

# 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/LM/23/0727**

**Re: Property at Communal Area and Garage, 11/10 Valleyfield Street, Edinburgh, EH3 9LP (“the Property”)**

### **The Parties:**

**Dr John Stout, 11/10 Valleyfield Street, Edinburgh, EH3 9LP (“the Homeowner”)**

**James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT (“the Property Factor”)**

### **Tribunal Members**

**Ms H Forbes (Legal Member) and Ms C Jones (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 OSP 6, OSP 9, and 2.7 of the 2021 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 received in the period between 8<sup>th</sup> March and 9<sup>th</sup> May 2023, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with paragraphs OSP6, OSP9, OSP11, 1B(4), 2.7, 3.2, 4.2, 4.9, 6.2 and 7.1 of the Code, and had failed to carry out its property factor duties.

2. A Case Management Discussion (“CMD”) took place by telephone conference on 16<sup>th</sup> August 2023. The Homeowner was in attendance. The Property Factor was represented by Mr Roger Bodden.
3. The Property Factor had raised two preliminary issues in their written representations by stating:
  - (i) That the application form is dated 8 March 2023, and pre-dates both notification letters to the factor, dated 21 March and 7 May 2023. Their position is that the purpose of Section 17(3) of the Property Factors (Scotland) Act 2011 (“the Act”) is to allow the Property Factor an opportunity to resolve any alleged breaches, and, on this occasion no such opportunity was given. It was their position that the application should be dismissed. The Tribunal explained that an application is not deemed to be made until the last documentation is received, which was 9<sup>th</sup> May 2023, in terms of Rule 5.
  - (ii) There has been no formal notification letter sent to the Property Factor in regard to the alleged failure to carry out Property Factor duties.
4. The Tribunal explained that it will not consider issues that arose before the new Code came into force on 16<sup>th</sup> August 2021, unless the issues are ongoing.
5. The CMD was continued to a further CMD on a date to be notified to parties.
6. The Tribunal issued a Direction dated 16<sup>th</sup> August 2023 to the Homeowner in the following terms:

The Homeowner must set out a list of each alleged failure to comply with the Code of Conduct, and the alleged failures to carry out property factor duties, including full details of:

  - (i) Each alleged failure of the relevant Code paragraph/duty;
  - (ii) When the alleged failure occurred;
  - (iii) When the alleged failure was reported to the Property Factor;
  - (iv) The response, if any, of the Property Factor.
7. A further CMD set down for 9<sup>th</sup> November 2023 did not proceed, as parties did not attend. Enquiries established that parties had not been notified of the CMD. The Tribunal decided to proceed to a hearing.
8. The Property Factor lodged written representations and productions.
9. The Homeowner lodged extensive written representations and productions.
10. The Homeowner lodged several Direction requests, and the Property Factor responded to those that the Tribunal allowed.

## **The Hearing**

11. A hearing took place by video conference on 7<sup>th</sup> March 2024. The Homeowner was in attendance. The Property Factor was represented by Mr Nic Mayall.

### **Preliminary Matters**

#### **(A) Documents**

12. The Homeowner confirmed he would be referring to the following documents:

- (i) 280 page document
- (ii) 22 Question response to Gibbs
- (iii) Financial response to Gibbs
- (iv) Response to Gibbs' replies
- (v) List of ignored communications
- (vi) 284 page document

13. Mr Mayall confirmed the Property Factor's representations and productions were contained within the following documents:

- (i) 49 page document lodged on 19<sup>th</sup> September 2023
- (ii) 83 page document lodged on 1<sup>st</sup> November 2023

#### **(B) Agreed matters**

14. Mr Mayall confirmed the Property Factor accepted a failure to comply with paragraph 2.7 of the Code.

### **Alleged failures to comply**

15. The Homeowner was asked to address the Tribunal by Code paragraph on each alleged failure to comply with the Code; however, it became obvious the Homeowner had prepared to address the Tribunal by issue, rather than the specific paragraphs of the Code. The Tribunal allowed the Homeowner to address it by issue.

### **Issue A – Fire Risk : Safety**

#### **The Homeowners' position**

16. The Homeowner said rubbish was discarded by a neighbour at the top of the stairwell on the 4<sup>th</sup> floor of block 11 in 2018. This is the only escape route for the five apartments on the 4<sup>th</sup> and 5<sup>th</sup> floors of the block. The Homeowner contacted the Property Factor on several occasions, providing details and photographs (emails page 87/280 onwards). The Property Factor's James Cherry emailed the Homeowner on 28<sup>th</sup> November 2018 (p89/280) stating that the cost of removal of the items would need to be shared among homeowners and that he intended to resolve the matter without any further delay. The Property Factor

made no mention of the items in their inspection report of September 2020 (p95/280) although they were mentioned in a letter to residents on 29<sup>th</sup> July 2020 (p224/280). The situation worsened, with more flammable items added up until the end of 2022. The tenant responsible for leaving the items then left, and the Homeowner discarded them. During a meeting with the Property Factor's Roger Bodden on 4<sup>th</sup> August 2023, the Homeowner was informed that the Property Factor had no legal right to remove fire hazards.

17. The Homeowner also complained in his written representations that no property inspections had been carried out between September 2020 and March 2023, or between April and August 2023. The Homeowner's position was that these failures constituted breaches of paragraphs 1B(4) and 6.2 of the Code, and a failure to carry out the property factor duties in paragraphs 4.1 and 4.7/4.8 of the Written Statement of Services ("WSS") (p19/280).

### **The Property Factor's position**

18. Mr Mayall said Roger Bodden met the Homeowner and explained that the Property Factor had no powers of enforcement to remove private property. If items such as mattresses are dumped, the Property Factor will remove and charge to homeowners. In this case, it was the goods and chattels of a tenant as opposed to rubbish, and the Property Factor had no power to remove them. With regard to paragraph 6.2 of the Code, it specifically requires that matters should be agreed by contract, and there is nothing within the contract between the parties that covers this matter. Paragraph 1B(4) refers to core services. Mr Mayall said the WSS lists the core services and the Development Schedule does not reference the removal of items within a common stairwell. Paragraph 1B(4) also refers to the WSS which has timescales for response, as required.
19. Asked by the Tribunal why the Property Factor's staff had said the items would be removed in 2018, Mr Mayall said he could only imagine this goes back to the difference between discarded mattresses and items belonging to a tenant and that the staff member may have misunderstood the nature of these items. He assumed the member of staff had contacted homeowners and occupants accordingly. It was his position that the Property Factor would take note of such items during inspection.

### **Issue B: Lack of roof maintenance plan and adequate maintenance of roof**

#### **The Homeowners' position**

20. The Homeowner experienced water ingress on two occasions through his lounge ceiling in January 2016. It was his position that this was due to blocked gutters. There are no access hatches to the roofs, so access is only by scaffolding or a cherry picker. The Homeowner said he was assured by the Property Factor that there was regular gutter cleaning, at least annually. The homeowner had also questioned the Property Factor on whether regular roof inspections/maintenance were carried out, he said this has not happened, and only reactive repairs are carried out. The Homeowner has asked the Property Factor for details of roof and façade maintenance on several occasions

including on 16.2.23; 7.5.23 and 16.5.23, with no response. Cleaning of the gutters only takes place when a slate is being fixed. The Homeowner has suffered recent water ingress since the application was made to the Tribunal.

21. The Homeowner discovered, after making his application to the Tribunal, that a surveyor report had been carried out by F3 Building Surveyors on 22<sup>nd</sup> October 2019 (p72/280). This was provided to the Property Factor but was not distributed to homeowners. The Homeowner received a copy from F3 on 20<sup>th</sup> July 2023. The report stated that the main flat roof appears in fair condition. It mentioned ponding and evidence of previous repairs and recommended a maintenance check of the flat roof. The report stated there was a man-safe system present.
22. A report was carried out by Thomasons in March 2023 (p167/280). This showed a lack of maintenance and significant moss/plant growth. A further report was carried out by Alumasc Roofing in March 2023. This concluded that the roof was in poor condition and beyond its typical life span. There was flooding in October 2023 which was caused by blocked gutters. The flat roof in all three blocks of apartments now requires to be replaced at a cost of over £400,000. There is no evidence of man-safe certification. This is a legal requirement.
23. The Homeowner said the Property Factor had failed to comply with paragraphs OSP9, OSP11, 1B(4) , 2.7 and 3.2 in respect of this issue. The Property Factor had also failed to carry out its property factor duties by failing to comply with paragraphs 4, 4.1, 5, 6.1, and 6.1.1 of its WSS. Responding to questions from the Tribunal as to how this fell within the 2021 Code, when much of the matters complained of had taken place before the Code was introduced, the Homeowner said the recommendations in the report had not been followed through and this had led to the current position.

### **The Property Factor's position**

24. Mr Mayall referred to two invoices lodged (productions 5 & 6) which showed gutter cleaning and work to downpipes had been carried out in 2021 and 2022. It was his position that it was categorically wrong to state that no gutter cleaning was done. Gutter cleaning is mentioned in the core services within the WSS and Development Schedule (p221/280). It is usually carried out every 12-18 months, unless it was in an area with a significant number of trees or there was a documented issue with constant blocked gutters.
25. The F3 report only showed ponding on the flat roof and slipped slates. There has been much talk of this report, but not of the Thomasons and Alumasc reports, which say the roof is coming to the end of its life span. There is no evidence that no maintenance was carried out. The Homeowner is failing to recognise that the roof has a finite life span, and it is now in excess of 20 years old. It is unfair to blame the Property Factor for the issues. Mr Mayall said the F3 report should have been distributed. There is no evidence of a breach of OSP9 or OSP11. Paragraph 3.2 has nothing to do with this matter. It concerns clients' funds.

26. Responding to questions from the Tribunal as to how often maintenance checks were carried out to the roof, Mr Mayall said the gutters were cleaned, and visual inspections were carried out at that time. It was unclear what the expectations of the Homeowner were or what else was expected. The Property Factor would not let it go longer than around 18 months between inspections. This was part of a plan and the fact that works had been carried out in 2021 and 2022 by two different contractors was evidence of this.
27. The Property Factor had not been aware of the man-safe system, as there is no access to the roof. The system requires repair. It is bolted into the flat roof and cannot be maintained until it is fixed.

### **The Homeowner's response**

28. The Homeowner stated that one of the invoices for gutter cleaning lodged by the Property Factor was for block 9 and not block 11. It was his position that the work was only carried out because someone was selling a property and there was a missing slate. A roofer had told the Homeowner that the Property Factor had no maintenance plan for the roof. The organisation, Under One Roof, recommends six-monthly gutter cleaning. When roofers went to unblock the section of the Homeowner's gutter in November, they did not clear the rest of the gutters, despite an email from him (p248/284) asking that all the guttering be cleared. The Homeowner referred the Tribunal to a photograph on page 249/284 which showed the back of the building is close to dense trees.

## **Issue C : Lack of proper inspection and general maintenance**

### **The Homeowners' position**

29. As well as a lack of inspections, the Property Factor has failed to respond to concerns raised on 16<sup>th</sup> February 2023 regarding the state of the communal hallway in block 11 (photographs at pp241-243/280). The Property Factor has failed to respond to emails and phone calls. They promise to call back, but do not do so. The Property Factor uses two different systems for billing and maintenance. The latter system does not work as well. There have been no proper meetings. Decoration has not been carried out for four or five years. There are holes in the walls and they have not been mentioned in inspection reports. The skirting boards required fixing and it took four years to have this done. The place now looks like a slum. The Homeowner said he appreciates the consent of all homeowners is required to carry out works and there has been a poor response to invitations to meetings in the past. The Property Factor is failing to provide a core service. There is no maintenance. Safety lights are out. Another property factor inspected the development at the request of the Homeowner and pointed out many issues and a lack of general maintenance. There has only been one ballot to ask homeowners. The alleged failures to comply are in respect of paragraphs OSP6 and 1B.4 and 2.7.

### **The Property Factor's position**

**30.** Mr Mayall said inspections are carried out and reported quarterly. Emergency lights are inspected every year. There are a high proportion of tenants. Mr Mayall questioned the existence of evidence that these matters had been reported to the Property Factor. It was his position that homeowners would have to put forward the requirement for decoration as a priority and the Property Factor would cost the work, he said he would expect redecoration to be carried out usually no more than every 10 years. One homeowner could not instigate decorating works. Given the high cost of roof works, it is unlikely that homeowners will wish to focus on decoration. Mr Mayall confirmed there is now a Residents Association with a committee and several meetings have been held recently.

### **Issue D: Lack of façade maintenance plan : inaction in following recommendations in important surveyors report**

#### **The Homeowners' position**

**31.** The homeowner said the facade was in a bad state, if it had been maintained it would not be as bad and the homeowners would not have to spend as much. The report by F3 recommended a check of the ball finials on the façade to the front elevation and recommended a restoration plan for the front façade. There is no evidence this has been done. There was also evidence of extensive moss growth and of water ingress from the front façade guttering but the report had stated this had not caused ongoing damage. The façade is deteriorating. There is mould and damp evident, and plant growth and blocked drains and guttering. The Thomasons report showed that there are friable areas of the façade, erosion of stonework, debris, algae and moss growth. There was no moss removal between 2019 and 2023. There is a question over the type of paint originally used, and this was not the fault of the Property Factor, however, there was a plan proposed in 2020 to remove the paint, and this was not acted upon. There was a ballot issued in 2021 but no results of the ballot were received by the Homeowner. The Homeowner has sent numerous emails regarding the façade to the Property Factor but no response has been received. There is also an issue with the garage, as the terrace has decayed and water drips onto cars and removes paint. The alleged breaches in respect of this matter are paragraphs 1B(4) , 2.7 and 3.2 of the Code, and paragraph 4.1 of the WSS.

**32.** The Homeowner said it was hoped repairs to the façade would have started after April 2023, but the money has not been in-gathered from homeowners. Three surveys are required for the flat roof, garage/terrace and façade. None have been carried out yet. It was his position that the Property Factor has been very lax in chasing this up. There is water ingress to all the top flats. The Homeowner said he had recently been told by the Property Factor that they would fund the surveys, if the Homeowner dropped the Tribunal application. He felt this was underhand and made it look as if the Homeowner was holding up the surveys.

### **The Property Factor's position**

33. Mr Mayall said works had been proposed on the back of the Thomasons report. There are three separate projects and the Property Factor has ingathered 83% of the required funding. They cannot proceed until all the funding has been ingathered. They issue reminders to homeowners who are not responding. There is no evidence that the façade has deteriorated significantly over the last few years. Any issues with the façade are picked up during inspections.
34. The F3 report did not highlight the issues that are highlighted in the Thomasons report, so the Property Factor would not be aware of these issues. The Property Factor would not look at non-visible areas unless there was an internal leak. There is no responsibility on the Property Factor to look at such areas. Responding to questions from the Tribunal as to the growth on top of the facade, which is visible, and the fact that the Homeowner said moss could be seen from communal areas, Mr Mayall said moss does not necessarily mean there is a maintenance issue. These issues have been caused due to the sandstone and the wrong paint being used. The paint is non-breathable and traps moisture, causing damp.

### **Issues E and F: Inadequate explanation of tendering process and billing : lack of transparency : conflict of interest : poor value for some services : financial implications. Further communication issues and income recovery /invoicing issues**

#### **The Homeowners' position**

35. The Property Factor is taking commission of 27.5% on buildings insurance. The Homeowner has checked with six other property factors who do not charge commission, and, instead, build this into the factoring fees. It took a long time to get the information on the commission from the Property Factor. Their response showed they are not open about their fees. The Property Factor could not give the Homeowner information about the claims made on the insurance policy. It was the Homeowner's position that this is a conflict of interest and a disincentive to obtain value for money for the homeowners.
36. The Homeowner said he had stopped paying his factoring bills in exasperation after failing to get responses from the Property Factor to enquiries. He had been charged a late payment fee and threatened with legal action. He had hoped not paying would make the Property Factor respond. The Homeowner's position was that the Property Factor was failing to follow their duties in their WSS in respect of disputed items, by failing to respond to communications, far less resolve concerns. He referred to his list of ignored communications and said he had never not paid until now. The alleged breaches in respect of these matters are paragraphs OSP6, OSP 9, OSP11, 2.7 and 3.2 of the Code, and paragraphs 5.8.6 and 6.1.1 of the WSS.

### **The Property Factor's position**

**37.** Mr Mayall said he has given the claims history to the Homeowner. It was his position that many property factors take this type of commission. They are perfectly entitled to do so as long as it is declared, and the Property Factor has declared it in their Development Schedule. The commission is a proportion of the broker's commission and should not have a detrimental effect on homeowners.

**38.** The Property Factor has an income recovery process. If there is a dispute raised over a billed item, the homeowner should pay the balance of the bill. The Homeowner chose not to do this. Mr Mayall said it was not clear what the Homeowner was disputing.

### **Further alleged failures to comply with the Code**

#### **Paragraphs 4.2 and 4.9**

##### **The Homeowners' position**

**39.** In respect of paragraph 4.2, the Homeowner said he accepted the Property Factor has made the debt recovery procedure available to homeowners and informed homeowners of late payment charges. In respect of 4.9, he has asked for information regarding outstanding debts but has not had a response from the Property Factor.

##### **The Property Factor's position**

**40.** Mr Mayall said he did not think 4.2 was applicable. He could not see any request from the Homeowner for information in respect of 4.9. Information is made available on outstanding debts in a live feed on the customer portal, which has been there for three years. There is a breakdown of the stages of debt recovery. The Homeowner said he has access to the portal, but was unaware of the live feed.

#### **Paragraph 7.1**

##### **The Homeowner's position**

**41.** The Homeowner said he had made all his complaints without using the word 'complaint', so the Property Factor had failed to deal with them as complaints. When he finally stated it was a complaint, his complaint seemed to skip the two-stage procedure. The Homeowner said he may have made his application to the Tribunal earlier than he should have.

##### **The Property Factor's position**

**42.** Mr Mayall said the Property Factor has a two-stage complaints procedure on their website. The Homeowner did not state he was making a formal complaint until after he had made his application to the Tribunal. There seemed no point

in taking it through the complaint procedure when an application had been made.

### **Final submissions**

- 43.** The Homeowner submitted the Property Factor was more interested in making money than in maintaining the development. No evidence of regular maintenance was provided. He has been told by roofers that there is no regular maintenance. The Property Factor has not adhered to their Written Statement of Services. The Property is deteriorating and the bills keep coming. The Property Factor's failures should be exposed, their licence reviewed and a financial penalty imposed.
- 44.** Mr Mayall made no final submissions, referring to the previous discussion and submissions made.

### **Findings in Fact and Law**

- 45.
- (i) The Homeowner is the heritable proprietor of the Property.
  - (ii) The Property Factor is registered as a Property Factor under registration number PF000103.
  - (iii) The Property Factor provides factoring services to the development of which the Property forms part.
  - (iv) There was water ingress to the Property in 2016.
  - (v) In August 2019, homeowners agreed to a survey by F3 Surveyors of the roof and front elevation of the block in which the Property is situated.
  - (vi) The F3 report recommended a restoration plan for the façade and a maintenance check on the flat roof.
  - (vii) The F3 report was not circulated to homeowners by the Property Factor.
  - (viii) An inspection report of the roof and façade of the block in which the Property is situated was carried out by Thomasons in March 2023.
  - (ix) The Thomasons report identified defects in the façade and roof.
  - (x) The Thomasons report recommended works be carried out to the façade, and further inspection be undertaken of the roof.
  - (xi) The Homeowner obtained a copy of the survey from F3 Surveyors on 20<sup>th</sup> July 2023.

- (xii) In or around 2018, a tenant deposited items on the common stairwell of the block of which the Property forms part.
- (xiii) In 2018, the Homeowner corresponded with the Property Factor requesting the removal of the items in the common stair.
- (xiv) In July 2020, the Property Factor contacted occupants of the properties within the block with a reminder that common areas must be kept clear.
- (xv) The Homeowner discarded the items in the common stair in 2022.
- (xvi) The Property Factor has failed to respond to enquiries and complaints received from the Homeowner within the timescales confirmed within their Written Statement of Services.
- (xvii) The Property Factor has failed to carry out the services they provide to the Homeowner using reasonable care and skill and in a timely way.

### **Tribunal Decision and Reasons**

***OSP6. You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.***

- 46. The Tribunal found the Property Factor had failed to carry out their services to homeowners using reasonable care and skill and in a timely way. It is stated within the WSS at 4.1 that roof inspections, gutter cleaning etc. will be provided where applicable on an 'as required' or 'as agreed' basis. It is stated within the Development Schedule that service provision includes common external building maintenance, and common roofs and tiles. Mr Mayall's evidence was that gutters were cleared every 12-18 months, unless it was in an area with a significant number of trees or there was a documented issue with constant blocked gutters. The Property is in an area with a significant number of trees, and vegetation in the gutters appears to have been observed from outside and from internal common areas. The Property Factor provided scant evidence that any regular and routine gutter cleaning or roof inspections are taking place. There was evidence of occasional gutter cleaning, but no evidence that this is part of any programme or schedule on the part of the Property Factor. The Tribunal took into account the evidence of the Homeowner that recent work at the Property did not seem to result in any wider or general inspection of gutter or roof issues, but was restricted to a small area. While the Tribunal accepted that the lack of access to the roof means roof inspections are not easily carried out, a proper programme of gutter cleaning may assist in identifying issues with the roof and façade.
- 47. The Tribunal made no findings in respect of a failure to carry out inspections by the Property Factor as insufficient evidence was lodged in this regard, and it was not clear what impact the Covid-19 pandemic had had upon the schedule of inspections.

48. The Tribunal made no findings in respect of a failure to carry out decorating works. This would require the commitment of all homeowners before any work could be carried out, and it is not clear that any such discussion took place. The issue of the Property Factor failing to respond to communications in this regard is dealt with under OSP11 and 2.7. It appears that this matter is now in hand (p249/280).

***OSP9. You must maintain appropriate records of your dealings with homeowners. This is particularly important if you need to demonstrate how you have met the Code's requirements.***

49. The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as insufficient evidence was provided in this regard.

***OSP11. You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.***

50. The Tribunal found there had been a failure to comply with this paragraph of the Code. This was clear from the evidence, including the list of ignored communication at page 23/284, and from the Property Factor's acceptance of a failure to comply with paragraph 2.7.

***1B(4) the core services that the property factor will provide to homeowners. This must include the target times for taking action in response to requests from homeowners for both routine and emergency repairs and the frequency of property visits (if part of the core service);***

51. The Tribunal did not find there had been a failure to comply with this paragraph of the Code. This paragraph refers to the content of the WSS. The WSS includes the required information.

***2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.***

52. A failure to comply with the paragraph was accepted by the Property Factor.

***3.2 The overriding objectives of this section are to ensure property factors:***

- ***protect homeowners' funds;***
- ***provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor;***
- ***make a clear distinction between homeowners' funds, for example a sinking or reserve fund, payment for works in***

*advance or a float or deposit and a property factor's own funds and fee income.*

53. The Tribunal did not find there had been a failure to comply with this paragraph of the Code. This section of the Code refers to financial obligations and homeowner funds. The Tribunal did not consider that the complaints made in this regard were relevant to this section of the Code. The Tribunal considered that the Property Factor is entitled to take commission in respect of buildings insurance and there was no conflict of interest.

***4.2 It is a requirement of section 1 of the Code (written statement of services) that a property factor informs homeowners of any late payment charges and the property factor's debt recovery procedure is made available to homeowners.***

54. The Tribunal did not find there had been a failure to comply with this paragraph of the Code as the debt recovery procedure and late payment charges are made available to homeowners.

***4.9 A property factor must take reasonable steps to keep homeowners informed in writing of outstanding debts that they may be liable to contribute to, or any debt recovery action against other homeowners which could have implications for them, while ensuring compliance with data protection legislation.***

55. The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Tribunal noted that the Property Factor has a live feed whereby homeowners can view this information, as set out on their income recovery policy.

***6.2 Property factors may also agree, by contract, to instruct that specific maintenance duties are undertaken by specialist contractors on behalf of homeowners which contribute to fire safety. For example, the requirement in fire safety law to maintain any measures provided in communal areas for the protection of firefighters e.g. firefighters lifts, rising fire mains etc, or to ensure that common areas are kept free of combustible items and obstructions.***

56. The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There was no evidence that there was any agreement between the parties by contract that such work would be carried out. The Tribunal observed that the Property Factor appeared to have failed to deal with the issue of the discarded items in a satisfactory manner, by initially informing the Homeowner the issue would be dealt with, and then failing to deal with it, or adequately explain matters to the Homeowner.

***7.1 A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the***

*property factor must provide homeowners with a copy of its complaints handling procedure on request.*

*The procedure must include:*

- *The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.*
- *The complaints process must, at some point, require the homeowner to make their complaint in writing.*
- *Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.*
- *How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.*
- *Where the property factor provides access to alternative dispute resolution services, information on this.*

57. The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Property Factor has the required complaints handling procedure. Although the procedure did not seem to have been followed, the Tribunal accepted the evidence of the Property Factor that this was because the application to the Tribunal had been made. The Tribunal also noted the Homeowner's evidence that he may have made the Tribunal application prematurely without waiting for the complaints procedure to proceed.

### **Property Factor Duties**

58. The Tribunal did not consider whether there had been a failure to carry out property factor duties, as the alleged failures were not notified properly to the Property Factor before the application was accepted. The Tribunal observed there may have been some merit in the Homeowner's complaints that the WSS had not been complied with in certain areas, but it was not appropriate to make findings in that regard given the lack of proper notification.

### **Observations**

59. The Tribunal considered that an application under the 2012 Code would have been required for it to consider the matter of the F3 roof survey that was not circulated to homeowners or acted upon. This occurred before the 2021 Code came into force and ought to have been the subject of an application under the earlier code. The Tribunal made no findings as to whether the current state of the roof and façade could be attributed to any failure on the part of the Property Factor, including the failure to circulate and act upon the F3 report. The Tribunal observed that expert evidence may be required to establish any such link.

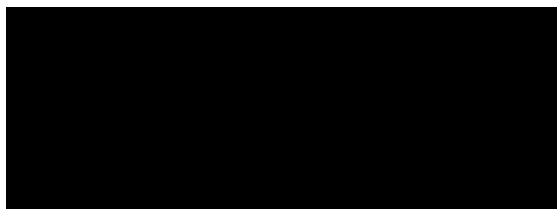
60. The Tribunal observed that the Development Schedule could be more specific about the frequency of, and programme for, gutter cleaning.

## **Proposed Property Factor Enforcement Order (PFEO)**

61. Having determined that the Property Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
62. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
63. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO 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.**



**Helen Forbes**  
Legal Member and Chairperson  
25<sup>th</sup> March 2024