

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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 Reference: FTS/HPC/PF/21/1755

Property address: Drumlea Estate, 6 School Lane, Drumoak, AB31 5EA (“the House”)

The Parties

Mr Gerard Buda, 6 School Lane, Drumoak, AB31 5EA (“the Homeowner”)

James Gibb, Bellahouston Business Centre, 423 Paisley Road West, Glasgow, G51 1PZ (“the Property Factor”)

Tribunal Members

Ms H Forbes (Legal Member)

Mr C Hepburn (Ordinary Member)

Decision

The First-tier Tribunal (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 paragraphs 1.1b.A.b, 1.1b.C.e, 2.1, 2.5, 3.2, 7.1 and 7.2 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”).

The decision is unanimous.

Background

1. By application dated 14th July 2021, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with the Code of Conduct for Property Factors (“the Code”). The Homeowner also alleged a breach of the Property Factor’s duties. Details of the alleged failures were outlined in the Homeowner’s application and associated documents.

2. Written representations and productions were lodged on behalf of the Property Factor on 5th and 8th November 2021.
3. A Case Management Discussion (“CMD”) took place by telephone conference on 19th November 2021. The Homeowner was in attendance. The Property Factor was represented by Ms Suzanne Cameron and Mr Nic Mayall.
4. There was discussion concerning the presentation of productions and written representations by both parties, in advance of a hearing. The Homeowner agreed to re-submit email evidence which could not be easily read in its current format. The Property Factor’s representatives agreed to re-submit their productions in one electronic document, if at all possible. There was some discussion about the fact that multiple copies of the Property Factor’s Written Statement of Services were contained within the Property Factor’s documents. Mr Mayall agreed to look into this matter and ensure only relevant documents were lodged. There was discussion regarding the alleged breaches of the Code and property factor duties as set out in paragraphs 1 to 7 of the Homeowner’s written statement A1. The Homeowner agreed to provide clarity in relation to this matter.
5. Mr Mayall raised an issue as to whether the Homeowner had referred to the correct paragraphs of the Code in his allegation that there had been a breach under section 1.1b and paragraph 5.9. The Homeowner said this was the correct section as the land that was managed by the Property Factor does not belong to the homeowners. Mr Mayall said further submissions may be made in this regard.
6. The case was continued to a hearing.
7. By email dated 14th January 2022, the Homeowner submitted amended representations with productions.
8. By email dated 19th January 2022, the Homeowner submitted a witness list.
9. By email dated 24th January 2022, the Property Factor submitted a copy of the Development Schedule in place at the time of termination of the contract between the parties.

The Hearing

10. A hearing took place by telephone conference on 26th January 2022. The Homeowner was in attendance. He was supported by Ms Davis. The Property Factor was represented by Ms Suzanne Cameron and Mr Nic Mayall.

Preliminary Matters

11. The Tribunal raised some preliminary matters as follows:
 - (i) **Development Schedule** – Mr Mayall said the Homeowner had submitted an older version of the Development Schedule but the

document submitted by the Property Factor on 24th January 2022 was the correct one as it was in place when the contract terminated. The Homeowner said he had no objection to the document being lodged. It was his position that it had not been circulated to homeowners but may have been on the client portal. He was unable to check this as he can no longer access the portal. The Tribunal agreed to accept the late lodging of the document.

- (ii) **Witness** – There was some discussion about the Homeowner’s witness. The Homeowner said he intended to call the witness if allegations were made about his character. Mr Mayall said he had never met the Homeowner, but a complaint had been escalated solely because there were issues when dealing with the Homeowner.
- (iii) **Documents** – There was some discussion about the documents to be referred to at the hearing. The Homeowner’s documents had been compiled into a PDF of 157 pages, which could be referred to at the hearing, although some present also had hard copy of the documents. The Property Factor representatives confirmed they had not lodged anything further, despite the discussions at the CMD about tidying up their productions into one document.
- (iv) **Paragraph 1.1b** – The Homeowner asked whether the Property Factor now accepted that this paragraph applied to his application. Mr Mayall said he would not be challenging this.

Findings in Fact

12.

- (i) The Homeowner is the heritable proprietor of the Property, which is one of 35 properties constructed around 2006.
- (ii) Drumlea Residents Association (“DRA”) was formed in May 2018.
- (iii) The Property Factor registered as a Property Factor on 23rd November 2012 under registration number PF000103.
- (iv) The estate includes approximately 3.6 hectares of communal land/woodland and wayleaves areas for which the DRA has a maintenance responsibility. This land is in the ownership of Stewart Milne.
- (v) The Property Factor was appointed by the DRA to manage the estate from 11th January 2019.
- (vi) A Scope of Work was drawn up and agreed between the parties in terms of the works to be carried out by the Property Factor.
- (vii) On 26th September 2019, the development manager (“SW”) did not attend a scheduled estate inspection with DRA committee members. On

following this up, the Homeowner was given different reasons on several occasions by different members of the Property Factor's staff for SW's failure to attend.

- (viii) At the insistence of the Homeowner and the DRA, a meeting took place on site between the parties on 6th February 2020. Ms Cameron ("SC") attended on behalf of the Property Factor and said she had had difficulties in accessing SW's files to obtain information on the estate. The Homeowner provided the details to SC by email on 18th February 2020.
- (ix) A further meeting/inspection took place on site on 27th February 2020. The Homeowner and the DRA complained about the lack of action arising from concerns raised at the earlier meeting and highlighted problems with tipping of excavation soil on their land.
- (x) On 6th March 2020, the DRA wrote to the landowner, Stewart Milne, regarding the tipping, copying the Property Factor into the email.
- (xi) On 10th March 2020, the Homeowner emailed the Property Factor, as no action had been taken.
- (xii) The Property Factor wrote to the person responsible for the tipping on 12th March 2020.
- (xiii) From March 2020 to June 2021, the service provided by the Property Factor was curtailed due to the Covid-19 pandemic. Site inspections were carried out on 19th October 2020 and 23rd November 2020.
- (xiv) The Property Factor charged homeowners the normal fee throughout the period during which the service was affected by the Covid-19 pandemic.
- (xv) A formal written complaint was lodged by the Homeowner on 1st July 2020.
- (xvi) Discussion took place between the Homeowner and Group Managing Director ("DR") regarding outstanding issues. It was agreed between the Homeowner and DR on 31st August 2020 that the Property Factor would make payment in the sum of £30 to each homeowner as compensation.
- (xvii) On 1st September 2020, DR wrote to homeowners stating that the compensation sum would be £20 each.
- (xviii) By letter dated 22nd March 2021, the DRA informed the Property Factor that the contract was terminated with three months' notice.
- (xix) The Property Factor acknowledged receipt of the letter on 29th March 2021 and stated that the Aberdeen team would be in touch to confirm the process for conclusion of the account.

- (xx) On 11th May 2021, the Property Factor wrote to all homeowners regarding conclusion of the account, stating that final service charge invoices would be issued within the November 2021 billing cycle, and refunds issued to homeowners in December 2021.
- (xxi) Following complaints by homeowners, the Property Factor stated by letter dated 17th May 2021 that final service charge invoices would be issued within the August 2021 billing cycle, and refunds issued to homeowners in December 2021.
- (xxii) Services ceased on 21st June 2021.
- (xxiii) The landscaping contractor providing services to the development issued their final invoice before the end of June 2021.
- (xxiv) A formal written complaint was lodged by the Homeowner on 10th June 2021.
- (xxv) The complaint was acknowledged immediately but the Homeowner was not informed that it was accepted nor was it allocated a unique reference number, in line with the Property Factor's complaints procedure.
- (xxvi) The Property Factor escalated the complaint to stage 5 of its complaints procedure.
- (xxvii) The complaint was dealt with by DR.
- (xxviii) The Homeowner received a refund of his balance from the Property Factor in December 2021.

Item 1

Communication – alleged failures to comply with paragraphs 2.1 and 2.5 of the Code and section 6 of the Written Statement of Services (“WSS”)

The Homeowner's position

13. The Homeowner set out his case, based on the document entitled 'Inventory Item A1'. He said the DRA had been entirely happy with the Property Factor when they dealt with SW. After she failed to turn up for their meeting in September 2019, the homeowners eventually pursued the matter. Upon calling the Property Factor, they were given several different excuses for SW's absence, including correspondence from DR stating that SW left the Property Factor's employment in September 2019. It later transpired that this information was incorrect.
14. At the meeting on 6th February 2020, the Homeowner agreed to provide SC with records of work carried out under SW's management, and did so. Several issues were discussed at the meeting including work required to the SUDS pond ditch, a fallen tree, and the dumping of excavation spoil.

- 15.** At the meeting on 27th February 2020, the Homeowner described himself and his co-chair as being 'robust' with SC about the fact that actions from the previous meeting had not all been dealt with, and no record of the meeting had been produced. The Homeowner said that the minute of both meetings was later uploaded to the Property Factor's portal. He referred to a screenshot which showed that the minutes were not on the portal on 4th October 2020. The DRA AGM was also referred to at the meeting and it was pointed out that no annual report had been issued to members. This had been done 3 weeks before the AGM the previous year. The AGM was postponed due to the Covid-19 outbreak.
- 16.** The DRA lodged a formal complaint on 1st July 2020 (Item D). This was escalated to DR on 3rd July 2020. Discussions took place between the Homeowner and DR. There were 27 communications between them in the period to the end of August 2020. The Homeowner described a professional relationship between himself and DR. A spreadsheet was produced by DR to ensure that all issues were recorded (Item D1 – page 67/157). The committee members noticed a significant number of inaccuracies within the information contained in the spreadsheet. The committee responses were inserted in the last column in the spreadsheet. DR contacted the Homeowner after reading the comments and said he was upset that the information he had been given by Property Factor staff was incorrect.
- 17.** The Homeowner said the Property Factor had failed to comply with paragraph 2.1 of the Code, which states: *You must not provide information which is misleading or false, by:*
- (i) Including and disseminating inaccurate information within the spreadsheet. It was the Homeowner's position that there was an inaccuracy in almost every cell of the spreadsheet.
 - (ii) Providing inaccurate information regarding SW's employment – the information given was misleading. Responding to questions from the Tribunal as to why the DRA felt they were entitled to information regarding SW's employment, which might be sensitive information, the Homeowner said they wanted to know why they were not getting a service. They were being misled as to whether or not the service would resume upon her return.
 - (iii) Agreeing that the homeowners would receive a compensatory payment of £30 and then amending this to £20. The initial offer had been £10 per homeowner. This was not acceptable. Homeowners suggested £40. The Homeowner and DR had negotiated and agreed £30, only to be told the following day that DR had changed his mind and decided to pay £20 per homeowner.
- 18.** The Homeowner said the Property Factor had failed to comply with paragraph 2.5 of the Code, which states: *You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond.*

Your response times should be confirmed in the written statement. It was the Homeowner's position that the Property Factor had failed to respond timeously to complaints regarding the tipping of excavation spoil.

The Property Factor's position

19. In relation to paragraph 2.1, Mr Mayall made the following representations:

- (i) The spreadsheet was not usually shared with homeowners. It was a working document. Although it may contain inaccuracies, there is a huge distinction to be made between inaccurate and false or misleading information.
- (ii) It was not surprising that different people within the organisation gave different explanations regarding SW, as there were different reasons for her absence, including annual leave and sick leave. This was not misleading or false. Responding to questions from the Tribunal as to the normal procedure when someone is on sick leave, Mr Mayall said it was expected that SW would pick up the work on her return from annual and/or sick leave. Mr Mayall said he could not see any evidence that DR had made any mistake in discussing the date when SW left the organisation.
- (iii) DR was entitled to review the decision regarding the compensatory payment. It was a goodwill gesture. No misleading or false information had been provided.

20. In relation to paragraph 2.5, Mr Mayall said there was a lack of evidence of a failure to respond to emails or letters in relation to the matter of excavation spoil. Paragraph 2.5 of the Code specifically refers to letter or email complaints or inquiries and there was no letter or email in relation to this matter.

21. Ms Cameron said she accepted that the DRA had written to the landowner. She then contacted the landowner and the homeowners in this regard. On 12th March 2020, she responded to the Homeowner.

Response from Homeowner

22. The Homeowner said that the DRA had written to the land owner, Stewart Milne about the excavation spoil, and had copied the letter by email to SC, two weeks after their initial meeting in February. The Homeowner undertook to try to locate the document within his productions, but found that it had not been produced. There was some discussion about section 6 of the WSS which relates to communication arrangements. The Homeowner said SC had not responded to his email within the 5 days mentioned in the WSS.

23. The Homeowner said the status of the spreadsheet within the organisation was irrelevant. It was information that was disseminated. He was not aware that it was an internal document.

- 24.** The Homeowner referred to page 156/157 of his productions, which included an excerpt from an email from DR showing that he apologised for his mistake in relation to the date of SW's departure from the company.

Decision of the Tribunal

Paragraph 2.1 of the Code

- 25.** The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. Although there were errors within the information in the spreadsheet which was issued to the Homeowner as a working document, the Tribunal did not consider this to fall within the scenario envisaged by this paragraph of the Code, which provides that the Property Factor must not provide information which is misleading or false. It would seem that the Homeowner and DRA were immediately able to identify incorrect information and correct it as required. The Homeowner was not misled in any way by the information in the spreadsheet, and DR apologised for any incorrect information.
- 26.** While the Tribunal considered that the Property Factor could have managed the situation better in relation to the absences of SW, by ensuring that the Homeowner and DRA had a contact person within the business, and that proper management of the development continued, the Tribunal considered that there were mitigating circumstances that led to different information being provided by different people. This was clearly a sensitive situation, and it may have been the case that the full circumstances of SW's absences were not known to everyone within the business.
- 27.** The Tribunal did not consider that the Property Factor had provided false or misleading information by agreeing to a compensation payment and then rescinding their agreement and proposing a different sum. The Tribunal considered that the Homeowner was justifiably aggrieved at the actions of DR in this regard, however, his actions did not constitute a failure to comply with this particular paragraph of the Code. The Tribunal observed that the Property Factor's written representations stated at page 5/104 that DR had not agreed the sum of £30, when it was actually clear from email evidence that he had agreed the sum and then changed his mind.

Paragraph 2.5 of the Code

- 28.** The Tribunal did not find that the Property Factor had failed to comply with this paragraph of the Code. The paragraph of the Code is specific to email and letter correspondence, and, although it appeared that the matter had been notified verbally to the Property Factor at the meeting on 6th February 2020, there was an insufficiency of evidence before the Tribunal regarding the matter of email or letter correspondence about the excavation spoil that would be required in order for the Tribunal to make a finding in this regard.

Item 2

Contractual Duties – failure to comply with paragraph 2.1 of the Code

The Homeowner's position

- 29.** The Homeowner stated that the Property Factor had not fulfilled their contractual duties as set out in the Scope of Work agreed between the parties prior to commencement of the contract (Item C p59/157). In written representations, the Homeowner had stated that the Property Factor had failed to carry out their contractual duties between 19th August 2019 and 6th February 2020, failed to act timeously regarding the excavation spoil, failed to manage the financial account appropriately by failing to adjust the direct debit to take account of 'imposed' credit, and failed to reduce the management fee despite absence of site inspections during the Covid-19 pandemic. The written representations also referenced inspection reports on the Property Factor's portal that the Homeowner suspected had not taken place.
- 30.** The Homeowner referred to the uploaded inspection reports and said both were identical and apparently signed by SW. If the evidence provided by DR in relation to when SW's employment ended, then she was not in their employment at the time the reports were signed. The reports state that the inspections were not accompanied, despite agreement in the Scope of Work that all inspections would be accompanied. There had been no contact from the Property Factor to say an inspection would take place on 29th November 2019.
- 31.** It was the Homeowner's position that the Property Factor had provided false or misleading information in this regard.

The Property Factor's position

- 32.** Mr Mayall said there was no false or misleading information provided. It was his position that the Code is clear that the WSS is the contract between the parties, so there is no dubiety over the contract.
- 33.** The inspection reports were carried out by SW, who ultimately left the company in January 2020. Mr Mayall stated again that he had only seen an extract of the email referred to by the Homeowner where DR was said to have made an error in relation to her leaving date. Even if DR had made a mistake, it was not intentionally misleading. DR was not directly involved in running the Property Factor's business before February 2020.

Response from Homeowner

- 34.** The Homeowner said it was critical that the Property Factor had agreed to abide by the terms of the Scope of Work, which formed part of the contract between the parties. He referred to page 3 of the Code which states that, in applying the standards in the Code, the [Tribunal] may take into account the title deeds and/or any agreement relating to the land which is managed or maintained by the property factor.

35. The Homeowner said DR was the Group Manager when concerns were raised by the DRA. He ought to have checked all the information before responding to the DRA.
36. The Homeowner said it was inconceivable that SW was still in employment and was not responding to the calls and emails from the Homeowner and the DRA,

Decision of the Tribunal

37. The Tribunal did not find that there had been a failure to comply with paragraph 2.1 of the Code. Although providing excerpts of emails rather than the original emails is not the best way to present evidence, the Tribunal accepted the Homeowner's evidence that DR had provided incorrect information in this regard, which information confused matters in relation to the signatures on the inspection reports. However, this did not constitute misleading or false information.
38. The Tribunal observed that it had expected this item to be progressed as a failure in carrying out property factor duties, however, the Homeowner was clear that he considered this to be a breach of paragraph 2.1 of the Code.

Item 3

Failure to honour agreed level of compensation

39. Neither party had any further representations to make on this point, which had been discussed previously.
40. The Tribunal made no findings in this regard, as the matter appeared to have been dealt with under Item 1, and no further alleged failure to comply with the Code or failure to carry out property factor duties had been highlighted.

Item 4

Charging of full fees during COVID restrictions – failure to comply with paragraph 2.1 of the Code

The Homeowner's position

41. It was the Homeowner's position that the Property Factor ought to have reduced the fees charged to homeowners during the period between March 2020 and June 2021, when no inspections or reports were carried out. No landscaping work was taking place, and the landscaping contractor did not charge during this period. The DRA requested that the Property Factor provide a pro-rata refund in this regard, as the Property Factor had failed to fulfil their contractual duties. This constituted a failure to comply with paragraph 2.1 of the Code.

The Property Factor's position

42. Mr Mayall said that inspections are a small part of the overall management of a development. All other administration was ongoing. It had been made clear to the homeowners that the Property Factor would not be reducing the management fee.

Decision of the Tribunal

43. The Tribunal did not find this to be a failure to comply with paragraph 2.1 of the Code. It was not clear to the Tribunal what false or misleading information had been provided by the Property Factor.

Item 5

Failure to manage termination of contract – failure to comply with paragraphs 2.1, 2.5 and 3.2 of the Code

The Homeowner's position

44. The Homeowner said that the DRA asked for homeowners' funds to be returned within 2 weeks of the date of termination which was 21st June 2021. This had been notified to the Property Factor on 22nd March 2021. All homeowners had a positive balance. There was an exchange of emails following the Property Factor's letters of 11th and 17th May 2021. These letters referred to payment being made to homeowners in December 2021. Different dates were given by different members of Property Factor staff. On 11th June 2021, DR had written in an email to the Homeowner (p144/157) that final invoices from suppliers were awaited. There was only one contractor providing services and the Homeowner understood the contractor had submitted their final invoice before the end of June 2021. There was no correspondence from the Property Factor during August. On 22nd September 2021, the Homeowner chased the matter up again. One homeowner raised a small claim action, another used the statutory notice procedure. In October 2021, the Homeowner became aware that two homeowners had received their funds, and seventeen had not. By email dated 20th October 2021 (p147/157), the Development Manager ("PB") stated that payments should be processed within the 29th October 2021 payment run. By email dated 2nd November 2021, PB informed the Homeowner that payment would be made in December. The Homeowner received the payment in December 2021. The information provided in this regard was misleading and false, according to the Homeowner. There had been a failure to comply with paragraphs 2.1 and 2.5 of the Code.
45. It was the Homeowner's position that the Property Factor had failed to comply with paragraph 3.2 of the Code, which states: *Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.*

The Property Factor's position

- 46.** In response to the allegation of failure to comply with paragraph 2.1 of the Code, Mr Mayall said there had to be intent in order for the provision of information to be found to be false or misleading. The Property Factor had provided information regarding the final account. Despite mistakes in the information provided, this stopped short of being false or misleading.
- 47.** In relation to paragraph 2.5, Mr Mayall said the Property Factor had written to the Homeowner regarding termination of contract in May 2021. There was also email communication between the Homeowner and DR. There was no breach of this paragraph.
- 48.** In relation to paragraph 3.2, Mr Mayall said there was an error in the first letter sent out on 11th May 2021. It was amended quickly, although the issue was confused because December 2021 was left in the letter. The floats were repaid in August. The Property Factor now asks homeowners for bank details in order to make repayments. At the time of this matter, the Property Factor relied on homeowners contacting them and providing their bank details. Mr Mayall said the Property Factor conceded that 3.2 had not been complied with, but a final invoice was produced.

Response by the Homeowner

- 49.** The Homeowner said he was aware that all but three homeowners paid the Property Factor by direct debit, therefore, the Property Factor would have had their bank details.
- 50.** There was some discussion around the term 'final invoice'. Mr Mayall said the final invoice was the invoice issued at the end of the quarter on 28th August 2021. The Homeowner said it was not appropriate to call that document the final invoice as it was a standard pro-forma invoice. The funds should have been returned within 12 weeks, and not 6 months.

Decision of the Tribunal

Paragraph 2.1

- 51.** The Tribunal found there had been a failure to comply with this paragraph of the Code. The Property Factor provided misleading and false information to the Homeowner in relation to the matter of return of homeowners' funds by carelessly and repeatedly giving incorrect information as to when the funds would be returned.

Paragraph 2.5

- 52.** The Tribunal found there had been a failure to comply with this paragraph of the Code, as, despite acknowledging the correspondence of 22nd March 2021 giving notice of termination of the contract, the Property Factor failed to correspond further until 11th May 2021 which is not within prompt timescales.

Paragraph 3.2

53. The Tribunal found that there had been a failure to comply with this paragraph of the Code. The Property Factor did not return the Homeowner's funds automatically at the point of settlement of the final bill. The Tribunal observed it was incumbent upon the Property Factor to ensure that funds were returned, and that it was not the responsibility of homeowners to request said funds.

Item 6

Failure to administer complaints in accordance with published procedure – failure to comply with paragraphs 7.1 and 7.2 of the Code

The Homeowner's position

54. Paragraph 7.1 states: *You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.*
55. The Homeowner said his complaint of 10th June 2021 had been acknowledged by the Property Factor upon receipt. The Property Factor's complaints procedure states that on receipt of a formal complaint, after acknowledgement, if accepted, it will be registered and a unique reference number allocated. The Homeowner was never informed that his complaint had been accepted, nor was he given a unique reference number. Stage 2 of the procedure states that the complaint will be passed to the relevant Senior Manager for investigation. The Homeowner's complaint was dealt with by DR, despite the fact that he had been intimately involved in the case for approximately two years. It was the Homeowner's position that DR was not an appropriate person to carry out the investigation. Stage 3 of the procedure states that the complaint will be fully and formally investigated by an appropriate Senior Manager. Stage 4 states that a response will be received from the investigating Senior Manager, and that findings will be signed off by a Senior Manager. The Homeowner said this suggests a different person to the one that carries out the investigation will sign it off. In this case, DR signed off all responses to the Homeowner's complaint. It was the Homeowner's position that the complaints procedure should be fair, unbiased and professional, and it was not. He ought to have been told that his complaint would not follow the stages in the complaints procedure. The procedure should be clear and it is not. He referred the Tribunal to the Property Factor's response dated 5th November 2021 (p6/104) which stated that the complaints procedure had not been followed and his complaint had been moved straight to stage 5.
56. Paragraph 7.2 states: *When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the [Tribunal].*

57. The Homeowner said he did not receive any such notification. He wrote to the Property Factor to ask if the complaints procedure was at an end, and he was told to contact them if he had any further queries.

The Property Factor's position

58. Mr Mayall said the Property Factor has a complaints procedure set out in the WSS and online. The Homeowner's complaint was investigated by DR because he and the Homeowner had been communicating for some time and it made sense for him to carry out the investigation. Only the Chief Executive is more senior than DR. The complaint was escalated straight to stage 5. There would have been no sense in doing otherwise. Mr Mayall referred the Tribunal to page 12/104 and an email from the Property Factor's Compliance Manager ("CF") dated 21st June 2021 which stated that DR's response had been a full response to the complaint, but if the Homeowner felt there was something that had not been responded to, he could provide clarification. It was Mr Mayall's position that this email confirmed it was a final response. Responding to questions from the Tribunal as to whether it was usual to escalate a complaint straight to stage 5, Mr Mayall said it was not, but it was done for two reasons in this case. Firstly, because of the involvement of DR; and secondly, because the Aberdeen staff were not comfortable with the Homeowner's tone.

Response from Homeowner

59. The Homeowner said he dealt with SW and SC in the Property Factor's Aberdeen office. He also dealt with two junior members of staff, both of whom had asked for his assistance with contractual and building-related matters. He had helped them in his spare time. He had not dealt with anyone else in the Aberdeen office.

Decision of the Tribunal

Paragraph 7.1

60. The Tribunal found there had been a failure to comply with this paragraph of the Code, in that the Property Factor, by their own admission, failed to follow their complaints procedure and moved the Homeowner's complaint to stage 5, without informing him of this. The Tribunal made no findings in regard to the content of the complaints policy and its clarity. The Tribunal observed that it would have been preferable if a different member of senior management had dealt with the complaint.
61. The Tribunal was not persuaded by the Property Factor's evidence that the complaint had to be dealt with in this way due to the tone used by the Homeowner. No compelling evidence of any unreasonable behaviour or tone that justified a departure from their usual complaints procedure was put forward by the Property Factor, and the Tribunal considered that the Homeowner was justifiably aggrieved by suggestions regarding his conduct.

Paragraph 7.2

62. The Tribunal found there had been a failure to comply with this paragraph of the Code. The email of 21st June 2021 from the Compliance Manager did not fulfil the requirements of paragraph 7.2.

Item 7

Failure to comply with the Code of Conduct in relation to the contents of the Written Statement of Services

The Homeowner's position

63. The Homeowner set out his concerns as follows:

1.1b Alternative standards for situations where the land is owned by a land maintenance company or a party other than the group of homeowners

The written statement should set out:

A. Authority to Act

b. a description of the use and location of the area of land to be maintained, including a map where possible (this information must be kept up-to-date);

The Homeowner said this was not included in the WSS.

B. Services Provided

c. Any work or services which are a requirement of the property titles should also be stated;

The Homeowner said the services such as maintaining the land, cutting grass, keeping the area tidy and maintaining the SUDS pond and ditch were not set out in the WSS.

C. Financial and Charging Arrangements

d. how many properties contribute towards maintenance costs for the area of land maintained;

f. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);

h. any services or works that may incur additional fees and charges, including when or how they may arise (this may take the form of a —menu of services) and details of how these fees and charges are calculated and notified;

The Homeowner said this information was not contained in the WSS. There was no specific mention of how the float would be repaid to homeowners.

F. How to End the Arrangement

o. clear information on how to change or terminate the service arrangement between you and the homeowner, including signposting to the applicable legislation. This information should state clearly any —cooling off" period, period of notice or penalty charges for early termination.

The Homeowner said there was no clarity in relation to this information.

- 64.** There was some discussion about paragraph 5.9 of the Code. It was agreed that this was not relevant to the case before the Tribunal as no public liability insurance was in place.

The Property Factor's position

- 65.** Mr Mayall said the Development Schedule forms part of the WSS. The WSS is a generic document, and it must be read with the Development Schedule, as stated in the documents. The Development Schedule is individual to the development. It contains the address of the development, but does not have a map. This is not necessary as it is clear what is to be maintained. The services are set out in the Development Schedule and this does not have to be as specific as stated by the Homeowner. Paragraph 5.5.3 of the WSS refers to the homeowner's share of costs in invoices. It is very clear where homeowners will find their share of costs. Paragraph 5.3 provides full details regarding the float. The amount of the float is set out in the Development Schedule. The management fee is all inclusive, but if there were additional costs, the homeowners would be notified. Responding to questions from the Tribunal, Mr Mayall confirmed that paragraph 4.6.1 of the WSS sets out the procedure where there are additional fees. The Property Factor does not have a menu of services as mentioned in the Code. There are very few scenarios where this might arise. Section 11 of the WSS specifies what is required on ending the arrangement.

Response from Homeowner

- 66.** The Homeowner pointed out that the recent Development Schedule lodged by the Property Factor referred at Section 03 to services that were not provided to the development, which meant the document was not individual to the development. It was his position that the services agreed in the scope of work should be included in the WSS. The DRA had expected the Property Factor to assess the title deeds for the development and include all the liabilities in the WSS or Development Schedule. A generic document cannot contain everything, and the situation of these homeowners was unusual.

Decision of the Tribunal

- 67.** The Tribunal found there had been a failure to comply with paragraphs 1.1b.A.b and 1.1b.C.e. There was no description of the use and location of the area of land in either the WSS or the Development Schedule. The only reference to the area of land in the Development Schedule is 'Drumlea', followed by the postcode and development number. This does not fulfil the

requirements of the Code. There was no indication in either document of the number of properties that contribute towards maintenance costs for the area of land maintained. Although this is contained within invoices, that does not satisfy the requirements of the Code. The Tribunal considered that all other information provided was sufficient to satisfy the Code.

Summary by Homeowner

- 68.** The Homeowner said this had been an extremely stressful process. It was beyond comprehension that the procedure of returning the funds to homeowners had taken 6 months. He had a great relationship with SW and there was no record of him having spoken to people in the manner alluded to by the Property Factor.

Summary on behalf of the Property Factor

- 69.** Mr Mayall said he struggled to understand the Homeowner's case and where the actual breaches occurred, as there was a lack of evidence.

Proposed Property Factor Enforcement Order (PFE0)

- 70.** Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFE0. The Tribunal decided to make a PFE0.
- 71.** In considering the terms of the PFE0, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failure to comply with the Code.
- 72.** Section 19 of the Act requires the Tribunal to give notice of any proposed PFE0 to the Property Factor and allow parties an opportunity to make representations.
- 73.** A proposed PFE0 accompanies this decision. Comments may be made in respect of the proposed PFE0 within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

Right of Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member and Chairperson
9th February 2022