

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision on Homeowner's application: Property Factor (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/Property Factors/20/0015

The Parties:-

Miss Joanna Wood and Mr Cameron Caine, 50 Schoolhill, Aberdeen, AB10 1JQ ("the Homeowners")

Aberdeen Property Leasing, Rosemount House, 138-140 Rosemount Place, Aberdeen, AB25 2YU ("the Property Factors")

The Tribunal:-

**Melanie Barbour (Legal Member)
Andrew Taylor (Ordinary Member)**

DECISION

The Factor has failed to carry out its property factors' duties. The Factor has failed to comply with its duties under section 14 (5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act") in that it did not comply with sections 1 Bc, Bd, Ce, Cf; 2.1, 2.4, 2.5, 3.3, 4.5, 6.1 and 6.4 of the Code. The decision is unanimous.

INTRODUCTION

1. By application dated 30 December 2019, the Homeowners complained to the Tribunal that the Property Factor was in breach of Sections 1, 2, 3, 4, and 6 of the Code of Conduct and had failed to carry out its Property Factors' duties.

2. By Notice of Acceptance dated 31 January 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned to take place on 3 April 2020. Written representations were to be submitted by 3 March 2020. This

date was extended to 20 March 2020. This hearing was postponed due to the COVID-19 Pandemic. A further hearing was assigned for 6 October 2020. The hearing was subsequently postponed at the request of the Property Factors. A further hearing was assigned for 4 November 2020. This hearing was subsequently postponed at the request of the Property Factors as the full period for formal notification had not been provided to them. The hearing was converted to a case management discussion on that date.

3. The application proceeded to hearings by WebEx. Hearing dates took place on 10 December 2020, 9 March 2021, 13 April 2021, 9 June 2021, and 20 September 2021. Both parties thereafter lodged final written submissions and responses by 18 October 2021.
4. The first hearing considered preliminary matters set out in the direction issued. The tribunal was unable to determine the preliminary matters at the conclusion of that hearing; the subsequent hearings considered the substantive complaints against the Property Factor, those matters and the preliminary matters were determined at the conclusion of the hearing and on receipt of the written submissions.
5. Both Homeowners attended the case management discussion and hearings. Daniel Byrne, Advocate together with Laura Lee and Beverly Atkinson from Messrs DAC Beachcroft appeared on behalf of the Property Factors.

EVIDENCE

6. Evidence was presented orally and in writing. The tribunal had before it the following papers (including productions):-
7. Homeowners: Application; Written submissions including productions; Homeowner's Written representations; Homeowner's Productions 1-20.
8. The Property Factors' Written representations; Property Factors Productions 1-35; Property Factors Affidavits from Simon Ivers, Sarah Jones, Lesli Jamieson, Bruce Kelly, Deborah Poppleton; Property Factors Inventory of Authorities.

HEARING

9. The tribunal heard evidence from a number of witnesses for the Property Factors (Marjorie Davidson, Simon Ivers, Sarah Jones, Lesli Jamieson and Bruce Kelly) and the Homeowners gave evidence themselves. On the whole the tribunal found each of the witnesses to be credible and reliable. We considered that they had given their evidence to the best of their ability.

10. Authority to Act and Extent of Duties

11. There was no dispute between the parties that the Property Factors had the authority to act as property factors for the development. What was less clear was the basis on which the Property Factors had derived their authority.

12. The Homeowners submitted that the Property Factors had been appointed in terms of the title deeds in around 1995. The Homeowners also referred to the Written Statement of Services submitted with their application asserting that this also determined the authority to act. The Homeowners referred to their written representations and advised that the Property Factors had been authorised to act since at least 2010.

13. In relation to the extent of the Property Factors' duties the Homeowners referred to the title deeds and the Written Statement of Services. They submitted that the Property Factors were bound by the terms of the title deeds, due to property factor guidance. The Homeowners advised that there were specific burdens in the deeds which set out the Property Factors duties. They referred to the title deeds at condition 7(c) which they submitted provided that the owners had been required to appoint a property factor. The advice that they had received from neighbours was that the Property Factors had been appointed in 1995 in terms of the title deeds. They submitted that there was no other written contract between the Property Factors and the Homeowners, and the Property Factors should be held to the title deeds.

14. The Property Factors advised that they had been the factors for the development longer than anyone currently working there could recall; they submitted that the appointment was based on custom and practice; the Property Factors did not have any written documents establishing a service agreement for the development. They

submitted that the title deeds allow for the appointment of property factors but did not in themselves appoint the Property Factors or set the extent of their duties. They submitted that the Property Factors' duties were set out in the Written Statement for Services; Welcome Letter; and annual budget.

15. Bruce Kelly's statement makes reference to how the factors may have been appointed. He suggested that there may have been a residents meeting and the Property Factors would have offered to be factors at that meeting. Thereafter, they would have written to owners setting out what services they would provide. It did not appear from what he said in evidence that the Property Factors had been appointed in terms of the title deeds.
16. The Homeowners submitted that the Written Statement of Services was a generic document and was vague. They submitted that while the Property Factors had not acted in accordance with the title deeds at all times, at other times the Property Factors had referred to the title deeds to determine what they should be doing. They suggested that the title deeds were clear and specified the Factors' duties; and the Homeowners had title and interest to enforce the title deeds. They noted that the Property Factors operated as factors for the entirety of the Homeowners' ownership. They submitted that in considering the title deeds it was clear that part of their duties was that the Property Factors were to carry out external decoration and internal painting.
17. The Property Factors referred to the Welcome Letter dated 10th February 2011 with the annual budget attached to it. The Property Factor suggested that this was representative of the factoring services provided. The Property Factors also referred to the amount of factoring fee charged and suggested that given the low level of fee charged this had to be instructive as to the extent of the Property Factors duties. They disputed that they had been instructed in terms of the title deeds.
18. The Homeowners disputed that the annual budget and Welcome Letter constituted the contract. The Homeowners advised that the annual budget did not confirm what the factoring fee covered; and they did not know what the factors were doing for their fee. They advised by way of example that the Written Statement of Services states that the Property Factors carry out inspections, but this was not included in the annual budget. They suggested that there were lots of issues that were not specified in the annual budget. The Welcome Letter and annual budget were no more than that

and they did not constitute a contract. The factoring fee did not represent what they were doing each year, nothing was budgeted for, they did not know what the Property Factors were doing. There was no plan setting out what the Property Factors were doing. They were not clear about what the factoring fee was for. The Homeowners advised that the Welcome Letter did not set out what services were included. They advised that the Written Statement of Services included things other than what was in the Welcome Letter. It was the title deeds that set out the detail of the factors' duties which included, the communal and other matters. The Homeowners advised that as the Property Factors were referred to in the title deeds, and as they had a copy of the deeds then they were bound by them.

19. The Property Factors submitted that the title deeds provided the ability to appoint a property factor, but they were not a contract with the Property Factor. The Property Factor was not named in them. The Homeowners submitted that nonetheless, the Property Factor needed to act in accordance with the terms of them. The Homeowners advised that the Property Factors had relied on them and referred to the title deeds during their appointment and therefore they had accepted that they were bound by them.
20. The Property Factors advised that maintenance was an obligation upon the Homeowners. The Homeowners disputed this and said the duty on the Property Factors arose from the title deed conditions. The Property Factors advised that the title deeds merely supplied the Homeowners with the power to appoint a property factor. The title deeds provided for the appointment of a property factor, but they did not themselves appoint one.
21. The Homeowners referred to sections of their appendix evidencing when the Property Factors had referred to the title deeds; e.g., line 176 referring to a review of the subjects; line 404 refers to the title deeds mentioning that the factors were working to the title deeds in 2016. The Homeowners also advised that they were not provided with a note of annual service charges; and they did not receive an annual account.
22. The Property Factors' Marjorie Davidson gave evidence advising that there was not anything in writing confirming the authority to act. In relation to the extent of the Property Factors duties, she referred to the Written Statement of Services and Welcome Letter. She explained that they would refer to the title deeds from time to

time if there were matters that they needed to consider. She gave evidence that the annual budget included a contingency fee for sundry expenses and small essential repairs. Sundry matters would include, for example, roof leaks, a broken door, something unusual. Consent was not sought for these small essential repairs, given the time it would take to obtain consent. There was no need to raise special billing, it would be paid out of the annual budget.

23. The Property Factors advised that annual account statements were available, but they did not usually send statements of account out to owners; they only sent out the annual budget. The Property Factors were asked if they had done works in addition to core services, they advised that they did not go round looking for things that were wrong, but if they were contacted by an owner they would deal with it. The Property Factors stated that there were no specific services set out in the Written Statement of Services, it was a fairly generic document. It was the Welcome Letter which set out the services provided. The Property Factors confirmed that the Written Statement of Services did not refer to core services. The Property Factors confirmed that they would manage major repairs if requested. The Property Factors agreed that some of the services provided were not included in the Welcome Letter, and more detail or information could have been set out there. The Property Factors advised that the function of a property inspection was to look at the development as a whole; take photos; check that routine work was up to a reasonable standard. The Property Factors advised that if there were not sufficient funds in the sundry budget, they would write to Homeowners, explain and seek further funds for any other works which needed to be carried out. If there were exceptional repairs required they would seek funds for these before any works were carried out.
24. The members noted that there did not appear to be any clear threshold to show when additional sums would be sought in addition to the sundry budget and major additional works.
25. The Property Factors said that they did comply with the title deeds whenever possible. They also said that they worked from the annual budget drafted; the Written Statement of Services and the Welcome Letter. To work out the next years' annual budget they looked at the previous year's spending. They advised that redecoration would incur an extra factoring fee. The roof repairs in 2010 would have had been major additional works.

26. There was discussion if external decoration was a core service. The Property Factors advised that they would need to employ someone to oversee the work. The Property Factors advised they would not make a decision themselves about instructing large repairs. They would need to call a vote with the owners. Roof repairs would need a vote, as would redecoration works; it was important to put large matters to a vote and allow owners to have a say. The Homeowners queried this and suggested that the major repairs were not put to a vote; as there was no record of any votes in 2019 regarding the roof works.
27. The Property Factors advised that they were mainly a cleaning and minor repairs service, however, they could carry out project management for major repairs subject to a Homeowners vote. The Property Factors reiterated their position that their authority to act and the extent of their duties did not arise from the title deeds. The deeds allowed Property Factors to be appointed under it, and it was clear that the factors had been appointed, however, it was not clear exactly how and on what basis they had been appointed. Without evidence showing that they had been appointed to undertake all the duties set out in the title deeds, the tribunal should not find that the title deeds regulated their appointment. They suggested that support for this position could be found in the letter regarding the roof repairs sent to the Homeowners in 2011 when the factors said they did not have authority to instruct the works in terms of the title deeds. The letter showed that the factors were not undertaking these works without first seeking authority from the Homeowners. They considered that custom and practice must define the extent of their appointment; together with the contract being made up of the Written Statement of Services, the annual budget, and the Welcome Letter.
28. The Code of Conduct
29. Section 1: Written Statement of Services
30. The Homeowners explained that they had never been informed of any delegated authority threshold; the Property Factors had spent money and instructed repairs but not sought authority to do so. The Property Factors had not been transparent about this issue and works carried out on the building. A lot of work had been done without instructions being sought from the Homeowners.

31. They advised that the Written Statement of Services contained no statement of delegated authority; it was not obvious where to look; there was a reference to sundry expenses, but it was not explained how this worked. There was no clear transparent statement; no money threshold provided. It was not clear what services were being provided. The Written Statement of Services did not set out what core services were being provided; it was not clear what were additional services. It was not clear what the factoring fee was for. The Written Statement of Services was generic. They submitted that the Property Factors keep pointing to the annual budget when asked about what the Property Factors were doing. There was no set response for times set out. There was no reference to any repairs. There was no programme of works.
32. There was nothing in the Written Statement of Services about the financial and charging arrangements in place, it should have included the management fee charged. They considered that this figure should be provided or, at least point to where it could be found. The factoring fee refers to each residential unit but nothing about the commercial unit. They believed that there had been an incorrect percentage split between the properties. The Property Factors referred to the annual budget but there was no breakdown in the budget.
33. They advised that there was a reference to contingency funding in the budget, but it doesn't refer to an amount. Although there was a budget it was not a complete picture; the commercial unit was not included in the budget split. They knew that there was a floating fund but not what it was there to do.
34. The Property Factors agreed that there may have been matters which should have been included in the Written Statement of Services, and they regretted that they had not addressed these issues earlier. The Homeowners advised that they had never been advised of any clear delegated threshold. They considered that they should have been given this threshold. The factors spent money and never came to the owners for authority about what they were spending the money on. This meant that Homeowners never found out what the issues for the building were. The financial threshold was very important as a lot of repairs had been work instructed by the factors without coming to the Homeowners for approval. They advised that there was no fee structure in the Written Statement of Services, no review, and no transparency.

35. The Property Factors advised that while there was no fee structure in the Written Statement of Services, individual budgets were issued annually and showed expenditure. The Homeowners disputed this.
36. In considering communication arrangements, the Property Factors pointed out that the Written Statement of Services provided a 4-week timescale in the Written Statement of Services. The Homeowners advised that it did not mention any other timescales.
37. The Property Factors submitted that the allegations were granular, there may have been mistakes but they needed to be looked at separately, looking at them together seeks to build up a big narrative, but by themselves, they were, in fact, small and unimportant.
38. The Homeowners advised that there was no specification of the services provided; no reference to core services; the Homeowners were not clear about what were "additional works". The Homeowners referred to the title deeds in terms of setting out the duties of the Property Factors.
39. The Property Factors advised that this was disputed, the title deeds provide for the right to appoint a property factor, they did not in themselves appoint the Property Factors.
40. Section 2: communication and consultation
41. The Homeowners advised that they had several examples of failure under this heading. For example, the Property Factors had continued using favoured contractors to carry out works and not put the works out to tender, there was no due diligence carried out. They were aware that the Property Factors never did an independent review of their contractors. They considered that the Property Factors provided misleading evidence about these matters. A further example was the gutters, there was a reference to gutter cleaning two times a year; but in fact, they were only cleaned once a year.
42. For the roof repairs, the Property Factors had advised the Homeowners that they were obtaining a report about this issue; this was misleading as the Property Factors did not organise the report. There had been no proper investigation, about the roof.

There had been leaks in various flats that the Property Factors knew about, however they did not advise the other owners about the leaks. They referred to their Appendix I, the letter from the factors about seeking to appoint a conservation architect. They saw this as misleading as they did not need a conservation architect at the point the factors were seeking to have one instructed; they did not think that they needed a conservation survey to get a heritage grant; they had asked the Property Factors about this matter but considered that they were not given a proper response to this matter. They did not consider that they were given a proper response to their letter of complaint. It was an incomplete and inaccurate response.

43. The reference to small repairs was misleading, all sundry budget matters were not paid from the sundry budget; every year there was an overspend, albeit a slight amount. When the Homeowners started to review the invoices against the annual budget they noted that the figures did not add up.
44. They advised that there was no procedure to consult; no threshold for delegated matters; no authority from the Homeowners was sought; they were never consulted before January 2019, about any works. There had been overspending of budgets on sundry elements every single year, but as there was no obvious financial threshold this was not clear. The Property Factors had been taking money from other parts of the budget to pay for “sundry repairs”. The Homeowners had not been aware of this fact however as no annual accounts were ever provided. There was no procedure to consult with the Homeowners. They reiterated that there was no delegated authority or threshold; it was not clear what the core services were. As there was no threshold the Property Factors did not come and speak to Homeowners and seek additional funds for items such as roof repairs.
45. The Homeowners advised that there had not been a reasonable response to their inquiries; and responses were not sufficiently prompt. They referred to appendices D, E and G. They submitted that they had not been sufficiently answered; they had been looking for answers and did not have them. There had been no reply to their complaints from the 23rd of January 2019 until the 19th of August 2019. The Homeowners referred to several other pieces of correspondence that they had sent out that had not answered their questions. They noted that there were some responses, but they did not provide complete answers to their questions.

46. Section 3.3: Financial obligations

47. The Homeowners submitted that they should have received a yearly financial breakdown of charges; what they received however was a basic projected annual budget for the next year.
48. The Property Factors advised that this was disputed. They explained that charges were shown on the end-of-year statement, and they were available on request. The Homeowners challenged this and advised that the Property Factors had never provided details of charges made. There were never any service charge statements provided until they requested them. They submitted that the annual budget was not based on the previous year; those sums were not accurate. The Homeowners needed to know the actual work taking place. Service charge statements did not have supporting documentation, and they were not given copy invoices. The Homeowners advised that they should have received an annual financial breakdown of charges, but they did not get this. The Property Factors advised that they had a raft of documents, and they confirmed that they would provide information as requested.

49. Section 4.5: Debt Recovery

50. The Homeowners referred to their complaint which was set out in their application. They had two issues under this heading (1) they did not know what the financial recovery procedures were; and (2) they did not consider that the stated procedures were adhered to. The Homeowners advised that they had not received any written reminder of one failure by them to pay fees and they were unhappy about how they were notified about the outstanding account in front of other owners.
51. The Property Factors advised that there was a system in place, and they disputed that there was a breach of the code; there may be a concession about how they had informed the Homeowners about an outstanding invoice, as they accepted that it may not have been done well in the past, but these procedures had been rectified. The Property Factors disputed that there was a breach of the code under this heading.

52. Section 6: Carrying out Repairs and Maintenance

53. The Homeowners did not know who the appointed contractors were or how they were appointed. The Homeowners were not included in the second roof works tender when they became owners. Works had taken place around the end of 2011/2012. They believed that the further works had not been tendered for after the first tender. There had been no due diligence. No consultation with the owners.
54. In 2019 further issues with the roof came to light. The first architect used to assess the condition of the roof was a relative of one of the owners; the Property Factors had been using him to advise on the roof repairs. It was an informal arrangement. The Homeowners considered that this was inappropriate.
55. Any programme of works for core services was difficult to identify. If periodic inspections were included as a core service there should have been a programme of works in place, there was none. They advised that as soon as the threshold for the sundry budget was reached, consent should have been sought from the Homeowners for any further spending, it had not been. The Homeowners had not known that certain sums set out to pay one thing in the annual budget were being diverted elsewhere. They submitted that the Property Factors failed to notify the Homeowners about the proper costs of items and that they were spending more than the sundry budget amounts set out in the accounts. They referred to complaints set out at Appendices D and F.
56. The Homeowners did not know that there had been ongoing water ingress happening at the development for a number of years. Only the Property Factors could have known about this. They submitted that the works in 2011 had never made the roof watertight. Thereafter there had been ongoing roof repairs. They did not know if there was any warranty for those works. They were not clear as to all the works done on the roof. The roofing company had been doing repairs for the last 10 years and it was still not watertight. The Written Statement of Services sets out that the factors will check on works. They submitted that the factors' inspection system was inadequate.

57. They also referred to the repairs to the front door and submitted that these were not inspected. That work was not essential, there was no urgency to that work. They also considered that there had been no inspection of the flat roof works.
58. There was no procedure in place to keep owners informed of works done. The Homeowners advised that there was no schedule of works; no cyclical arrangements; no tendering; no consultation; they were not aware of what the periods of inspections were, and they did not know how the works were instructed to an agreed threshold. The Property Factors advised these issues were disputed.
59. The Homeowners advised that roof works were carried out in 2010-2011 by the same contractor who did subsequent works to the roof. They considered that the 2010-2011 works were linked to the later works. The earlier works had never been adequate. The Homeowners purchased the property in late 2010 they did not know of any water ingress; they understood that works had been carried out at that time and that the problem had been fixed; however, it had not been. The contractor who completed that work was the same contractor who did the later works.
60. The Property Factors queried if the Homeowners were owners at the relevant time and questioned if this issue was within the jurisdiction of the tribunal. The Homeowners advised that they purchased the property in October 2010 and the work was carried out in 2011. The Homeowners advised that the tendering had been done and works had been paid by the previous owner; further works were also paid for by the previous owners. Homeowners advised that there had been changes to the contract of works. The Homeowners had not been contacted about this change. They submitted that the repairs had not worked, and they had been paying for this issue ever since. The Property Factors disputed this issue, they had used reputable tradesmen; and the instructions to the tradesmen had been reasonable.

61. Property Factors Duties

62. 2.1 Programme of works.

63. The Homeowners submitted that there had been no programme of work for the development. The Property Factors said they would come forward with a plan of work and had given dates of when things would be done and when completed, but it was never provided. There was a lack of routine programme and maintenance. They

considered that the breach arose through the code of conduct and the Written Statement of Services. Core services would have included periodic property inspections.

64. The Property Factors advised that their service was reactive; they were not carrying out cyclical works; and that the repairs to the roof were properly instructed and carried out.
65. The Homeowners referred to an independent survey that has been instructed for the development and which highlighted the lack of maintenance to the property; they submitted that the Property Factors actions were a contributing factor to the problems in the development (Homeowners Production 6). The owners had not known what was going on and they did not have a broad picture. The Property Factors were the only party with knowledge of all works being done by contractors. They considered that there had been a breach of the Property Factors duty in relation to water ingress and water sitting on the roof. The resolution sought related to the alleged failure to maintain the property, water ingress, roof works, and rot at the windows. They sought compensation and an apology. The Property Factors should compensate for the roof; stress and time spent investigating the matter. They should provide an answer as to what had happened.

66. 2.2 Water Ingress (2010 – present)

67. The Homeowners considered that the roof repairs in 2010 had been substantial but had not been adequately signed off and checked. They submitted that the Property Factors had a duty to do meaningful inspection but had failed to do so. They should have gone back to the contract, and any repairs should have been rectified but never were. This failure had allowed ongoing failure to escalate. As there was no financial threshold, there was no obvious reason for the Property Factors to come and speak to the Homeowners about these ongoing repairs. There were no checks or reviews on the tradesmen who had been responsible for managing the building, the Property Factors were the only people responsible for collating the information. As soon as the Homeowners knew there was a problem with the roof, they had organised with the other owners and had instructed tradesmen to come and look at the matter. There was nothing in writing that the Property Factor had to share information with the Homeowners however they considered it was fundamental that they should have done so. They were relying on a highly advanced management system, and it should

have flagged the problem up. Given the delay in getting this resolved the Homeowners submitted that the Property Factors had created £300,000 worth of a roof repair bill for the development. Owners had never been made aware or contacted or consulted with. None of the issues had been sufficiently signed off and checked. Different owners had been having leaks and only the Property Factors were aware of this. The Homeowners organised the owners to meet to discuss this issue.

68. They considered that the Property Factors should not have relied on the architect who was an uncle of an owner; they had not sought the correct type of architect to assess the issue. They had not done due diligence. They had dragged their heels in getting an assessment; they had not listened to the Homeowners' concerns, which led to the owners instructing their own survey. The Property Factors had not managed the matter properly and the Homeowners had had to take over. They had gotten to the point where they decided they could not continue with the Property Factors acting as factors for the development; it had been a majority decision to get new property factors.
69. They considered that as the Property Factors had been involved in the building for so long they had a responsibility for maintaining the building. Over the last 10 years, they had done very little. They did not employ competent staff to do the work.
70. The Property Factors submitted that this complaint was a damages action; and if so, the principal remedy was not a competent remedy in this forum.
71. The Homeowners advised that the Property Factor should have complied with the title deeds. They had taken on the role to manage the repair works but did not fulfil their duties in terms of the title deeds even at a basic level. They were responsible and had responsibilities. The problems with the roof were never resolved and caused further damage to the building. It was never satisfactorily addressed and there was still water coming in. They failed to address the problem. Considering the Written Statement of Services and Welcome Letters as a contract would also lead to the conclusion that the property factors had failed in their duty. There had been no benchmarking. The Welcome Letter covered small essential leaks and anything above sundry budget becomes an extra and they should have spoken to the Homeowners about that. Written Statement of Services referred to sundry expenses for small repairs. The Homeowners did not know what repairs had been instructed.

72. There should have been proper management of the roof contract, with regular inspections. It was unclear how they inspected any roof works and signed them off. They also failed to provide value for money. The work done by the roofing contractor was never called into question. It was not value for money, they had spent a lot over the years. The work was never put back out to tender. No evidence of benchmarking, no evidence that the roofers had done what they should have done. They had failed to manage the contract properly.
73. They considered that when it was clear that the roof had not been fixed then they should have sought other quotes from other companies.
74. When the Homeowners received the statements they would only get an undetailed account, and it was not clear therefore how much money was being spent on the roof.
75. They submitted that the property factors failed to provide an effective remedy for the issues with the roof.

76. 2.3 External redecoration

77. The Homeowners advised that the title deeds provided that external redecoration should take place. There should have been a cyclical maintenance plan in place for this work. There had not been one. There was no evidence of any work done. They had raised the issue with the Property Factors but there had been no works done. The redecoration should have been done three times from them taking ownership; the Property Factors had said that they were doing it, but then that they were waiting until the roof building works had been carried out; and there had been no progress.
78. The Property Factors submitted that the Homeowners needed to establish a relevant duty on the Property Factors, and they submitted that the duty does not arise from the title deeds.

79. 2.4 Internal/external maintenance

80. The Homeowners referred to their productions from July 2018 (see email 26 July 2018 Homeowners Appendix C line 116-157) when they raised with the Property

Factors that they had failed to do a proper inspection. They referred to the Written Statement of Services and the need for regular inspections. They noted that they had rented out the property from 2015 until 2018, and when they returned they noted that the condition of the communal areas was poor, and they did not think that the Property Factors had been carrying out regular inspections.

81. They advised that they were in the dark as to how often inspections should take place. The cleaning programme should be in place. Inspections as well, are separate from the maintenance of the actual fabric of the building. There had been redecoration of internal parts of the building in around 2009/2010 but at no time since had they been asked or required to vote for further internal decoration.
82. The Homeowners advised that the alleged breach of duty was set out in their written application. Duty is set out in the title deeds with regards to windows, external and internal redecoration.
83. The Property Factors denied that any duty arose from the title deeds.

84. 2.5 Flat roof

85. The Homeowners advised there were concerns about the guttering system for the whole building, the Property Factors had failed to maintain the communal parts in good order. They were responsible for gutter cleaning. It needed to be more than once a year, but this did not happen. They had failed to do meaningful inspections. This was not value for money. The Homeowners made several complaints about gutters and the flat roof area, but it was not remedied. There was no evidence that the contract to do this work was tendered. The flat roof area had standing stagnant water and bird excrement on it.
86. The Homeowners considered that the Property Factors had breached their duty. The roof had been leaking and there had been water ingress; it was also contaminated with various debris, and it was a health hazard. They could not open windows due to the debris. The Property Factors had been asked to have it cleaned and they had failed to do so. The Property Factors had a duty to maintain that area but had failed. The Property Factors charged the Homeowners for the roof maintenance, and they had accepted a duty as factors to ensure that maintenance works to the roof were

carried out. The remedy sought was payment towards the cost of remedying the damage and investigating what repairs were required.

87. The Property Factors' position was that there was a lack of clarity as to the duty owed, and they had specific responses from the roofing contractor in respect of the work done.

88. 2.6 Historical Billing errors

89. The Homeowners advised that there were numerous errors, they had pointed these out to the Property Factors, and there was a lack of transparency, for example with the electricity account; there had been no proper apportionment; there was no explanation for the mistakes. By way of remedy, they sought that the Property Factors pay for an independent auditor and, if errors were uncovered, that any balance of money improperly charged should go to the correct owner.

90. The Property Factors denied that there had been a breach; the position was that the final reconciled financial position has been sent to the Homeowners with closing banking statements.

91. The Homeowners advised that not once had the Property Factors stayed within the sundry budget, but they had not asked if they could use other budget money. The Homeowners advised that as part of the resolution they needed to know what had happened and why has it taken so long to get accurate information. Why were their queries dismissed when it was reported to the Property Factors. There had been several attempts to provide accurate accounts. Part of the Property Factors basic service was to provide advice on what is going on and if bills should be correctly apportioned, this was their job; the electricity split had been inaccurate.

92. The Homeowners submitted that they had paid more for energy than was used, but the surplus was then used to pay for other repairs. Therefore, this sum was not accurate. The budget did not reflect the actual costs of electricity.

93. 2.7 Energy Provider Switching

94. The Homeowners submitted that energy suppliers should be reviewed to ensure that the owners were getting the most competitive deal. They had asked the Property Factors to look into this matter but had been told that they do not do that work.
95. The Property Factors submitted that the Homeowners had received grants for doing the works to the roof. They understood that they had received about 75% of a grant for the total cost. The Homeowners noted that the sum could go up and there could be further costs.
96. The Property Factors suggested that the internal and external decoration was to be done after the roof repairs were carried out. The Homeowners advised that the Property Factors needed to put this to the group of owners. The Homeowners indicated that they had sold their property, however, their home report had marked down some aspects of the condition of certain communal parts, and this had led to a reduction in the property's value. They contended that the roof repairs which had been done over the years had not been emergency repairs. They considered that the roof works could have been carried out after a consultation period. The Homeowners advised that even if the roof repairs had initially been paid from the sundry budget the Property Factors should have then approached the owners to advise that the roof leaks were ongoing so that the owners could take a view on matters. They advised that different neighbours had been struggling to deal with the roof leaks and were unaware of other owners with similar problems in the development. Only the Property Factors had an overview. They considered that a lot of money had been spent over a 10 year period without the issue being raised with the owners.
97. The Homeowners submitted that the Property Factors had misled them. The Property Factors had provided inadequate or misleading information. They referred to earlier examples they had given of misleading information; for example, they referred to being told by the factors that they had instructed a more detailed survey. It became apparent a more detailed report was required, but no report was obtained.
98. The Property Factors referred to Lesley Jamieson's witness statement. She referred to her statement and adopted it as her evidence. She advised that the factors were aware that the owners had concerns with the roof. She became involved in trying to

assist with the issue, it was an ongoing issue due to the age of the roof. The uncle of one of the owners was a qualified architect and they had approached the factors offering to assist, at that point, she considered that the rest of the owners would need to agree. The uncle had offered to do the work free of charge. She advised that she had just started working with the factors at that time and she needed more information, and therefore thought it helpful to meet the Homeowners and to get feedback from them.

99. She understood small and essential repairs to be, day-to-day repairs routine maintenance and changing light bulbs. She advised that the budget was set every year. She would consider the previous year's budget and invoices. She agreed the overview was simplistic. She could have provided more detail if asked, but nothing formal was in place. She advised that there were basic costs, including cleaners. There was also a preferred contractor list. They did take on additional contractors too, a bigger choice would be helpful. She advised that there was only water ingress in top floor flats E and H. The repairs were not above the annual budget but had been part of the budget.

100. She noted that the previous budgets were not as detailed as they could be, she had looked to see what her predecessor had done. She advised that there was a lot of work that was non-chargeable. She considered that something more formal was needed.

101. In relation to the roof works, she had contacted an Aberdeen Council building officer about conservation matters. She advised that it was difficult to get suitably qualified professionals to assess and undertake the roofing works, she believed this was due to the location of the building. She had organised to bring in Aberdeen Heritage Trust to speak to the owners about seeking grants for the work. They advised her about the works to the building and suggested the use of the conservation architect for the building, this was due to the nature of the building, the works needed, and the location of the building. The factors had struggled to get an appropriately qualified architect. She had discussed the cost of the payment of the repairs. She noted that the other owners were prepared to pay for the costs. Her job was to try and resolve the repair situation. She advised that she considered that contractors should have been appointed to address the repair works but there needed to be up-to-date discussions about what needed to be done with the owners. The heritage trust had advised on the building works and what could be taken into account in making a grant application. She agreed the flat roof was a mess but could

not recall seeing standing water on it. She advised that the flat roof would have been surveyed. She advised that in her opinion the building needed some "TLC".

102. In terms of mis-billing, she understood that this had been looked at and any money had been re-apportioned to the properties themselves. To trace previous owners was not feasible. She recollects the apportionment was pennies. She thought that the apportionment came about as there had been an assessment of the cost against the quote and the actual figures. She was not sure who instigated the reconciliation, but she had reviewed the figures for the year that she was there.

103. The Property Factors were responsible for inspections of the property. There were monthly visits to each of the properties, it was a routine inspection. There was no set timescale for this. She advised that she did regular inspections given that there were issues with the roof at the development.

104. Considering the payment threshold, she advised that the threshold was anything outwith the ordinary budget, and that had to be approved by the Homeowners. To ensure that money from the budget was correctly spent, she advised that as the invoices came in, there would be a formal review at the end of the year, to keep track of costs. She advised if the sundry budget was spent, then they would contact the Homeowners if they needed any additional money.

105. Sarah Jones gave evidence for the Property Factor. She adopted her statement. She advised the authority to act came from the annual budget and Written Statement of Services. The purpose of the budget was to show a breakdown of annual costs; and how much they were proposing to spend in the coming year. Regarding the gutters she gave evidence that they were cleaned originally once a year and then twice a year, she did not think that the twice a year cleaning applied to that development until 2018. The frequency increased due to the development's location and birds nesting. The annual budget sets out the cyclical works that would be done at the development.

106. Mr. Kelly gave evidence for the Property Factors, and he adopted his statement. He advised that when he started, they provided a reactive service. They would do repairs or maintenance as requested by the owners. At the beginning of the year, they prepared a budget which costed the repairs for the year as could be predicted; and a sundry budget was set for everyday items e.g., locks broken, etc.

107. In relation to the scope of the works he could not recall how the extent of the services had been determined. However, he advised that they would write to the owners with a note of the services provided, the Welcome Letter confirmed these services. As new owners came in they would get a copy of the Welcome Letter.

108. Paragraph 14 of his statement showed that they provided a reactive service and did not do regular inspections. They decided as they were a small office they did not have the time to do that amount of assessment. He advised that inspections related to the limited services provided. He advised that they were not looking for matters to resolve. They would explain to owners to look after the property themselves but if they noted something they would seek to address it.

109. He advised that when budgets were prepared, they referred to several different items in the budget. It was their policy to collect money in advance. He advised at Paragraph 17 that they did consider the title deeds if matters were unclear and if they thought essential maintenance was needed. He advised that they did not use the title deeds as a schedule of works. He advised that he had not been involved since May 2009 with the development.

110. Lesli Jamieson advised that the scope of service provided was set out in the Welcome Letter. She advised that under paragraph 12 if Homeowners wanted more information, they could have obtained it by contacting the factor and requesting it. It would have been provided. She advised that she was involved in instructing John Stills Steeplejacks. They were instructed on this development for the majority of works. She advised that they had inherited an aging roof that had issues.

111. She advised that the roof works which were being considered in 2019 were major additional works. It was outwith the usual scope of Property Factors duties. They were trying to look at the whole roof and not just piecemeal repairs. She was not clear why the 10% additional fee had not been added to the account. She thought that this was a rather exceptional case.

112. External redecoration had been discussed but in 2019 the main issue was the roof; this was to be done first. Aberdeen Heritage Trust had advised that windows could be included in the grant works; but the roof works were to be done first. She advised that the external redecoration was to be done every 5 years, and it had been

postponed when the roof needed work undertaken on it. The priority was to be the roof works being carried out. The Property Factors would follow the instructions of the majority of the owners.

113. She advised that she had viewed the flat roof, she had noted no rubbish, but saw some seagull excrement; she saw no other visual issues, albeit she advised that she did not have experience as a roofer, she was viewing general maintenance and cleanliness issues.

114. The Homeowners queried that she had received a complaint and not dealt with it. She advised that she was aware of the ongoing discussion about the roof. The Homeowners queried that other complaints about other matters were raised. She did not consider that the majority of the owners complained, she advised that it was a minority. The Homeowners challenged her that the separate owners were proceeding with repairs, as the factors were not organising the repairs or discharging their duties. She advised that the factors had told the owners that proposed works to be done to the roof would need to be discussed with the other owners so that they were all involved in the works being carried out.

115. Simon Ivers, from John Stills Steeplejacks, gave evidence for the Property Factors. He advised that they had worked on the development for a number of years, this was in part, as steeplejacks, they could undertake roof work without the requirement of scaffolding. The firm can climb the roofs and abseil. He had over 23 years of experience in this profession. He worked for John Stills. They had four employees. They did high-level rope work, repairing work, and accessing roofs. The company had been in existence for 40 years. He considered that they had a good reputation in the Aberdeen area.

116. He advised that where there was water ingress they would access the roof and assess what was required, take photos and put this to the customer, write out an assessment of work and prepare a quote. He did 90% of the assessments. He advised that 90% of problems with water ingress were obvious but a small number were problematic, and he advised that the development of Schoolhill fell in that 10%. He assumed that the whole roof had been stripped and redone in the '80s. He also referred to box gutters being lead and also the parapet gutters. He noted the age of the roof. Given the variable issues pertaining to the roof, he was unable to identify where the water was coming in. He had looked at the box gutters. They had carried

out a dye test on the roof leaks over the Flat E, but the findings were inconclusive. He advised that they had managed to address some of the water ingress. He advised that there were also leaks on different parts of the roof. He had worked on the roof for 9/10 years and successfully carried out several repairs. In his opinion there had been and were so many repairs to the roof because it was an old roof. He advised that there had been a lot of work done in 2010/2011, however since then there would have been some slates that slipped, birds nesting in the gutters, these matters lead to leaks. There are more problems in older roofs due to settlement. It has been 30/40 years since the slates were replaced. There were nails on the roof and these perish over time. He considered that the roof was pretty well maintained overall.

117. He advised that the gutters were cleaned at least once a year. He advised that nesting seagulls were a common problem in Aberdeen. He considered that the roof was in overall good condition when the works were done in 2010. He considered that it had been effective and had stopped the water ingress at that time. He advised that he had mainly been back and forth on the roof after 2010 to deal with cleaning gutters.

118. It was put to him that there were further repairs done to the roof after the 2010 works had been done. He explained that it would depend on the work which had been done after 2010. He advised that there had been repairs to mortar skewers he explained that the ongoing roof costs were because roofs need ongoing maintenance. He agreed that there appeared to be an ongoing leak in at least 2012 but he could not recall where that leak was as it was 10 years ago. He was asked about repairs in 2016 but advised he would need to understand the context of the issues to be able to answer. He advised that they would give an estimate first for any works over £100.

FINDINGS

119. The tribunal makes the following findings:-

- a. That the Property Factors had been the Property Factors for the development since at least October 2012 when the Property Factors (Scotland) Act 2011 came into effect.

- b. That the Property Factors had the authority to act as Property Factors at the property.
- c. That there was no specific contract giving authority to the Property Factors to act for the development.
- d. The Property Factors' authority to act appeared on balance to have derived by appointment by a group of homeowners.
- e. That the extent of the services provided by the Property Factors' appeared to be derived from a combination of the Written Statement of Services, the Welcome Letter, and the Annual Budget.
- f. That from time to time the Property Factors did have regard to the terms of the title deeds when looking at the maintenance requirements for the development.
- g. That there was a Written Statement of Services in place for the development. That it contained a section for Major Additional Works to be managed by the Property Factors; it also contained provision about sundry expenses for small repairs.
- h. That the title deeds for the property provided for the appointment of Property Factors.
- i. The title deeds provided information about what duties a Property Factor could be required to undertake.
- j. There was no evidence that the Property Factors had been instructed to act in accordance with the specific terms of the title deeds.
- k. The Property Factors did not provide an annual account setting out payments of invoiced items until at least 2019.
- l. That the Property Factors did not have a practice of issuing annual accounts.

- m. That the Property Factors issued a Welcome Letter setting out that their duties included communal hall cleaning, carpet shampooing, gutter cleaning, arrangement of communal repairs, the remedy of communal issues. The Welcome Letter enclosed a copy of the annual budget; and noted that a contingency fee would be charged for small essential repairs.
- n. That the Property Factors issued annual budgets every year. The budgets set out the proposed spending for the forthcoming year.
- o. That the Written Statement of Services did not contain a section setting out the Property Factors authority to act.
- p. That the Written Statement of Services did not contain information relating to the fees for the Property Factors services.
- q. That the information provided to the Homeowners regarding the proportion of factoring fees charged within the development had been inaccurate.
- r. That it was difficult for the Homeowners to know what works the Property Factors had carried out in accordance with their duties considering the terms of the annual budget, the Welcome Letter and the Written Statement of Services.
- s. There was no obvious financial threshold setting out when owners consent would be required for works.
- t. There was no written procedure setting out when the factors should consult with owners.
- u. There was no written programme of works for cyclical maintenance and property inspections.

DECISION

120. Authority to Act and Extent of Duties

121. This was the first issue that the tribunal had to consider. There was no clarity as to the basis on which the Property Factors had been instructed. There was no written documentation or oral evidence which was able to confirm how this appointment had come about. Having regard to the evidence from Bruce Kelly, it would appear that around the time when the Factors became involved as factors for the development, they offered a limited factoring service which was reactive. He also thought that the Factors would have attended an owners meeting prior to their appointment and then would have written out to owners to confirm the extent of their instruction. He indicated that it would have been limited. Mr Kelly appeared to have the most detailed knowledge of what was likely to have occurred leading to the appointment of the Factors. We preferred his evidence on this matter. On balance we found it was likely that the Property Factors had obtained their authority to act from the appointment by the owners.

122. In terms of the extent of the Property Factors' duties, the tribunal was shown a range of documents including the title deeds, the Written Statement of Services, a Welcome Letter, and Annual Budget and there was evidence led as to what the Factors had and had not done during their time as property factors at the development.

123. It appeared to us that the Property Factors may not have been instructed in terms of the title deeds. There was no written evidence to support the proposition that they had been instructed in terms of the title deeds. Again, we noted the evidence of Bruce Kelly setting out the type of factoring business that the Property Factors were running at the time of their appointment, it appeared to be limited to general maintenance and cleaning and was operated as a reactive factoring service. The title deeds provided for a much more comprehensive set of duties if instructed under them, and we could not find that such a contract of agency had been entered into.

124. It appeared to the tribunal that the extent of the duties could be determined by considering the terms of the Written Statement of Services and Welcome Letter both of which set out various services and duties. We also noted the evidence of the Property Factors' witnesses that the Annual Budget also indicated the extent of the factors' duties. We accepted that the Property Factors did on occasion consider the title deeds, albeit this appeared more for general guidance, than because they thought that the title deeds were part of their contractual duties. We considered that the Property Factors were therefore authorised to act based on the Written Statement of Services, the Annual Budget and Welcome Letter. On occasions, they

also used the title deeds as guidance to assist them in discharging their factoring duties. We did not find however that their duties extended to those matters set out in the title deeds.

125. We would comment that there was a lack of clarification as to the terms on which the Property Factors had been instructed and the extent of their duties. This was further compounded by the Factors discharging their duties in what appeared to be a haphazard manner. The lack of clarity on the extent of the Factors' duties made determining this application very difficult for the tribunal. This difficulty was also something that both the Property Factors and the Homeowners had clearly experienced. We consider that it was not helpful to any party to have such a lack of clarity in a contract of agency. This lack of clarity was something that the Property Factors (Scotland) Act 2011 and the code of conduct had sought to address since 2012. We considered it concerning that the Property Factors had never sought to properly and clearly set out the services that they were providing. This lack of clarification had left both parties at a disadvantage in dealings involving the development.

126. Breaches of the Code

127. Section 1: Written Statement of Services

128. Aa: As there was no statement of the Property Factors authority to act the tribunal found that there had been a breach of this section of the code.

129. Ab: The tribunal did not find that there had been a breach of this section of the code in relation to a statement of delegated authority. The wording confirms that there should be a statement of any delegated authority where applicable for instructing works and situations in which you may act without further consultation. The Written Statement of Services sets out that provision for sundry repairs for small repairs; and also, major additional works. It states that "*Major Additional Works - where major communal works outwith those delivered as part of the general factoring service are required we would seek approval from all owners at the development in accordance with each individual deed of conditions.*" While we considered it could have been better written and contained more detail, there was a differentiation set out in the Written Statement of Services between small and major repairs. The Annual Budget provided notice of the yearly sum being sought for sundry repairs.

We considered that on balance having regard to the terms of the code that there had been no breach under this provision.

130. Bc: We found that this section of the code had been breached. There was no definition in the Written Statement of Services as to what core services were; what any target times for repair work were; and the frequency of property inspections. The only reference in the Written Statement of Services was to a section that stated that regular inspections would be carried out however it said no more than "... *APL Factoring shall regularly visit the development to review the condition of the managed areas and works completed ...*" .

131. Bd: We found that there had been a breach under this section, while we note that there is some reference to small repairs and major additional works, we found that there was a lack of sufficient information as to what any other services and works in addition to the core services were which may be undertaken by the Factors. The Written Statement of Services did not explain the types of services and works which may be required in the maintenance of the development, and what may incur additional fees. We did not consider that the reference to major additional works was sufficient to meet the requirements of the code. We did not consider that the information in the Welcome Letter or the Annual Budget provided any assistance as to what any additional services would be.

132. Ce: There is a reference to a factoring fee in the Written Statement of Services. It did not however explain any fee structure and the processes for reviewing and increasing or decreasing the fee. We find that there is a partial breach under this section of the code. While we note that the Homeowners were concerned that there was no clear threshold for spending, we did not find this to be completely correct, the contingency fund was for a set fee.

133. Cf: We find that there was a breach of this requirement of the code, the percentage of the proportion of management fee paid was not set out in the Property Factors documentation.

134. Ci, Ck, and Di: There are no submissions on these matters by the Homeowners. We have not, therefore, considered these sections of the Written Statement of Services.

135. As Dm and Dn are not confirmed to be complaints in the Homeowners application at section 7 we have not considered these issues.

136. Section 2: Communication and Consultation (2.1, 2.4, 2.5)

137. 2.1: We found that there was a breach under this section of the code, as we found that the Property Factors did provide information that was misleading or false. The Homeowners had set out several examples, for example in considering the roof repairs, the Property Factors had advised the Homeowners that they were obtaining a report about this issue; this was misleading as the Property Factors did not organise the report. Further, as the annual budget was supposed to be based on the previous year's spending on items, we considered that the annual budget setting out what would be spent for the year was misleading. We found that the Annual Budget had *blurred* the actual cost of items, and as shown by the Homeowners the Property Factors had used budget monies from some items to cover the cost of other items within the sundry budget. This had led to a misunderstanding of what works were taking place at the development in each year. We considered that this information was misleading.

138. 2.4: We found that there had been a breach under this section, we did not consider that there was a procedure in place to consult with Homeowners, and to seek their written approval. While we note that there was a provision in the Written Statement of Services for a sundry expenses budget for small repairs and there was a section on major additional works, we considered that the actual practice adopted by the Property Factors was very informal and there was, in reality, no proper procedures in place to manage either sundry repairs or, major additional works. We would note again that the Annual Budget was misleading about what was being paid for which items, and it appears that the Factors should have been approaching the owners for additional funds for the sundry budget when monies from one costed item had been exhausted. This was not done. In addition, there were no annual accounts provided to the owners which would have shown what in fact was being spent on the development. The Homeowners had submitted that there had been no procedure in place to consult for works over the sundry budget. We would agree there appeared to be nothing in writing which properly set out when and how the Factors would consult for any works needed which were outside sundry budget works. It was relevant that there was no threshold allowing for delegated matters. We note that there was

limited evidence of any authority being sought from the owners regarding the works to the external areas of the building in 2019. We found that there was no evidence of the Factors consulting with the owners before January 2019. Given that the Property Factors position was that they were a reactive service and the duties extended to what was set out in the Welcome Letter, we considered that they should have had clear procedures in place for consultation with owners for works that fell outwith the ones set out in the Welcome Letter and Annual Budget. We note that the Factors had not in fact sought to add any 10% surcharge to their fee for the works they had been undertaking in relation to the roof works in 2019 and this added to the confusion as to what category these works fell into, small essential or major additional works.

139. 2.5: We found there to be a breach under this section of the code and that there had been a failure to timeously answer complaints and correspondence from the Homeowners. We note that there had been no response to the Homeowners' complaint of 23 January 2019 until 9 August 2019.

140. Section 3: Financial Obligations

141. 3.3: We found there to be a breach under this section. We note that the Property Factors provided an annual budget at the beginning of the year. We have commented earlier in this decision that we agree with the Homeowners that the Annual Budget was not an accurate account of the previous years' spending and therefore it could not be relied on as evidence of a "*detailed financial breakdown of the charges made and a description of the activities and works carried out which are charged for*". We consider that such an account detailing the financial breakdown of the charges made and a description of the activities and works carried out which were charged for these matters should have been sent out to the Homeowners. We note that the Property Factors advised that such information was available on request, we do not consider (and in compliance with the terms of the code), that the Homeowners had to request the information to receive it.

142. Section 4: Debt Recovery

143. 4.5: We found that there had been a breach under this provision. It appeared that there had either not been a system in place which was able to flag up a non-payment or any such system was not inadequate.

144. Section 6: Carrying Repairs and Maintenance

145. 6.1: The section requires that the Property Factors must have a procedure for owners to notify them of matters including repairs or maintenance; and also, that factors must inform Homeowners of the progress of repairs, maintenance works, or timescales for completion. We consider that there had been a breach of this section of the code. We did consider that there was a procedure in place for owners to notify the Factors of matters requiring repair or maintenance. We consider however that the Factors had failed to properly inform the owners of issues regarding the progress of repairs.

146. We consider that this breach stems from various failures by the Factors including their failure to have in place a clear and detailed written statement of services which confirmed the extent of the Factors' duties; their failure to provide a detailed and accurate yearly account; and their failure by staff to act in accordance with the terms of their duties and to clarify what duties they were discharging (i.e. sundry repairs or major additional works).

147. We believe that this building, given its age, style and setting brought challenges in terms of its management however, matters regarding repairs and maintenance should have been brought to the owners attention by the Factors if they were outwith any of the delegated duties set out in the Welcome Letter and Annual Budget.

148. We believed that while the Factors may have been acting in good faith in carrying out their duties, they did not appear to have been discharging them to a reasonable standard given the lack of clarity as to the extent of those duties and what type of repairs and maintenance had been carried out or was proposed to be carried out. Had there been better written documentation in place this lack of clarity and understanding on the part of all parties may not have arisen. Had there been better communication in relation to what repair works were being carried out to the roof the

Homeowners may have better understood what was going on with the ongoing roof repairs.

149. We considered that this breach is linked to the breaches in sections 1, 2.1, 2.4 and 3.3, and there should have been a more detailed written statement of services and clearer communication about the number of ongoing roof leaks and clarification of what repairs were being done to the roof. The invoices showing what had been spent on the roof would have assisted the Homeowners. We consider that providing only an Annual Budget by way of information was insufficient and contributed to the breach under this section.

150. 6.3: We did not uphold this complaint as we did not have evidence of any requests being made by the Homeowner asking how contractors had been appointed.

151. 6.4: We found that there was a breach of this provision. The Written Statement of Services refers to carrying out regular inspections to review the condition of the managed areas and works completed. There are no specific core services set out in the Written Statement of Services, reference requires to be had to the Welcome Letter and Annual Budget. If the core services include periodic inspection (which it did) then the Property Factors were required to prepare a programme of works for these core services. We considered that their core services were as set out in the Welcome Letter and Annual Budget. We do not consider that the terms of any of the Factor's documentation including the Annual Budget could be relied on by the Factors as providing a programme of works for the cyclical maintenance.

152. 6.6: We did not find that there was a breach about the matters complained of under this section, as what was being required was documentation relating to a tendering process carried out to works before the Property Factors (Scotland) Act 2011 was in force. We do not consider that this tribunal, therefore, has jurisdiction to consider this matter.

153. 6.9: We did not find that this section of the code of conduct had been proved. The terms of this breach as that *the factor must pursue the contractor to remedy the defects in any inadequate work or service provided*. The issues from this section are, which works were carried out; when were those works carried out; when were they

found to be defective; what were the defects; when were the defects known to the Factors; and what did the Factors do or not do in terms of pursuing the contractor about any defects.

154. Considering the terms of the code the duty is on the Factor to pursue a contractor to remedy defects in works or services provided. The Factors would have had to have been aware of defective workmanship and failed to pursue the contractor about the matter. We do not consider that there was evidence showing that these facts existed.

155. The Homeowners complaint stems from roof works being carried out in 2011. In terms of the Property Factor (Scotland) Act 2011 the code was not effective until 1 October 2012. We do not consider that the tribunal has jurisdiction to find any breach in relation to works carried out before the code came into force.

156. Thereafter, we consider that we could find that there was a breach of this section of the code in terms of what the Factors did or did not do after 1 October 2012, however, we do not consider that we were in a position to determine that the maintenance and repair works after 2012 were defective either in relation to the 2011 works or in relation to any post-2012 works. The evidence given by the Factors was that there had been ongoing repairs and maintenance to the roof, it was not clear what these repair and maintenance works were for and if the works had been defective. We considered that ongoing repair and maintenance works would not necessarily be unreasonable given the age of the roof and associated items. We do not consider that ongoing maintenance and repair per se demonstrated that any particular works had been defective and we did not have sufficient evidence before us detailing what works may have been defective when they were carried out and what they were for. Without clear evidence that any repairs had to be carried out to remedy defective workmanship and that the Factors had been aware of this and had done nothing about it, we are unable to find that there has been a breach under this section of the code.

157. We would note that this jurisdiction is limited to matters arising from the Property Factors (Scotland) Act 2011 and we do not have jurisdiction to consider broader legal issues other than what is contained in the 2011 Act. Questions of negligence or breach of contract and damages arising therefrom are not competent matters for this jurisdiction to deal with.

158. Property Factor Duties

159. The Property Factors' duties derive from the terms of the Written Statement of Services, the Welcome Letter, and the Annual Budget. Although there are title deeds for the property, and although in evidence the Property Factors said that they would consider them, we consider that on balance the Property Factors had not been instructed to act in accordance with the title deeds.

160. Property Factor Duty: Program of Works

161. While the Written Statement of Services Welcome Letter and Annual Budget did not stipulate any duty owed by the Property Factors to put in place a programme of works, considering the terms of the code of conduct at section 6.4, we considered that as the Written Statement of Services sets out that the Factors will do regular inspections, and as the code of conduct provides that the Property Factors must prepare a programme of works, therefore, there was a duty to provide a programme of works. No programme was provided by the Property Factors. Accordingly, we find that there had been a breach of this duty.

162. Property Factor Duty: Water Ingress (2010 to present)

163. The 2001 Act came into force on 1 October 2012. Homeowners are entitled to make applications to the Tribunal for a determination as to whether a property factor has failed to carry out the property factor duties (section 17(1)(a)). The tribunal is required to ascertain what the actual duty is before turning to consider if there has been a breach of the duty. In this case, duties arise from the Written Statement of Services, Welcome Letter, and Annual Budget. Any duty in terms of dealing with "water ingress" would need to be considered against the duties set out in these documents. We consider that any duty to deal with water ingress would fall within, either sundry expenses for small repairs or, major additional works.

164. The Welcome Letter provided that the Property Factors would undertake communal hall cleaning; communal carpet shampooing; gutter cleaning; the arrangement of communal repairs; remedy of communal issues; and it also noted that there is a contingency fund for instructing small essential repairs, such as intercom problems, door locks, roof leaks, etc. The Property Factor undertook to carry out roof repairs under the small essential repairs, and it appears that they did

carry out several repairs and maintenance to the roof using that budget. We did not find that there had been a breach under the Property Factors duty in terms of repairs under the small essential repairs.

165. Turning to the major additional works, there is a provision in the Written Statement of Services that the Property Factors will “*where major communal works outwith those delivered as part of the general factoring service are required, we would seek approval from all owners at the development by each individual deed of conditions. ... This fee covers the additional administration required in carrying out major works including the collection of quotes, additional communication and invoicing of owner, collection of payments (if required) pursuit of payments, management of repairs/works, monitoring and inspecting the progress of works and completion approval, payment of invoices raised*”.

166. Having regard to the question as to when any duty in relation to major works for water ingress was triggered it is clear that there had been roof repairs in 2010/11, and ongoing “sundry repairs” continued thereafter. It is difficult to pinpoint at what stage any duty crystallized upon the Property Factors in relation to any duties to manage the process under *major additional works* to the roof, however, it seems clear enough that the Property Factors were (from at least 2019) carrying out services for the roof works (water ingress) which must be deemed to be major additional works.

167. On balance, we considered that there had been a lack of competent management by the Factors in their role when dealing with the management of the roof works as major additional works. If they considered that the water ingress repairs were to be progressed as major additional works, then this should have been clearly made known to the Homeowners, in order that all parties were clear as to what the Factors were going to do in terms of their factoring role. We did not consider that there were clear procedures in place by the Property Factors setting out that they were now managing a programme of major additional works. We were not clear about what process they were following in terms of assessing the works needed to address any roof repairs, obtaining appropriate advice and proper quotes, and regularly communicating with the owners about how they were progressing with these works. We find therefore that there was a breach by the Property Factors in terms of their duty to manage major additional works in relation to the roof repairs (otherwise known as water ingress).

168. Property Factor Duty: external redecoration

169. We did not find that there had been a breach under this provision for the reason that although there are provisions contained in the title deeds about having common external painting carried out at least once every three years; we considered that while there had been a factoring contract in place between the parties, it was not the title deeds which set the extent of it. There was no evidence before the tribunal which demonstrated that the terms of the title deeds had ever defined the Property Factors contract of agency. We would have to conclude therefore that neither the Property Factors nor the Homeowners had relied upon the title deeds as dictating the Property Factors duties. Further, given that it also appeared that no redecoration works have been carried out for several years and this was not in accordance with the time scales set out in the title deeds, it appeared that the owners had neither pursued the Property Factors to discharge these duties nor, carried out the redecoration works themselves. We were not convinced that the Property Factors could be held liable for failure to have these works instructed by third-party contractors.

170. Property Factor Duty: internal maintenance

171. Considering the terms of the Welcome Letter, the Written Statement of Services, and Annual Budget in determining the extent of the Factors duties we do not consider that the Factors had any duty per se to have these works instructed on a cyclical basis. Any internal maintenance redecoration works would have constituted major additional works had the Factors been managing any such works. We did not consider that the Factors were bound to have these works instructed in terms of the title deeds for the same reason as set out in the preceding paragraph. We did not therefore find that there had been a breach of a Property Factor Duty under this heading.

172. Property Factor Duty: Flat Roof

173. It was not clear exactly what the Factors duty for the flat roof was when considering the terms of the Welcome Letter, the Written Statement of Services and Annual Budget. We did not consider that there had been a breach under this section in terms of general maintenance and cleaning works, as works had been carried out

to the flat roof. It appeared that the Property Factors had been ensuring that the cleaning and maintenance works were carried out even though there was no clear duty to do so.

174. Having regard to the question of water ingress at the flat roof we would refer to our decision in the section Property Factor Duty: Water Ingress (2010 to present).

175. Historical Billing Errors

176. We are unable to identify what the exact Property Factor's duty would be about the billing errors. However, in this case, we consider that it must be a matter of custom and practice that owners would be entitled to expect that any financial information provided should be accurate financial information. Given that this was not the case, we find that there was a breach of the Property Factors' duty.

177. Energy Provider Switching

178. Considering the terms of the Written Statement of Services, Welcome Letter, and Annual Budget we do not find that there was a duty on the Property Factors to seek best value for energy supplies. We did not therefore find there to be a breach under this heading.

PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER

179. Having considered what breaches of the code of conduct and Property Factors duties have been established we require to consider an appropriate remedy. While we note that the Homeowners are no longer the owner of the subjects we do not consider that this prohibits us for providing a remedy in this application. We also note that the Property Factors are no longer the Factors for the development. Again, we do not consider that this precludes us from imposing a suitable remedy.

180. The 2011 Act seeks to resolve disputes between a factor and a Homeowner. Having regard to the application, evidence before the tribunal and current circumstances of the parties as we understand them (as set out in the previous paragraph) we consider that the most appropriate proposed order to make would be an order for compensation.

181. We would confirm that the application appears to have been made in large part due to issues arising from the maintenance and repair of the roof and associated fixtures. The tribunal did not have before it comprehensive evidence of the state of the roof from 2011 to 2020, and the extent of the maintenance and repairs carried out between 2011 until 2020. We are not clear that the cost of roof repairs would have been different if the maintenance had been done differently. We also consider that the Homeowners had a duty as owners to ensure the proper maintenance of their property, and we consider that this includes communal areas. We are also conscious that the duty of the Factors are those of agents to the owners, and they are not the contractors doing the works. Further and as noted above this tribunal does not have jurisdiction to consider actions for breach of contract or negligence.

182. That said, we consider that the Property Factors have not been good factors. We have found them to have carried out their duties in an amateurish manner and with no proper procedures in place so that both parties knew what each other was responsible for. The failure to have a clear Written Statement of Services in place was a particular concern to the tribunal as no party had any clear idea what the Factor was responsible for. The failure to follow their own procedures in terms of sundry repairs and major additional works was a breach of the Property Factors' duties. The failure to provide any accounts was also problematic. The lack of an annual account appeared to have masked for some time that there were ongoing repairs to the roof. Whether in fact actual knowledge of the extent of the roof maintenance and repairs over the years from 2012 would have led the Homeowners to proactively instruct further surveys is unknown, but the fact that no accounts were ever provided, made it less likely that the Homeowners would have considered such action. Overall, the Property Factors have breached several sections of the code and have not carried out their duties properly.

183. We sympathise with the Homeowners who have been clearly frustrated with the conduct of the Property Factors and the Factors' inability to explain what they were doing in discharging their duties.

184. We consider that we should make an award to the Homeowners to compensate for the stress and inconvenience caused by the ongoing failure by the Property Factors to provide a professional service to them.

185. We considered that these were some of the worst breaches the Tribunal had seen in terms of the competency of a Property Factor. The Tribunal proposes to make a property factor enforcement order (“PFEO”). The terms of the proposed PFEO are set out in the attached Section 19 (2)(a) Notice.

Appeal

A Homeowner or property factor 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.

Melanie Barbour Legal Member and Chair

24 February 2022 Date