

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/23/0234 and FTS/HPC/PF/23/0236

Property: 19 Brora Street, Glasgow G33 2BY (“the Property”)

The Parties:-

Ms Elaine Guthrie, 19 Brora Street, Glasgow G33 2BY (“the homeowner”)

Wheatley Homes Glasgow Limited, a Registered Society (SP2572RS), represented by their agents, Lowther Homes Limited, Wheatley House, 25 Cochrane Street, Glasgow G1 1HL (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Robert Buchan (Ordinary Member)

Decision

1. **The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors had failed to comply with Sections 2.5, 6.1 and 7 of the Property Factors Code of Practice effective 1 October 2012 and OSP6, OSP11 and Sections 2, 6.4 and 7 of the Property Factors Code of Practice effective 16 August 2021 and had failed to carry out the Property Factor’s duties. The Tribunal proposes to make a Property Factor Enforcement Order.**

Background

2. By applications, received by the Tribunal on 24 January 2023, the homeowner sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. She alleged failures to comply with Sections 1, 2.5, 6.1, 6.3 and 7 of the Property Factors Code of Conduct effective from 1 October 2012 (“the 2012 Code”) and OSP6, OSP11 and Sections 1, 2, 3, 6.3, 6.4, 6.5, 6.6 and 7 of the Property Factors Code of Conduct effective from 16 August 2021 (“the 2021 Code”). As the alleged breaches occurred both before and after 16 August 2021, it was necessary for

two applications to be made. The homeowner also complained that there had been a failure to carry out the Property Factor's duties.

3. The homeowner's applications stated that the property factors had failed to comply with their Written Statement of Services ("WSS") in respect of the requirement to deal with repairs timeously, keep the homeowner advised and deal with complaints. The property factors had been contacted in 2019 as a result of water damage to the exterior and interior of the Property. The repairs had not been carried out properly and contractors had not been advised of the full issues surrounding the damage, so could not carry out the repair properly. The homeowner had requested that the property factors instruct a structural report in respect of new issues surrounding the cracks in the internal and external walls.
4. The homeowner provided the Tribunal with copies of email correspondence between the Parties from 8 November 2019 to 15 June 2022. The contents of the correspondence and documentation provided with the application are summarised in the following paragraphs numbered 5-13 inclusive.
5. In the first email, the property factors advised that 8 slates had been replaced and 3 refitted, with acropol (sic) being applied to the rear lead valley. The work had been completed on 18 September 2019. On 10 November 2019, the homeowner reported that, in addition to the roof, a crack had developed on the inside supporting wall of the Property and asked for it to be inspected. The property factors confirmed on 12 November that an inspection would be carried out two weeks later. On 10 December 2019, the homeowner, consenting to the repairs, sought confirmation that repairs to the downpipe and inside wall would also be carried out, and advised that she required a note of the reasons for the property damage in order to begin to discuss the matter with her insurers. She expressed concern about what would happen if consent was not obtained from other owners. She sent a reminder on 17 December and, on 31 December, not having received a reply, she told the property factors that it was now three weeks since her original email and she had not received any response. She stated that she had looked into the title deeds and that no authorisation was required from any other proprietor for repairs. It was only needed for improvements. On 6 January 2020, the property factors apologised for their delayed response. They had chased up their Common Repairs Team and referred the homeowner to the relevant section of her title deeds which set out a £200 threshold for repairs and maintenance. On 8 January, the property factors confirmed that they had the necessary consent and works would now proceed. In an email of the same day, the homeowner referred the property factors to the fact that she had advised them in writing quite a few times about her concern relating to possible structural damage to an inside wall. Following another reminder, the property factors, on 17 January, apologised that the homeowner had not yet received a response. They had asked their Common Repairs Team to prioritise her enquiry and advised that a slater was booked to attend on 23 January. The homeowner responded that, as there had been previous unsuccessful attempts to repair the roof, she expected a full review and a report on the findings.

6. On 28 January 2020, the property factors' Common Repairs Team summarised the history of recent repairs. Their system indicated that the initial repair reported in November 2019 to address water ingress was rejected as the property factors did not receive consent to proceed. They later received that consent and the repair had been reprogrammed for 27 January 2020. The downpipe was reported as cracked on 26 November 2020 (the Tribunal assumes that the date was November 2019) and a section of it was replaced on 13 January 2020. The homeowner acknowledged that information but reminded the property factors that she had still not received a substantive response to her earlier queries. She repeated this on 7 February, adding that she had yet to receive any feedback on the repair work that was carried out. The property factors' response on 13 February was that they would be unable to offer any further concise information as the homeowner had not specifically requested a response to a specific enquiry. The homeowner replied that she was now going to write to the property factors' CEO, which she did on 21 March 2020.
7. The property factors replied on 29 April 2020. They conceded that communication with the homeowner could have been better between October 2019 and April 2020. There had been occasions when the homeowner contacted them, but they had failed to fully respond to her enquiries. They asked her to accept their apologies and reassurance that measures were in place to ensure this did not happen again. With regard to the crack on the internal wall, the inspection at the end of November had noted it and pictures were taken, but the immediate water ingress was prioritised. In line with Government guidelines on COVID-19, their repairs service was currently only carrying out emergency repairs to the common areas of properties. This was where there was an immediate threat to residents, the wider public or the safety of the property. They understood the homeowner's frustration but could not carry out a further inspection at that time and had asked one of their team to contact the homeowner directly once restrictions were lifted, to arrange an inspection specifically to investigate the crack and determine whether there was a structural issue to be addressed. In line with their Complaints Policy, the property factors confirmed that the homeowner's complaint had been upheld and the letter advised her of her right to escalate it to Stage 2.
8. The response of the homeowner on 23 May was that, whilst her complaint had been upheld, it did not provide the clarity she had sought on several issues nor did it provide her with the relevant documents she had requested some time ago. The property factors then told her that, once restrictions had been lifted, they would be happy to revisit the complaint with a view to arranging an inspection.
9. On 22 December 2020, the property factors confirmed that they had booked the homeowner's emergency repair to the roof and would visit on 22-23 December. On 22 December the homeowner replied that she had had another email saying that individuals had turned up at the Property, but no-one was at home. She had not been advised that someone had to be at home. On 23 December 2020, the property factors confirmed a new appointment for 14 January 2021. On 19 January, an auto-generated notification was sent to the

homeowner stating that it had not been possible to carry out the roof repairs as no-one was home at the agreed appointment time. The homeowner immediately responded that nobody had ever confirmed the appointment with her. In another email of the same date, she advised the property factors that she had finally run out of patience and would be passing the matter to a lawyer to pursue negligence.

10. On 4 March 2021, contractors carried out repairs to the roof, but the homeowner complained to the property factors that the roofer had stated that the lead valley needed to be replaced. The property factors had instructed a lesser repair. On 9 March, referring to a further Stage 1 complaint of 10 December 2020, the property factors apologised for the fact that the homeowner remained unhappy with the service she was receiving, but repeated that, due to the tighter restrictions which were put in place, they had been unable to instruct the internal inspection of the Property.
11. On 14 March 2022, the property factors provided a Stage 2 response to the homeowner, who had written to their Chief Executive on 4 March. The complaint was upheld. They accepted that, whilst they had to pause their services for some time due to COVID restrictions, there had been clear opportunities prior to May 2021 when the repairs could have been carried out. There had also been missed appointments, in addition to conflicting information having been given to the homeowner in relation to appointment times. The homeowner had asked the property factors to assist her with an insurance claim and they confirmed that they had checked with Ageas, who advised that the costs of the homeowner's contractor would be covered once she made a claim and provided a quotation for the works. The homeowner had recommended a structural survey, which the property factors had arranged, and which was carried out on 20 December 2021. They understood that the homeowner had had concerns with the structural survey and had questioned its accuracy and the qualifications of the person who carried it out, but explained that the engineer carried out work for Balfour Beatty and, as a qualified surveyor, had been instructed by City Building Glasgow, who deliver the property factors' repairs service in the West of Scotland. They purported to attach a copy of the survey and stated that there was no subsidence identified in the block of which the Property forms part. The property factors accepted that there had been failures in responding timeously to some of the homeowner's emailed enquiries. In relation to the insurance claim, the property factors confirmed that they had forwarded, to the loss adjuster for Ageas, the quotation that the homeowner had provided, and had supplied contact details for the loss adjusters. Having upheld her complaints at Stage 2, the property factors signposted the homeowner to the Tribunal, should she be unhappy with the decision.
12. On 30 March 2022, the property factors apologised for the fact that the attachments, including the survey report, that were to accompany the Stage 2 response had been omitted and attached them.

13. On 14 June 2022, referring to a letter of 1 April to which she had not received a response, the homeowner sent a courtesy email to the property factors, notifying them that further cracks had opened up inside her property.
14. On 23 September 2022, the homeowner's solicitor formally intimated to the property factors that the homeowner believed they had failed to comply with Sections 1, 2.1. 2.5, 3. 6.1, 6.3. 6.9 and 7 of the 2012 Code and had failed to carry out the Property Factor's duties. On 18 October, they advised that they were now referring the matter to the Tribunal and on 24 January 2023, they informed the property factors that the homeowner believed they had failed to comply with OSP6, OSP11 and Sections 1, 2, 3, 6.3, 6.4, 6.5, 6.6 and 7 of the 2021 Code. Sections 2.1 and 6.9 of the 2012 Code were not included in the application.
15. The property factors provided detailed written representations to the Tribunal. The property factors conceded that there had been failures in repairs being completed and that there had been some failures to respond to enquiries and complaints within the timescales set in their complaints handling procedure, but they did not accept a number of the items complained of in the applications.

First Case Management Discussion

16. On 8 March 2023, the Tribunal advised the Parties of the date of a Case Hearing, which was held by means of a telephone conference call on the morning of 27 April 2023. The Applicant was present and was represented by Mrs Kara MacGregor-Duke of Complete Clarity & Simplicity Legal, Glasgow. The Respondents were represented by Mr David Adams, Senior Solicitor of Wheatley Group, and Mrs Vicky Aitken, their Factoring and Property Manager.
17. At the outset, Mr Adams requested, and Mrs MacGregor-Duke acceded to the request, that the applications should be amended to correct the name of the property factors for the Property to Wheatley Homes Glasgow Limited with Lowther Homes as their agents in terms of Rule 32 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017.
18. The Tribunal advised the Parties that, from its review of the paperwork submitted by the Parties, it had concluded that certain additional documents were required. Accordingly, it was agreed by the Parties and the Tribunal that the proceedings should be regarded as a Case Management Discussion rather than a Hearing, with the Tribunal issuing Directions to the Parties regarding the documents that it required to see. The Parties were content that, once the Directions had been complied with and the documents cross-copied, with Parties invited to provide further written representations should they then wish to make them, the applications could be determined on the basis of written representations without the need for a full evidential Hearing.
19. The homeowner clarified that the Property forms part of a block of four flats, two up and two down. In response to a question from the Tribunal, she

confirmed that she had put in an insurance claim in 2021 in respect of the internal damage to the Property. She had expected the property factors to progress the claim with the insurers, but had recently contacted the insurers directly, although she had not yet received a response. Mrs Aitken confirmed that the homeowner had obtained a claim number, and the property factors had passed on quotes that the homeowner had obtained.

20. Mr Adams told the Tribunal that the property factors were still hopeful that matters could be resolved. They proposed to instruct a fuller survey of the Property with a view to finding out what work required to be done. He confirmed that this report would be commissioned from an independent company and not from City Building Glasgow, which is part-owned by Wheatley Group, and that it would cover both the exterior of the building and the interior of the Property.
21. The Tribunal continued consideration of the applications to a later date when, following its issuing Directions to the Parties and receipt of the documentation required by its Directions, it would invite the Parties to make any further representations they might wish to the Tribunal, and the Tribunal would determine the applications on the basis of written submissions, without a full evidential Hearing.
22. The Tribunal issued Directions to the Parties.
23. The homeowner was required to provide:
 1. *A copy of the Land Certificate for the Property, to include in the Burdens Section, the Deed of Conditions or other Deed that sets out the basis on which common repairs can be instructed and*
 2. *Receipted fee notes for legal expenses, vouching for any other expenses she has incurred in relation to the applications and details of any financial remedy she is seeking.*
24. The property factors were required to provide:
 1. *A copy of the report in relation to the Property provided by A.J.Balfour;*
 2. *The receipted Invoice for that report, with confirmation as to whether that cost was absorbed by the property factors or re-charged to the owners of the block of which the Property forms part and*
 3. *Confirmation that they have or will instruct, at no cost to the homeowners, a detailed report on the condition of the roof and roof pertinents above the Property the internal condition of the area of the Property affected by water ingress.*
25. On 31 May 2023, the homeowner's solicitors provided the Tribunal with a copy of the Land Certificate for the Property and receipted fee notes for legal expenses incurred by the homeowner. The Burdens Section of the Land Certificate provides that the factor must obtain authorisation of a majority of proprietors for works costing more than £200. The receipted fee notes, including Outlays and VAT amounted to £8,563.61 to 31 May 2023.

26. The homeowner's solicitors also commented on the previous written representations by the property factors. They noted that the property factors had accepted failures to comply with OSP6 and OSP11 of the Code. As regards the alleged failure to provide a copy of the WSS, regardless of whether it could be found on the property factors' website, a copy must be provided to all homeowners. In any event, correspondence was issued to the property factors on behalf of the homeowner in July/August 2022, requesting a copy, but no response was received. The view of the homeowner was that costs were cut, and the water ingress simply "patched up" in order to keep costs down. These repairs were unsuccessful and resulted in extensive repairs being required, at additional cost. The homeowner had been repeatedly emailing the property factors since 2019, to no successful conclusion. There had been clear failings in communication. The homeowner confirmed that water ingress has been reported since 2019 and that she viewed this as an emergency situation. A contractor other than City Building could have been instructed to carry out the repairs and the property factors had failed to give a reason why this was not possible. The property factors were not accepting any breach in relation to Complaints Resolution, on the basis that complaints have been upheld, but upholding 5 complaints is meaningless when the repairs remain outstanding and communication is ignored. At the first Case Management Discussion, the property factors said that they proposed to instruct a fuller survey of the Property, but to date, no contact had been made with the homeowner regarding this. The property factors also said that they had passed information to the insurers, but they had not provided the claim number to the homeowner.
27. The homeowner asked the Tribunal to grant a PFEO, ordering the property factors to instruct and submit to the Tribunal a fresh Structural Engineer's Report in relation to the damage to her home, to repair the wall cracking both inside and outside her Property, to repair the mould inside her Property, to provide a copy of the report for roof repairs apparently completed on 22 February 2023 and to repair the gutter damage to ensure no further leaks, including replacement of the downpipe. She also sought an Order for costs, including £8,563 61 legal fees and outlays and compensation for loss, stress and inconvenience. The homeowner had paid all the property factors' fees notwithstanding the issues raised in 2019 and asked the Tribunal to consider ordering a refund of all or part of those fees.
28. The property factors responded on 1 June 2023 to the Tribunal's Directions. They provided a copy report by AJ Balfour Associates Ltd ("AJ Balfour") dated 20 December 2021. They stated that they did not have a copy of the Invoice for that report but confirmed that no costs were charged to the owners for the survey to be done. They confirmed that they would instruct the detailed report as set out in the Direction.

Second Case Management Discussion

29. A second Case Management Discussion was held by means of a telephone conference call on the morning of 27 July 2023. The Applicant was again

present and represented by Mrs Kara MacGregor-Duke of Complete Clarity & Simplicity Legal, Glasgow. The Respondents were again represented by Mr David Adams, Senior Solicitor of Wheatley Group and Mrs Vicky Aitken, their Factoring and Property Manager.

30. The Parties confirmed that they were still content that the Tribunal decide the applications without a full evidential Hearing.
31. Mr Adams told the Tribunal that the structural engineer's report had been obtained earlier in the week. Both Parties agreed that the applications should not be decided without the Tribunal having seen the report and the Parties having had an opportunity to comment on it. Mr Adams stated that he would also wish to use that as an opportunity to comment on the homeowner's written representations of 31 May 2023. Mrs MacGregor-Duke said that she would also use a further period of continuation to provide the Tribunal with copies of the property factors' invoices for their fees. Mrs Aitken told the Tribunal that, in the light of the report, a further meeting had been arranged with the insurance company's claims handlers and loss adjusters the following week and that she would be happy to report back to the homeowner afterwards. The property factors agreed to copy to the Tribunal any briefing note following the meeting.
32. Mrs MacGregor-Duke expressed concern that it had taken so long for the structural engineer's report to be undertaken. It had not been done until 7 July 2023 and, whilst it was very helpful and positive, she was disappointed that the property factors were looking for yet more time to answer issues.
33. Miss Guthrie stated her view that there had only been the bare minimum of effort on the property factors' part. They had said in their written submissions on 1 June 2023 that they did not have a copy of the Invoice from AJ Balfour, but Miss Guthrie had contacted the company directly and had received a copy within 5 days. Mr Adams advised that the property factors now have it and submitted that the cost was irrelevant, as it had not been passed on to the owners. Miss Guthrie expressed the view that it had been included in the property factors' Invoice of 21 December 2021.
34. The view of the Tribunal was that, in view of the fact that both Parties were seeking a continuation, albeit for different reasons, and the Tribunal had not seen the structural engineer's report, a further continuation would be appropriate. The Tribunal did not make further Directions but told the Parties that it would expect them to use the intervening period to provide their comments on the report and to provide the documentation as indicated in Paragraph 31 of this Decision.
35. On 7 November 2023, the homeowner's solicitors made further written submissions. They noted that the property factors had not as yet produced a copy of the report from the building consultants and had not lodged any written submissions in response to those of 31 May 2023 from the homeowner, as they had said at the Second Case Management Discussion they would do. The solicitors provided a list of property factors' fees invoiced to the

homeowner from 1 July 2019 to 30 September 2023. They amounted to £1,601.13. The homeowner had not paid the last 7 Invoices, totalling £688.41, but wished to be reimbursed the fees from the start of the dispute, namely the £912.72 that she had paid. She did not wish this to be done by means of a credit to her account with the property factors. She also requested that no management fees be payable by her until the matter is resolved and repairs carried out. She was also seeking an order for costs, her legal fees and outlays now being £9,456.71, with the costs of preparation for and appearance at the third Case Management Discussion to be added. The homeowner was also seeking compensation for loss, stress and inconvenience. She has been unable to pursue her insurance claim as the property factors have failed to liaise with the insurers.

36. The homeowner was disputing the submission by the property factors that the cost of the AJ Balfour report was irrelevant as it had not been passed on to homeowners. She believed that it was included in the property factors' Invoice of 21 December 2021. There was a discrepancy of £108.55 between the amount of the Invoice from AJ Balfour and the amount refunded to the homeowner, who was seeking full accounting from the property factors.
37. On 8 November 2023, the property factors provided the Tribunal with a copy of a Building Surveyor's Inspection Report from Brown + Wallace, building consultants, Glasgow, dated 21 July 2023. It concluded that it is evident that water ingress has occurred through the roof coverings and at valley gutters, resulting in timber decay evident within the roof space and also causing the water damage evident within the stairway. At the time of their inspection all internal areas were found to be dry. They understood that localised patch repairs had been undertaken. There is evidence of condensation staining to the underside of the roof due to general lack of natural ventilation and deficient insulation within the roof space. The vertical crack to the wall running the full height in the entrance stairway is located where it appears two differing construction methods meet. This suggests the crack is a result of differential movement, possibly exacerbated by, or directly caused by water ingress from the leaking roof entering the wall cavity. They stated that hairline cracks to the internal building fabric and external cracking to the cementitious render finish to the elevations is localised, minor in nature, and not to be unexpected in a building of this age and construction. The slate roof is, however, in poor condition with widespread defective slates and lead/copper flashings, and open pointing to brick chimney stacks. The glazed roof hatch and rainwater goods are also in poor condition.
38. Fourteen recommendations are made in the Report, including the comment that "full replacement of the roof coverings in the short term may present a more financially viable solution over the long term."
39. The property factors also provided a copy of a letter to the homeowner of 24 October 2023, in which they advised her of a residents' meeting scheduled for 15 November "to discuss the repair recommendations within your block".

40. Responding to the homeowner's submissions of the previous day, the property factors stated that the claims handler for the homeowner's insurance claim had advised them that they do not require anything further at this stage and that the homeowner should hear directly from them. The AJ Balfour bill had been £768.56 excluding VAT. Each owner's share was £192.14 plus VAT, making a total of £230.57, which was fully refunded to the owners in the block. There was no justification in fact or in law for a Property Factor Enforcement Order. Repairs and their costs to a homeowner's property are the responsibility of the homeowner. The reason for the cracking is explained in the original survey report and in the subsequent report. Where works are required to common parts, owners have to consent to them. There had been no need for the homeowner to engage a solicitor. The property factors had liaised with the homeowner throughout, but she had been reluctant to accept the position in relation to a number of matters, including the need for consent for works in excess of the threshold, some delays caused by COVID restrictions and the position in relation to the cracks in her walls. The homeowner had refused to accept the offer to resolve matters contained within the property factors' Stage 2 response and had indicated that she preferred to "litigate". There was no justification for an order for costs or for waiving the property factors' Invoices which are due in terms of the title deeds.

Third Case Management Discussion

41. A third Case Management Discussion was held by means of a telephone conference call on the morning of 13 November 2023. The Applicant was again present and represented by Mrs Kara MacGregor-Duke of Complete Clarity & Simplicity Legal, Glasgow. The Respondents were represented by Mr David Adams, Senior Solicitor of Wheatley Group and by Margaret McGeechan.
42. The first part of the discussion centred on the report from Brown + Wallace. The Tribunal Members asked the property factors why, having had a roof report carried out following a complaint about water penetration into the homeowner's flat, they had not considered having at least the roof space checked for any consequential damage. Mr Adams replied that his understanding was that there was a problem with internal repairs and that remedial works were carried out in March 2021. The homeowner confirmed that work was carried out then, but the property factors never sent anyone out to check it had been done properly. The cracks were getting bigger and the mould was getting worse. Mr Adams referred the Tribunal to the Brown + Wallace Report, which confirmed that at the time of their inspection all internal areas were found to be dry and that they understood that localised patch repairs had been undertaken. The homeowner pointed out that there had been no internal patch repairs and that the Report suggested that the vertical crack in the internal wall had possibly been exacerbated by water ingress. Mr Adams accepted that the confirmation from City Building to there having been no issues reported internally, referred to by AJ Balfour in their report, was incorrect. He said that the question was whether the differential movement had been caused by or exacerbated by the water ingress.

43. In relation to the homeowner's insurance claim, Mr Adams said that his understanding was that the insurers have all the information they need to progress the claim. The property factors were not at fault.
44. The homeowner then addressed the issue of the property factors' fees. On 3 December 2021, she had received a common repairs consent form in respect of the inspection by AJ Balfour. Their charge was not shown in the property factors' bill until 23 March 2023, and she had, by letter, been pursuing sight of the AJ Balfour invoice. The owners had not been communicated with regarding the removal of the charge. She had obtained a copy directly from the company and it was for £660, but the amount shown in the property factors' bill was £768.56 and she wondered if City Building had added a charge to it. Mr Adams replied that the property factors' position is that the sum of £768.56 was fully refunded to owners.
45. The homeowner then responded to the property factors' statement in their submissions of 7 November 2023 that she had been reluctant to accept the position in relation to a number of matters. She said that this astonished her. There had been no acceptance by the property factors of timber rot and the need for roof repairs. She had been unable to renovate her kitchen, as she did not know whether there is any timber rot there. The property factors had failed at every opportunity and had caused her so much distress. They had failed to accept, acknowledge or apologise for their failings. Mr Adams responded that there have been apologies in relation to the history of the matter and an attempt to engage with the homeowner at the end of Stage 2 of her complaint.
46. The Tribunal Members then invited Mrs MacGregor-Duke to address them on the question of expenses, referring her to Rule 40 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, which states that the Tribunal can only make an award of expenses if it decides that the homeowner has been put to unnecessary or unreasonable expense through unreasonable behaviour by the property factors in the conduct of the case. Mrs MacGregor-Duke told the Tribunal that it was not being suggested that the property factors had acted unreasonably in their conduct of the case. What was being sought was in the realm of compensation. The homeowner is a very articulate woman, but she had felt that after so many years of trying to get things moved on, she had to take legal action, and the Tribunal should consider the cost to her of legal fees when looking at compensation.
47. The homeowner, in closing remarks, said that the property factors' final written submissions were egregious to her. They lacked credibility in saying orally and in writing that they had not billed her for the AJ Balfour report, when it was clear that they had. The property factors had misled her, had failed to engage, and had then tried to twist things to make it appear to be her fault.
48. Mr Adams made no closing remarks, being content to rely on the evidence already given by the property factors to the Tribunal.

Reasons for Decision

49. The Tribunal decided that the best way of presenting its Decision would be to consider in turn each of the Sections of the Code of Conduct about which the homeowner has complained and summarise the arguments put by both sides, then to give the Tribunal's decision and provide its reasons. Where appropriate, only the relevant portions of the various Sections are set out.
50. At the heart of these applications is the homeowner's complaint that an issue with damage to her Property resulting in water ingress, which she reported as long ago as August 2019, has still not been resolved. On 2 September 2019, she emailed the property factors to let them know that a crack had developed in the hall of her Property. She believed there might be some structural damage as a result of water ingress. The property factors advised on 8 November that a roof repair had been carried out, but did not arrange to inspect the inside walls and assess damage to the homeowner's Property. On 10 November 2019, the homeowner reported that a crack had appeared on the inside supporting wall of the building. She asked for a copy of any report on the damage to pass on to her insurance company and the property factors told her that an inspection had been arranged for 26 November to view the cracks on the inside wall. On 10 December, she raised concerns over how the matter was progressing and sought an update. She had to send two reminders before, on 6 January 2020, the property factors told her that the matter had been passed to their Common Repairs Team. She was told that a slater would be in attendance on 23 January 2020. On 17 January, the homeowner wrote to the property factors to express her concern that there had been several attempts to repair the roof but that she felt that the underlying problems were not being fixed. On 28 January, the property factors advised that the initial repair, reported in November 2019, had not been carried out due to consent not being received. They now had the necessary consent and the repair had been programmed for 27 January.
51. There was further email correspondence over the summer of 2020, with the property factors stating and the homeowner accepting that pandemic restrictions meant that work could not be carried out in people's homes unless it was of an emergency nature. On 24 August 2020, the homeowner asked about the next steps forward, with work having resumed in most parts of the UK. After two reminders, the property factors responded on 9 September to say that they were unable to resolve the homeowner's issues until restrictions were lifted. On 22 December, they advised her that they had booked her "Emergency repair to roof" for 22 December and that they would let her know what work was required to complete her repair and the date by which they aimed to have the work carried out.
52. On 22 December the homeowner received another email saying that individuals had turned up at the Property, but no-one was at home. She had not been advised that someone had to be at home, and it had never been necessary before for roof repairs. On 23 December, the property factors confirmed a new appointment for 14 January 2021. On 19 January, an auto-generated notification was sent to the homeowner stating that it had not been

possible to carry out the roof repairs as no-one was home at the agreed appointment time. The homeowner immediately responded that nobody had ever confirmed the appointment with her. The Tribunal did not agree that the appointment had not been confirmed (the communication of 23 December was sufficient confirmation), but noted that, yet again, she had not been told that she would require to be at home or to arrange for someone to be there to give access to her Property. No explanation was given by the property factors as to why an external roof repair required someone to be at home when the contractor attended.

53. On 5 March 2021, the property factors told the homeowner that repair work to the roof had been carried out on the previous day. She questioned the repair work, as she had spoken directly to the tradesman who had told her that the lead valley needed to be replaced. She stated her view that the large crack in the wall of her hall had been the result of water ingress via the lead valley gutter. On 5 March, the property factors put in place a “30 working day repair line” and lead flashing works were carried out on 27 and 28 May 2021, but nobody attended thereafter to check that the work had been effective.
54. By this time, the homeowner had made two formal complaints to the property factors, both of which had been upheld. On 4 March 2022, she made a further complaint, which was upheld at Stage 2 on 14 March. In their response to that complaint, the property factors referred to the survey carried out by AJ Balfour, whose report was dated 20 December 2021. The homeowner had questioned the report and the qualifications of the person who carried it out, as the surveyor had not looked inside the building or inside her Property. The property factors did not uphold that element of the complaint, but they did accept that there had been failures in responding timeously to some of her enquiries sent in by email. The homeowner replied on the same day to say that the report had not been attached to the property factors’ response. They sent it to her on 30 March 2022. In their written submissions, the property factors said that the survey report had been provided and issued to the homeowner “as soon as we had received it in early 2022”. The report is, however, dated 20 December 2021 and the Tribunal noted that the Invoice from AJ Balfour is dated the following day. It would be unusual for an Invoice to precede a report in such circumstances and the homeowner having requested it on 14 March 2022 suggests to the Tribunal, therefore, that the property factors took 3 months to provide her with a copy of the survey report, when they must have known how important its findings would be for her. The Applicant also stated in her written representations that the surveyor had been told specifically by City Building Glasgow that there was no damage to the inside of the property, which was incorrect. Although the homeowner had written at least 12 emails or letters to the property factors specifically mentioning the internal crack, the report states “Prior to completing the site survey, it was confirmed via City Building that there has (sic) been no issues reported internally and that the customer has only reported cracks on the external elements of the building.” The property factors were aware from November 2019 that the homeowner had reported both a crack in the wall of her hall and a crack in the inside supporting wall of the building. The view of the homeowner was that, as at the date of the applications, nobody had

properly assessed the damage both inside and outside the building and the damage to her Property was worsening.

55. On 15 February 2023, the property factors upheld a further Stage 2 complaint by the homeowner. It had been upheld at Stage 1 on 19 January. In total, therefore, 5 complaints were upheld, on 29 April 2020 (Stage 1), 23 December 2020 (Stage 1), 14 March 2022 (Stage 2), 19 January 2023 (Stage 1) and 15 February 2023 (Stage 2). The homeowner's fundamental issue is that, despite that, the property factors have still not dealt satisfactorily with the substance of her complaints.
56. The timing of the failure of the property factors to deal properly in late 2019 and early 2020 with the homeowner's report of water penetration into her Property and of a crack in an internal wall of the building had very serious consequences, as the COVID-19 pandemic and resultant lockdown meant that no progress could be made for many months thereafter. It was clear to the Tribunal that the property factors' response to the homeowner's report of water ingress should have been not only to instruct roof inspections and repairs (possibly temporary repairs at first), but also to investigate the water ingress issue within the building. If water was coming into the homeowner's Property, an inspection of the roof space above should have been regarded by the property factors as essential, to check for possible rot or other consequential damage. Had this been done timeously, it is possible that the necessary repairs could have been agreed upon and carried out before the pandemic struck. The Tribunal accepted, of course, that this could not have been foreseen by the property factors in August and November 2019, but that did not excuse the dilatory manner in which they appear to have dealt with issues that they must have known might be of a serious nature, including the possibility that there was now a structural problem.
57. The view of the Tribunal is that the property factors have repeatedly failed to "grasp the nettle" in this matter and continue to fail to do so. They had a report from Brown + Wallace on 21 July 2023, but it was not until 24 October that they intimated to owners a meeting, to be held on 15 November, to discuss the repair work detailed within the "recent" survey. That does not form part of the present applications, but it is nevertheless a matter on which the property factors should reflect.

The 2012 Code of Conduct

58. **Section 1 of the 2012 Code of Conduct** requires property factors to provide each homeowner with a written statement setting out the terms and service delivery standards of the arrangements in place between the property factors and the homeowner. The Tribunal **did not uphold** the complaint under this Section, which was that the homeowner had not been provided with a copy of the Written Statement of Services ("WSS"). The property factors stated that a copy would have been sent to the homeowner at the time of introduction of the 2011 Act. Although no evidence was provided to establish that a copy had been issued at those times and also when it was updated on 16 August 2021,

the view of the Tribunal was that the balance of probabilities suggested that it was highly likely that it had been sent, as this was action that all property factors were undertaking in the light of the new legislation. The Tribunal noted that, in any event, a copy was sent to her, with the Stage 2 Complaint response, on 15 February 2023.

59. **Section 2.5** states “*You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond*”. The Tribunal **upheld** the complaint under this Section. The homeowner had provided evidence that on 10 December 2019, she had raised concerns over how the matter was progressing and had sought an update, following the property factors having told her that an inspection had been arranged for 26 November. She had to send reminders on 17 and 30 December. She had also asked on 17 January 2020 for a copy of any report on the findings of the damage, but this had not been provided.
60. In their written submissions, the property factors accepted that, whilst they had to pause services due to COVID restrictions, they did believe there had been failures in communication to the homeowner. This accorded with the conclusion they had set out in a letter of 29 April 2020, in which they conceded that communication with the homeowner could have been better between October 2019 and April 2020 and that there had been occasions when the homeowner had contacted them, but they had failed to fully respond to her enquiries. They told her that “measures are in place to ensure this does not happen again.”
61. **Section 6.1** provides “*You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion*”. The Tribunal **upheld** the complaint under this Section. There was clear evidence from the volume of emails and reminders from the homeowner that the property factors had failed to keep the homeowner informed of the progress of the work. They had stated in their written representations that they acknowledged delays in repairs being carried out and information being provided to the homeowner in relation to these. They stated that although progress was made in 2021, there were opportunities prior to COVID restrictions being implemented for works to have been carried out.
62. **Section 6.3** adds the requirement that “*On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff*”. The Tribunal **did not uphold** the complaint under this Section. The property factors set out in their WSS that City Building Glasgow, (a company jointly owned by Wheatley Group and Glasgow City Council) deliver their repairs service in the west of Scotland and stated in their written representations that the decision to provide repairs services directly through the Wheatley family of companies had come after an independent options appraisal in 2015/2016. The homeowner did not accept the findings of the report from AJ Balfour, but they had been

appointed by the property factors as professional advisers. The homeowner had not questioned why they had been appointed and she had no issue with the appointment of Brown+Wallace to carry out the structural survey.

63. **Section 7** deals with Complaints Resolution, the relevant portion being “*You must have a clear written complaints procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow*”. The homeowner’s position was that she had made 5 complaints to the property factors, all of which had been upheld, but there had been no resolution of the matters that were the substance of her complaints. They all went back to the initial failure to deal properly with her report of water ingress and cracking to the wall of the hall of her Property and the reports of cracking in an internal wall of the building of which it forms part. The view of the Tribunal is that is not sufficient for property factors to simply uphold complaints if they do not also undertake to take steps to resolve the underlying issues. It should not be necessary for a homeowner to have to make successive complaints in such circumstances. The Tribunal **upheld** the ground of complaint, the property factors having admitted that there had been failures in responses being provided within the timescales set out in their complaints handling procedure.

The 2021 Code of Conduct

64. **OSP6 of the 2021 Code of Conduct** states “*You must carry out the services you provide to homeowners using reasonable skill and in a timely way, including by making sure that staff have the training and information they need to be effective*”. The Tribunal **upheld** this ground of complaint. The issue was not whether staff had sufficient training. It was accepted by the property factors that there had been failures in repairs being completed and responses being sent to the homeowner in a timely manner.
65. **OSP11** states *You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure*”. The Tribunal **upheld** this ground of complaint. The homeowner’s contention was that this matter had been ongoing since 2019, so had not been dealt with within reasonable timescales. The property factors accepted that, although the majority of the homeowner’s enquiries had been responded to within the timescales set in their complaints handling procedure, there had been failures in responses being provided on time to her.
66. **Section 1** requires property factors to provide each homeowner with a comprehensible WSS and that a copy of the latest WSS must be made available by the property factor on request by a homeowner. The Tribunal **did not uphold** the complaint under this Section for the reasons set out in its Decision relating to Section 1 of the 2012 Code of Conduct.
67. **Section 2** covers Communication and Consultation, the relevant portion being Section 2.7, which states “*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". The Tribunal **upheld** the complaint under this Section, as it also had in relation to Section 2.5 of the 2012 Code. In their Stage 2 Complaint response of 14 March 2022, the property factors accepted that there had been failures in responding timeously to some of the homeowner's enquiries sent in via email. In their Stage 2 Complaint response of 15 February 2023, they referred to the homeowner's email of April 2022 addressed to their former Group Chief Executive. The property factors' notes at that time indicated that the case was closed and that previous advice had been given to the issues she had raised and repair lines were issued for plumbing investigations and roof repairs. They sincerely apologised that the homeowner did not receive an email from them to confirm this.

68. **Section 3** deals with Financial Obligations and provides "*Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills*". The Tribunal **did not uphold** the complaint under this Section. The homeowner's view, expressed in her written submissions, was that costs were cut and the water ingress simply "patched up" in order to keep costs down. These repairs had been unsuccessful, resulting in extensive repairs now being required, at additional cost. The property factors stressed that they had no interest in carrying out a lesser repair than that which may be required. The Tribunal did not agree with the homeowner's summary, but decided that no "improper" payment requests had been made and that it was unable to make a finding that the property factors had failed to comply with Section 3 of the Code.
69. The Tribunal did not make a finding in relation to the AJ Balfour Invoice of 21 December 2021, as it was not necessary to seek an answer as to whether there had been any "mark-up" by City Building Glasgow. The entire bill had been borne by the property factors, but the Tribunal would encourage them, in future, to disclose any "mark-up" on contractors' invoices being applied by them or by City Building Glasgow.
70. **Section 6.3** states "*A property factor must have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention*". The Tribunal **did not uphold** the complaint under this Section, as the property factors' WSS sets out the relevant procedures. The point being made by the homeowner was that she had been repeatedly emailing the property factors since 2019, to no successful conclusion. There were clear failings in the level of communication to the point where the homeowner was ignored. The Tribunal noted those submissions, but held that they did not constitute a failure to comply with Section 6.3 and had been dealt with, correctly, in relation to the complaint under Section 2.
71. **Section 6.4** includes a requirement that "*Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and*

homeowners informed of the progress of this work, including estimated timescales for completion". The Tribunal **upheld** the complaint under this Section. The property factors' failings in relation to Section 6.1 of the 2012 Code continued beyond 16 August 2021, when the 2021 version of the Code came into effect.

72. **Section 6.5** states that "*If emergency arrangements are part of the service provided to homeowners, a property factor must have procedures in place for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for providing contractors access to properties in order to carry out emergency repairs wherever possible*". The Tribunal **did not uphold** the complaint under this Section. The property factors' WSS specifies how they will deal with emergency repairs.
73. **Section 6.6** provides "*A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair and maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner*". No evidence was presented relating directly to this Section and the complaint was, therefore, **not upheld**. The portion of the Section relating to how and why particular contractors were appointed is covered in the Tribunal's Decision in relation to the complaint made under Section 6.3 of the 2012 Code. The property factors, however, ought perhaps to consider the comment by Brown + Wallace that "full replacement of the roof coverings in the short term may present a financially more viable solution over the long term" and whether or not their appointed contractors should be offering such advice where appropriate.
74. **Section 7** deals with Complaints Resolution and, as well as, very much in line with Section 7 of the 2012 Code, requiring property factors to have such a process, states that "*The procedure should be applied consistently and reasonably*". The Tribunal **upheld** the complaint under this Section, its view being that it is not a reasonable application of a complaints procedure to consistently uphold complaints but do nothing about the issues which gave rise to them. The Tribunal agreed with the homeowner's statement that she has had 5 separate complaints upheld, but that her situation remains unchanged. She did not accept the report from AJ Balfour, as it did not cover internal repairs or structural work. The second report, from Brown + Wallace, raised serious concerns about the roof. That is what she had complained about at the outset. The view of the Tribunal is that she was perfectly justified in seeking a more detailed report. It highlighted significant issues, some of which should have been dealt with earlier. She expressed concern that only "patch-up" jobs had been done. The roof space should at least have been inspected, to make sure there was no rot or other consequential damage, following the water penetration. The property factors should have been more pro-active

throughout the process and have, therefore, significantly failed the homeowner.

Property Factor's Duties

75. The Tribunal also determined that the property factors had failed to comply with the Property Factor's Duties. They failed on numerous occasions to meet the Customer Service commitment in the WSS to respond to correspondence within five working days and, if unable to deal in full with an enquiry in that time to inform the homeowner of progress every five days. They also failed to provide formal responses to the homeowner's complaints within the timescales indicated in their WSS.
76. The Tribunal did not have sufficient information to make a finding relative to the homeowner's insurance claim. There is no doubting the fact that the repair works within the Property were very significantly delayed as a result of the failures of the property factors to get a proper hold of and deal with the homeowner's complaint that water ingress had caused damage to the Property, including cracking in the wall of the hall, but the Tribunal had to take into account the effect of the COVID pandemic on the operational capability of property factors, assessors and contractors. The property factors stated in their written representations of 8 November 2023 that the claims handler for the homeowner's insurers had confirmed that they did not require anything from them at this stage to progress the claim and that the homeowner would hear directly from them.

Property Factor Enforcement Order

77. Having determined that the property factors have failed to comply with Sections 2.5, 6.1 and 7 of the 2012 Code of Conduct and OSP6, OSP11 and Sections 2, 6.4 and 7 of the 2021 Code of Conduct and that they had failed to comply with the Property Factor's Duties, the Tribunal then considered whether to make a Property Factor Enforcement Order ("PFEO"). The homeowner had sought a PFEO ordering the property factors to instruct a fresh structural engineers' report, to repair wall cracking both inside and outside the Property, to repair the mould inside the Property, to provide a report relating to roof repairs apparently completed on 22 February 2022 and to repair damage to the gutter. It is for property owners to meet the cost of repairs, and it was not competent for the Tribunal to order the property factors to carry out works. The fresh structural report had been instructed and obtained.
78. The homeowner added that she had been asked to pay for a service which she had not received, including associated costs with regards to repairs and reports and she had required to instruct solicitors. She asked the Tribunal to consider awarding her compensation and to take into account her legal costs. She felt that the matter was complex enough to justify instructing a solicitor. The property factors said that there had been no need for the homeowner to instruct a solicitor. She had not taken up the acceptance by them in their Stage

2 Response of 14 March 2022 of her request to resolve matters amicably by contact with a senior officer to discuss resolution and, in her email of 15 June 2022, she had stated her intention to litigate. They also expressed the view that there was no justification for waiving their own fees.

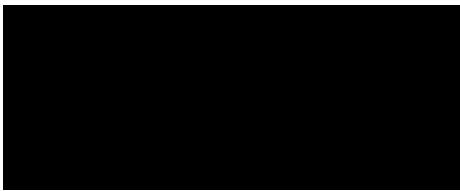
79. The view of the Tribunal is that the homeowner has been let down by the property factors over a protracted period. She has been unable to undertake work that she had planned within the Property until the problems are resolved and that is not likely to be for some months yet. The homeowner has complained and complained and her complaints have been upheld by the property factors, but the matter was not resolved. Accordingly, the Tribunal proposes making a PFEO as set out in the accompanying Section 19(1)(a) Notice.
80. It was very disappointing to note that the property factors upheld a series of complaints but did not offer the homeowner any compensation or abatement of their fees, when the service they provided fell well short of what she was entitled to expect. The Tribunal recognised that the property factors have been carrying out various other factoring duties for the homeowner and her neighbours, and was mindful of the significant disruption caused by the COVID-19 restrictions. Taking these matters into account, the Tribunal decided that the property factors should be ordered to reimburse the homeowner 50% of the factoring fees from 1 July 2019 to 30 September 2023, a sum of £800.57. The homeowner has withheld the fees since 1 January 2022 and has paid £919.72 in total. The property factors should, therefore, reimburse her the sum of £112.15.
81. The Tribunal then looked at the question of compensation for inconvenience and distress, including the fact that the homeowner had engaged solicitors to act on her behalf. The Tribunal understood the sense of frustration that she must have felt, having successive complaints upheld but no progress made to address the underlying issues. Also taken into account were the inexplicable delays in sending the survey reports to the homeowner and the apparent seriousness of the complaints. Rainwater penetration and a crack appearing in a wall are likely to cause alarm to any householder, along with a natural desire to have the matter investigated and dealt with as soon as possible. Having considered carefully all the representations made to it on compensation, the Tribunal decided that it would order the property factors to pay to the homeowner the sum of £2,500, which includes a contribution towards her legal fees, this being a sum that the Tribunal regarded as reasonable in all the circumstances.
82. The Tribunal would exhort the property factors to examine closely their procedures and processes and in particular the manner in which they deal with complaints. Simply upholding them is not good enough. They should have been working proactively with the homeowner from the moment she reported water ingress to her Property and she should not have had to send one reminder after another when they were well aware that there were, potentially, serious repairs issues to be investigated. Had they addressed the problems when they were first reported by the homeowner, it is possible that work would

have been carried out before the end of 2019, instead of remaining outstanding four years later.

83. The Tribunal's Decision was unanimous.

Appeals

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.



15 January 2024

Legal Member