

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended**

**Chamber Reference: FTS/HPC/PF/22/0025 & FTS/HPC/PF/22/0668,**

### **The Parties**

**Dr Yana Berezovskaya, 10 Warriston Road, Edinburgh, EH7 4HJ ("the Homeowner")**

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

**Land Register Title: MID151317**

**Subjects: The Printhouse, 10 Warriston Road, Edinburgh, EH7 4HJ ("the Property")**

### **Tribunal Members**

**Ms H Forbes (Legal Member)**

**Mr D Godfrey (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 2.5 and 6.1 of the 2012 Property Factor Code of Conduct and paragraphs OSP6, 2.7, 6.1, and 6.4 of the 2021 Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the Act").

The decision is unanimous.

### **Background**

1. By applications received in the period between 7<sup>th</sup> January and 18<sup>th</sup> February 2021 the Homeowner applied to the Tribunal for a determination on whether

2. the Property Factor had failed to comply with paragraphs Bc, Bd, Dm , 2.5, 3.3, 4.1, 4.6, 4.7, 6.1, 6.4, 6.8 and 7.1 of the 2012 Code and paragraphs OSP2-6, OSP11, D13, D14, D15, 2.1, 2.4, 2.7, 3.1, 3.2, 3.4, 6.1, 6.4, 6.6, 6.7, and 7.1 of the 2021 Code. The Homeowner also alleged breaches of property factor duties. Details of the alleged failures were outlined in the Homeowner's application and associated documents.
3. A Case Management Discussion ("CMD") took place by telephone conference on 18<sup>th</sup> May 2022. The Homeowner was in attendance. The Property Factor was represented by Mr Roger Bodden. Mr Rick Anderson and Mr Aryk Slupek were also in attendance on behalf of the Property Factor.
4. The Homeowner confirmed that cases FTS/HPC/PF/22/0027, FTS/HPC/PF/22/0030, FTS/HPC/PF/22/0669 and FTS/HPC/PF/22/0671 could be withdrawn, as they were a duplication of the complaints made under cases FTS/HPC/PF/22/0025 and FTS/HPC/PF/22/0668.
5. It was agreed that the complaints made under paragraphs D14 and D15 of the 2021 Code, and paragraph Bc and Bd of the 2012 Code could not competently be made under Section 1 of the Codes, which refer only to the content of the Written Statement of Services and not to the service standards.
6. The alleged failures to carry out property factor duties set out in the application appeared, in the main, to be a duplication of the complaints made under the Codes. The Tribunal explained that it will not consider the same matter as both an alleged breach of the Code and a failure to carry out property factor duties. Property factor duties encompass matters that are not set out in the Codes, and the Homeowner was advised to take legal advice on this matter, should she so wish, or consult the Housing and Property Chamber website and previous decisions for assistance. The Tribunal said it would not consider allegations that the Property Factor has failed in respect of other homeowners.
7. The case was continued to a hearing to take place on a date to be notified to parties.
8. On or around 4<sup>th</sup> April 2022, the Homeowner lodged updated representations and productions.
9. On or around 10<sup>th</sup> May 2022, the Property Factor lodged written representations and productions.
10. A hearing set down for 2<sup>nd</sup> August 2022 was adjourned by the Tribunal due to concerns about the presentation of the paperwork provided by the Homeowner.
11. The Tribunal issued a Direction dated 3<sup>rd</sup> August 2022 in regard to the presentation of the documents for the rescheduled hearing.
12. By email dated 10<sup>th</sup> October 2022, the Homeowner lodged amended representations and productions

## **13. The Hearing**

**14.** A hearing took place by telephone conference on 9<sup>th</sup> November 2022. The Homeowner was in attendance. The Property Factor was represented by Mr Roger Bodden. Mr Aryk Slupek was also in attendance.

### **Preliminary Matters**

**15.** The Tribunal raised the following preliminary matter:

- (i) **Was there any agreement between parties that certain paragraphs of the Codes had been breached?**

The Homeowner said there had been an acceptance of some errors by the Property Factor and repayment of some sums had been made, but the Property Factor had stopped responding to her further issues.

Mr Bodden said there was no agreement, as it had been difficult to review the volume of documents lodged by the Homeowner.

- (ii) **Documentation** – The Tribunal confirmed that everyone present had the correct documentation in PDF format, namely:

**Homeowner** – PDF Documents numbered 1 to 5 (referred to throughout as 'HO Document number/page number')

**Property Factor** – PDF Documents numbered 1 and 2. (referred to throughout as 'PF Document number/page number').

It was noted that the Property Factor's written representations dated 10<sup>th</sup> May 2022 were included at HO1/1.

There was an adjournment to allow the Tribunal clerk to provide the Property Factor documents to the Homeowner, however, it transpired that they had previously been issued to her.

The Homeowner said she would present her case based on HO Document 2 – *Further notes to accompany forms C1 and C2*

### **(1) 2012 CODE – PARAGRAPH Dm**

#### **The Homeowner's Position**

**16.** The Homeowner said there is no timescale of response set out in the Property Factor's Written Statement of Services ("WSS"). The Tribunal was referred to Document 4 page 263 (HO4/263) which showed the old WSS, which states: *James Gibb staff will acknowledge receipt of a communication within five working days of receipt. Timescales for resolution of queries, relevant to the prevailing issues, will be advised to the homeowner, where possible, on receipt*

*acknowledgement*. The Homeowner said this does not fulfil the requirement of the Code for a clear timescale to be set, as it is a very vague statement, giving the Property Factor a loophole to say every time that it 'wasn't possible' to advise timescale, which is against the letter and the spirit of the Code.

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

17. Mr Bodden said the WSS provided for a five-day period for an initial response and this complies with the 2012 Code.

### **Tribunal Decision**

18. The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. The initial timetable is set out in the WSS.

## **(2) CLIENT PORTAL ISSUES**

**2012 Code – Paragraphs 2.5, 3.3 (These were not considered as the issues complained of fell within the period covered by the 2021 Code)**

**2021 Code – Paragraphs OSP2, OSP3, 2.1, 2.4, 2.7, 3.1, 3.2, 3.4**

### **The Homeowner's Position**

19. The Homeowner said provision of development information is patchy and inconsistent. The client portal is not fit for purpose, because documentation is not uploaded onto it. There are only a handful of historical documents there, which were uploaded inconsistently, and eventually fewer and fewer documents were uploaded. This means that the residents do not get access to complete information about their development. It was her position that information is hidden from homeowners. The Homeowner referred to HO4/121 which showed a screenshot of the client portal. It could be seen that more documents had been uploaded in previous years, particularly in 2017
20. Referring to alleged failures to comply with the 2012 Code, the Homeowner said the absence of information on the client portal was a breach of this paragraph. When she tried to get information, it was not provided, and the portal was one method of communication. The Homeowner said supporting documentation had not been made available on request. A particular example was the roof issue.
21. Responding to questions from the Tribunal, the Homeowner accepted that the documents to which she had referred to support the alleged breaches (HO4/274-288) showed that the requests for site inspection reports took place after the 2021 Code was introduced. The Homeowner said this may be the case throughout her complaint. It had been difficult to present her case without a solicitor and she had indicated where matters straddled both Codes, but had not realised that specific complaints would have to be specified as to the particular Code that was relevant at the time of the complaint. The Homeowner

accepted that some of her complaints would, therefore, not be considered by the Tribunal if they fell outwith the particular Code timescale.

### **2021 Code – Paragraph OSP2 and OSP3**

- 22.** The Homeowner referred to the email correspondence at HO4/274-277 which indicated that she had requested documents in December 2021 and had not received them.

### **2021 Code – Paragraph 2.1**

- 23.** The Homeowner said she was particularly referring to the last three lines of this paragraph, namely: *They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.* It was her position that there was no accountability and the Property Factor was hiding information that showed inspections were not happening.

### **Paragraph 2.4**

- 24.** The Homeowner referred the Tribunal to HO4/144, an email that showed she had requested documents from the Property Factor on 29<sup>th</sup> November 2020. She received a response on 2<sup>nd</sup> December 2020. The Homeowner said this alleged breach was very much to do with the client portal documents. The portal was incomplete and the documents were not available. The Homeowner said the documents in relation to the lift inspection were an example of a breach of this paragraph.

### **Paragraph 2.7**

- 25.** The Homeowner referred the Tribunal to HO4/277, which was an email from her to the Property Factor dated 29<sup>th</sup> November 2021 requesting additional inspection reports. The Homeowner said she did not receive them despite the emails and telephone calls. It had taken the Property Factor 22 days to provide information requested in relation to insurance as indicated by the emails at HO4/193-195.

### **Paragraph 3.1**

- 26.** The Homeowner referred to the examples in her written representations regarding the documents missing from the portal and her attempts to get copies. She referred to further information on HO2/5 regarding an invoice audit she had carried out.

### **Paragraph 3.2**

- 27.** The Homeowner said the second bullet point was the relevant one, namely: *provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor.* The Homeowner's position was that she had

requested copy contractor invoices and these had not been provided. The Homeowner also suggested that if the reports or invoices were available on the portal, this would be clear and transparent. She also referred to the errors in the invoices that she had received from the Property Factor.

#### **Paragraph 3.4**

- 28.** The Homeowner said there was no evidence that the statement required by this paragraph had been provided. These statements should be in the portal and are not there. Responding to questions from the Tribunal, the Homeowner said she does not get the annual statement.

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

- 29.** Mr Bodden said there is no provision within the Codes for a client portal. The presence or absence of documents in the portal is not a Code breach. The Property Factor includes invoices on their portal.
- 30.** Mr Bodden said the Property Factor accepted their response times could have been better, and that there had been a breach of paragraph 2.5 under the 2012 Code and paragraph 2.7 under the 2021 Code.
- 31.** It was his position that there was no breach of OSP2 or OSP3 as there was no satisfactory evidence of either. There were lots of chatty emails back and forth which showed there was no breach of paragraph 2.1. As for paragraph 2.4, the Homeowner had not disclosed a failure to provide any documents that required to be disclosed under the Code.
- 32.** Mr Bodden submitted that, in regard to paragraph 3.1, the issue was with the Homeowner and her requirements, rather than with the Property Factor. Information had been provided to the Homeowner to a normal level of reasonableness, but not to her level, or to the standards of information that she requested. It was his position that there was no clear evidence of a breach of paragraph 3.2. As for paragraph 3.4, the Property Factor exceeds the requirement of the Code by providing quarterly financial statements. Responding to questions from the Tribunal, Mr Bodden referred to HO4/231 as an example of the quarterly statement provided for August to November 2020. Mr Bodden said the reason the number of documents on the portal varied from year to year depended on the manager at the time. There could be a degree of inconsistency. It is always a work in progress. It is an enhanced service rather than a core service.

#### **TRIBUNAL DECISION**

- 33.** The Tribunal did not find any failures to comply with the Code in respect of the way in which the client portal is set out or managed, accepting the position of the Property Factor that the portal is not a requirement of the Code.

## **Paragraphs OSP 2 & 3**

- 34.** The Tribunal did not consider there was evidence to support a failure to comply with these paragraphs.

### **Paragraph 2.1**

The Tribunal found there was no evidence to support a failure to comply with this paragraph. Some information was accessible on the portal. Other information was accessible from other sources. Some of the information on the portal may be dated, but it continues to be relevant.

### **Paragraph 2.4**

- 35.** The Tribunal did not find that there had been a failure to comply with this paragraph. It specifically relates to documents that must be made available to a homeowner under the Code. The Tribunal was not directed to any such documents by the Homeowner.

### **Paragraph 3.1**

- 36.** The Tribunal did not find that there had been a failure to comply with this paragraph. The monthly increased charge was set out in the Property Factor's letter of November 2020 (HO4/117). The Homeowner asked for the annual charge and was provided timeously with this information (HO4/143).

### **Paragraph 3.2**

- 37.** The Tribunal did not find that there had been a failure to comply with this paragraph. The Homeowner was provided with contractor invoices as requested.

### **Paragraph 3.4**

- 38.** The Tribunal did not find that there had been a failure to comply with this paragraph. The Property Factor provides quarterly statements that comply with the requirements of the Code.

## **(3) COMMUNAL GARAGE DOOR**

The Tribunal indicated that it would not consider this item as it related to another homeowner.

## **(4) WINDOW CLEANING INVOICE QUERY**

**2012 Code – PARAGRAPH 2.5**

**2021 Code – Paragraphs OSP4, 2.7, 3.1, 3.2**

## **The Homeowner's position**

### **2012 Code – Paragraph 2.5**

This was accepted by the Property Factor.

### **2021 Code – Paragraph OSP4**

- 39.** The Homeowner's position was that the Property Factor had, either deliberately or negligently, charged for window cleaning when no invoice from the cleaners was supplied to the Property Factor.

### **2021 Code – Paragraph 2.7**

- 40.** This was accepted by the Property Factor

#### **Paragraph 3.1**

- 41.** The Homeowner referred the Tribunal to an email exchange beginning at HO4/192 on 21<sup>st</sup> March 2021 where she had asked for clarity from the Property Factor in relation to window cleaning charges on an invoice. The matter was not answered fully until 25<sup>th</sup> April 2021, which was over a month. She had to repeatedly request further information and go into a great deal of detail before the Property Factor understood the issues and gave a satisfactory response.

#### **Paragraph 3.2**

- 42.** The Homeowner said the second bullet point was the relevant one, namely: *provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor*. The Property Factor charged proprietors for window cleaning when no invoice from the cleaners was supplied.

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

- 43.** Mr Bodden said it was an example of a billing error that had been identified. The Property Factor wrote to homeowners on 17<sup>th</sup> March 2021 informing them of the error (HO4/118). The Homeowner did not accept the explanation and the email chain then ensued.

- 44.** It was pointed out by the Ordinary Member at this stage that the complaints fell within the dates for the 2012 Code.

## **Tribunal Decision**

- 45.** The Tribunal made no findings in this regard, other than to note the Property Factor's acceptance of a failure to comply with paragraph 2.5 of the 2012 Code, as the remainder of the allegations made by the Homeowner involved the 2012 Code rather than the 2021 Code.

## **(5) INVOICE AUDIT**

**2012 Code – Paragraph 2.5, 3.3, 6.1, 6.4**

**2021 Code – Paragraphs OSP2, OSP6, 2.1, 2.4, 2.7, 3.1, 3.2, 3.4, 6.4, 6.6, 6.7 (These were not considered as the issues complained of fell within the 2012 Code)**

**The Homeowner's position**

**2012 Code – Paragraph 2.5**

- 46.** The Homeowner referred the Tribunal to HO4/119 which was an email from her to the Property Factor dated 15<sup>th</sup> April 2021 enclosing an invoice audit document she had compiled asking them to input answers to various questions. She had not received a response, despite chasing this up on 5<sup>th</sup> July 2021, including further questions. The audit document was at HO4/236, and the Homeowner said it could be seen how many issues there were.
- 47.** It was agreed that the dates for this matter fell within the 2012 Code. Mr Bodden indicated again that it was accepted that, on occasion, paragraph 2.5 had been breached, although it was his position that the Homeowner was not asking reasonable questions in the invoice audit.

**Paragraph 3.3**

- 48.** The Homeowner's written submissions stated that she found it difficult to ascertain what homeowners were being charged for and how often.

**Paragraphs 6.1 and 6.4**

- 49.** The Homeowner said she could not understand the work carried out from the invoices. She had asked for details of the frequency of maintenance and what was included, referring to HO4/238. The information had not been provided.
- 50.** The Homeowner referred to HO4/242 and a billing query where she had tried to get clarity on apportionment of charges. The Property Factor had made errors in relation to several apportionments, which were set out in her written submissions and included lift and fire alarm maintenance.
- 51.** The Homeowner submitted that her requests for information contained in her audit were reasonable and that it was all about context. The Property Factor had shown they could not be trusted and it was reasonable to ask for the information.

**The Property Factor's position**

- 52.** Mr Bodden submitted that there was no evidence to support a breach of paragraph 6.1, which is very specific. As for paragraph 6.4, cyclical maintenance is not part of the Property Factor's core service. Responding to

questions from the Tribunal regarding the wording of the paragraph of the Code, which states that, if periodic property inspections are included, a programme of works is required, Mr Bodden submitted that the Code does not refer to the type of property inspections carried out by the Property Factor, but refers to building-type inspections including surveys. Responding to questions from the Tribunal as to whether the maintenance schedule is provided to homeowners, Mr Bodden said he could not confirm this, but the information on statutory inspections such as fire inspections is readily available.

- 53.** Mr Bodden said the Property Factor accepted that it had not provided all requested information in full to the Homeowner, but submitted that her audit and requirements went beyond reasonable.

### **Tribunal Decision**

#### **Paragraph 3.3**

- 54.** The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. The Property Factor provides quarterly statements that comply with the requirements of the Code.

#### **55. Paragraph 6.1**

The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. There was no evidence that the Property Factor did not have a procedure for notification of repairs or failure to inform of progress/timescales. Issues relating to failure to inform homeowners are dealt with further below under another complaint.

#### **56. Paragraph 6.4**

The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. No evidence was provided of the matters specified in this paragraph.

### **(6) DEBT RECOVERY**

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

#### **2012 Code – Paragraphs 4.1, 4.6, 4.7**

#### **Paragraph 4.1**

- 57.** The Homeowner said there was no debt recovery procedure within the WSS, or if there was, she could not understand it. There were no steps and no timelines.

#### **Paragraph 4.6**

**58.** The Homeowner said the Property Factor had allowed old debts to age out and did not follow them up. She referred to discussion at an AGM on 20<sup>th</sup> January 2022, when the Property Factor had committed to providing requested information to show they had taken reasonable steps to recover unpaid charges. The information was never received.

#### **Paragraph 4.7**

- 59.** Responding to questions from the Tribunal as to whether she had been charged due to unpaid charges from other homeowners, the Homeowner said she thought so. There had been no discussion about chasing the culprits, and the Homeowner said she thought the Property Factor had forgotten about them.
- 60.** The Homeowner referred to HO4/285, an email of 29<sup>th</sup> January 2022 that showed she had asked for information regarding old debts, and the Property Factor's response had been *There is no debt on the development, the oldest debt is to be spread across owners*. The Homeowner said she had asked for this information previously. She gave up asking in February 2022 when the information was not forthcoming.

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

- 61.** Mr Bodden said there was a clear written procedure in the WSS and on the website. At the request of the Homeowner, Mr Bodden referred to HO4/55, paragraph 5.11.5, where it stated *A copy of James Gibb's income recovery procedure is available, on our website, under the "documents and guides" tab. A hard copy can be requested by contacting your local office*. Having checked the website during the hearing, the Homeowner stated that the policy was not there.
- 62.** There had been discussion about the debt at the January 2022 AGM. He clearly explained the situation at the meeting. No homeowners had been charged yet in respect of old debts. There was a question of whether the debts, which totaled £485 were worth pursuing.

#### **TRIBUNAL DECISION**

#### **Paragraph 4.1**

- 63.** The Tribunal did not find that there had been a failure to comply with this paragraph. The Property Factor has a clear written procedure for debt recovery which is referred to in the WSS and available in hard copy if required (PF2/60).

#### **Paragraph 4.6**

The Tribunal did not find that there had been a failure to comply with this paragraph. There was no evidence provided of a failure to keep homeowners informed of any debt recovery problems of other homeowne

#### **Paragraph 4.7**

- 64.** The Tribunal did not find that there had been a failure to comply with this paragraph. The Property Factor has not charged remaining homeowners for any such costs.

#### **(7) INSURANCE POLICY DOCUMENT**

**2012 Code – Paragraph 2.5 (This was not considered as the issue complained of fell within the 2021 Code)**

**2021 Code – paragraph 2.7**

- 65.** Mr Bodden confirmed that it was accepted that there had been a delay in providing information and a failure to comply with this paragraph.

#### **(8) COMMUNAL DRAINAGE PIPE AND ROOF ISSUE**

**2012 Code 2.5, 6.1**

**2021 Code OSP6, 2.7, 6.1, 6.4, 6.6**

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

- 66.** The Homeowner said this issue straddled both Codes. It began in May 2020, when the upstairs neighbour reported a leak in the communal drainage pipe to the Property Factor. Water pooling on the neighbour's roof has leaked into the Homeowner's property. The Property Factor instructed a specialist who concluded that repairs were required to the roof membrane. The leak deteriorated over the coming months. After chasing up the matter, it transpired that the roof works had not been carried out and the Property Factor had failed to follow up with the contractor. Five months after the leak was reported, works were carried out, however, the leak continued. Several specialists have looked at the roof. The Property Factor had failed to coordinate the specialists and there was no plan of action. Five different contractors visited from January to October 2021. Holes were cut into the balcony ceilings and the balconies are not unusable. The Property Factor did not share specialist reports or quotes despite being asked to do so. They eventually shared a couple of reports. The source of the leak has not yet been established.

- 67.** Mr Bodden indicated that the Property Factor accepted the alleged failures to comply with paragraphs 2.5 (2012) and 2.7 (2021)

**2012 Code paragraph 6.1**

- 68.** The Homeowner said there have been problems with lack of information on progress, and endless email trails that show nothing has been happening. These are set out in the written representations.

## **2021 Code paragraph OSP6**

**69.** The Homeowner said the Property Factor's approach was messy. They were sending random people to carry out work. There is no clarity in what need to be done. Responding to questions from the Tribunal as to what service, as required by this paragraph, the Homeowner was referring to, she said there is a chaotic approach to who needs to go onto the roof. The homeowners have been charged for having the holes covered up when they are not covered. The Homeowner referred to HO3/19 where the Property Factor had stated by email dated 5<sup>th</sup> August 2021 that the hole should have been covered up but 'there is no harm done'. This was a flippant approach. The roof is in a terrible state and the Homeowner is unable to sell or let the Property.

### **Paragraph 6.1**

**70.** The Homeowner said that every file shows that the Property Factor is preventing the Homeowner from keeping the Property well maintained. The Homeowner said that she had made herself available to meet tradesmen at short notice, letting contractors into her property, some of whom fail to keep appointments. Homeowners have to meet tradesmen but are unable to answer questions because they don't know what works have been carried out previously and without sight of any of the reports which have already been obtained.

### **Paragraph 6.4**

**71.** The Homeowner said there is no timescale for the repairs and homeowners are not being kept informed of the progress of the work. They do not have a full picture and the Property Factor is not sharing information. The problem has been ongoing for two and a half years and is still unresolved.

### **Paragraph 6.6**

**72.** The Homeowner said that information needed to be made available, as stated in the last sentence of the paragraph. The homeowners had asked for all the previous reports in connection with the roof but the Property Factor would not provide those. The chair of the residents' association has asked for a meeting with the Property Factor to get further information and view reports. They are awaiting a response.

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

**73.** Mr Bodden explained that there is a flat roof above the property which is above the Homeowner's. The membrane on the roof has perished. There has been a series of repairs. Water has penetrated the external balconies. It was a reasonable approach to carry out minor reactive repairs. A surveyor has been appointed. Reports have been shared. An area of slate was removed, and work carried out. It has now gone back to the surveyors and they are recommending a cost of £500 to take the work to the next level. They are awaiting the homeowners' agreement, but the homeowners are questioning

this and have created a delay. On a number of occasions, the Property Factor has required the consent of homeowners because the cost has exceeded the delegated authority and the work could not be accelerated.

- 74.** Responding to questions from the Tribunal regarding the fact that the Property Factor had stated in written representations that this work was not the responsibility of the Property Factor, Mr Bodden said it could be argued that this position was correct from the relevant Deed of Conditions, but it was being treated as a common repair which would be covered by common insurance.
- 75.** Mr Bodden said there had been a request for historic reports but these were of no relevance since the surveyor became involved. There is now total clarity on what needs to happen next, and the homeowners do not need to understand what has happened in the past. The homeowners need to put their trust in professionals. There is no requirement for a further meeting or past reports. Further expenditure is required.

## **TRIBUNAL DECISION**

### **2012 Code Paragraph 6.1**

- 76.** The Tribunal found there had been a failure by the Property Factor to comply with this paragraph of the Code, by failing to keep the Homeowner informed of the progress of works to the roof. Emails at HO3/2 onwards show the Homeowner asking for progress reports, and repeatedly chasing up the Property Factor, with no response to emails.

### **2021 Code OSP 6**

- 77.** The Tribunal found there had been a failure by the Property Factor to comply with this paragraph of the Code, by failing to provide services in a timely way.

#### **Paragraph 6.1**

- 78.** The Tribunal found there had been a failure by the Property Factor to comply with this paragraph of the Code, by failing to seek to make prompt repairs.

#### **Paragraph 6.4**

- 79.** The Tribunal found there had been a failure by the Property Factor to comply with this paragraph of the Code, by failing to keep the Homeowner informed of the progress of the work and failing to provide timescales. Documents at HO4/200-209 show the Homeowner chasing up the Property Factor for information from 2.11.21 to 14.12.21. HO4/126 shows an email from the Homeowner asking for update on 10.12.21. No response was received.

#### **Paragraph 6.6**

**80.** The Tribunal did not find there had been a failure by the Property Factor to comply with this paragraph of the Code. There was no evidence that the Homeowner had requested the type of information set out in this paragraph, such as how and why contractors had been appointed.

## **(9) CLEANERS – CONFLICT OF INTEREST**

### **2012 Code paragraph 6.8**

**2021 Code OSP2, 2.1, 3.1, 3.2 (These were not considered as the issue complained of fell within the 2012 Code)**

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

**81.** The Homeowner said there was an overall impression during the Covid-19 pandemic that there was a cosy relationship between the Property Factor and the cleaning company. The Property Factor had paid the cleaning company when the cleaning had not been carried out. The Property Factor always took the side of the cleaners and had not always acted in the best interests of homeowners. The Homeowner referred to HO4/142, which was an email of 5<sup>th</sup> April 2020 raising this issue with the Property Factor. There was an exchange of emails and the charges for missing cleaning visits were eventually credited to homeowners.

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

**82.** Mr Bodden said there was no evidence of a conflict of interest because there was none. It was a fluid situation that occurred 10 days after lockdown. The Property Factor reviewed the situation. Only one visit was missed and credits were provided. These were exceptional circumstances.

## **TRIBUNAL DECISION**

### **Paragraph 6.8**

**83.** The Tribunal did not find that there had been a failure to comply with this paragraph. There was no evidence of a conflict of interest.

## **PROPERTY FACTOR DUTIES**

**84.** There was some discussion about the fact that the Homeowner's alleged breaches as set out in document 2 covered areas of the Code, such as the complaints procedure and communication. The Tribunal said it would consider the submissions set out in the Homeowner's document 2, and invited parties to make any further submissions

**85.** The Homeowner referred to the Property Factor's delays in arranging AGMs, and their refusal to schedule meetings by Zoom. The Homeowner referred to a statement from the chair of the residents' association at HO3/39, regarding the AGM on 20<sup>th</sup> January 2022, which supported her position. The homeowners have now voted to change Property Factors. The Homeowner

said she had tried to coach and help the Property Factor staff but they think she is disruptive. They cannot listen and learn.

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

**86.** Mr Bodden said the Deed of Conditions places the burden for arranging AGMs on the homeowners and perhaps they need to take responsibility.

### **TRIBUNAL DECISION**

**87.** The Tribunal did not find there was a failure to carry out Property Factor duties as the complaints made by the Homeowner fell within the Code, which covers the complaints procedure and communication matters. There was insufficient evidence provided to the Tribunal to make any finding regarding the responsibility to schedule AGMs.

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

**88.**

- (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) The Property Factor's earlier version of the WSS sets out a timescale of five days for an acknowledgement of receipt of communication, with a further timescale to be advised thereafter. This complies with the requirements of the 2012 Code.
- (v) The Property Factor portal is not a requirement of either Code.
- (vi) The Property Factor provides quarterly statements to homeowners that comply with the requirements of the 2012 Code.
- (vii) On occasion, the Property Factor has failed to respond to the Homeowner's enquiries and complaints within prompt timescales.
- (viii) The Property Factor has a debt recovery procedure which is referred to in the Written Statement of Services and is available upon request.
- (ix) There is outstanding debt from previous homeowners but this has not been charged to current homeowners by the Property Factor.
- (x) A leak was reported in the communal drainage pipe or roof covering in May 2020. This has caused water to pool on a neighbouring roof and water has leaked into the Property

- (xi) Minor repairs have been carried out to the roof.
- (xii) Various specialists have inspected the roof.
- (xiii) The problem with water ingress continues and the source of the leak has not been identified.
- (xiv) The Property Factor has failed to keep the Homeowner informed of the progress of the works to the roof.
- (xv) The Property Factor has failed to provide timescales for completion of the works to the roof.
- (xvi) The Property Factor failed to recommend the input of professional advice at an early stage in the process.

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

**89.** 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.

**90.** In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failure to comply with the Code.

**91.** 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.

**92.** 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.**



Legal Member and Chairperson  
12<sup>th</sup> December 2022