor stated that the Property

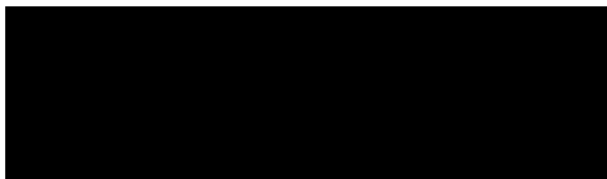
Manager had full discretion in terms of Clause 5.2.8 (v) (e) (2) to instruct works in excess of the monetary limit. The Tribunal's view is that Clause 5.2.8 (v) (e) (2) does not give the Property Factor full discretion: Clause 5.2.8 (v) (e) (2) provides a power to instruct repairs for "interim protection". The "interim protection" in this case had already been achieved by British Engineering Services disabling the lift and putting it out of use. The repair instructed by the Property Factor was a full and not an interim repair and should have been authorised and instructed by the Development proprietors at a meeting called and conducted in terms of the Deed of Conditions.

Property Factor Enforcement Order (PFEO)

26. 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."*

27. The Tribunal's view is that no useful purpose can be served by making a PFEO. Although, the repair was not authorised and instructed by the majority of owners at a meeting, the majority of owners were clearly in favour of the repair being carried out and, had a meeting been called, would have voted in favour of the repair. Therefore, the position of the Homeowner is not unduly prejudiced and so the Tribunal declines to make a PFEO.

Signed



Karen Moore, Chairperson

20 December 2023