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

Property Factors (Scotland) Act 2011 ("the Act"), Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the 2017 Regulations")

Chamber Ref: FTS/HPC/PF/17/0274

Property at 27 Dempsey Court, Queens Lane North, Aberdeen, AB15 4DY ("The Property")

The Parties: -

Mr David Gordon, residing at the Property ("the Homeowner")

James Gibb Property Management Ltd, trading as James Gibb Residential Factors, 32 Charlotte Square, Edinburgh, EH2 4ET ("the Factor")

Tribunal Members: -

Maurice O'Carroll (Legal Member)
Andrew McFarlane (Ordinary Member)

Decision of the Tribunal Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has failed to comply with the Code of Conduct for Property Factors ("the Code") as required by section 14(5) of the Act.

Background

1. By application dated 17 July 2017, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed to comply with parts of sections 1, 2, 3 and 6 of the Code of Conduct for Property Factors ("the Code"). The application did not raise any issues regarding property factor duties arising from any source other than the Code.

2. Formal notification of the Code breaches in compliance with section 17(3) of the Act was intimated to the Factor by the Homeowner on 24 March 2017. Further notification of alleged breaches of the Code was sent to the Factor by the Homeowner on 14 September 2017. The parts of the Code specifically addressed in those notifications and which therefore formed the basis of the application and consideration by the Tribunal were: Section 1 (preamble), 2.1, 2.4, 2.5, 3.3, 6.1, 6.3, 6.4, 6.6 and 6.9 which are dealt with in turn below.

3. By decision dated 22 September 2017, a Convenor on behalf of the President of the Housing and Property Chamber decided to refer the application to the Tribunal for a hearing. Notices of referral were sent to the parties on 26 October 2017 and a hearing was set down for 8 December 2017 in Aberdeen.

4. A hearing took place within Ferryhill Community Centre, Albury Road, Aberdeen at 10am on 8 December 2017. The Homeowner was personally present and gave evidence on his own behalf. No representative for the Factor appeared at that hearing. The Tribunal was satisfied that adequate notice of the hearing had been issued. An earlier request for postponement by the Factor had provided no valid reason for doing so and was therefore refused. The hearing therefore proceeded as arranged on that date. Apparently, the Factor was also hampered in attending the hearing on 8 December 2017 due to adverse weather conditions, but the Tribunal did not become aware of this until after the entire hearing had concluded.

5. Prior to the hearing on 8 December 2017, the Tribunal decided that a site inspection would be necessary and that a second day of hearing might also be required. Accordingly, a further hearing was held on 19 December 2017, following an inspection of the Property which took place at 9.30am on that date. The Homeowner was again present for both. The second day of the hearing provided the Factor with an opportunity to be heard and to give evidence. The Factor appeared at both the site inspection and hearing and was represented by Mrs Brenda Troup, Operations Manager. Mrs Troup duly provided evidence on the second day of the hearing which was in turn responded to by the Homeowner.

6. The written submissions and documentation produced by each of the parties were taken into account by the Tribunal, in addition to the oral evidence led at the hearings.

Tribunal findings

The Tribunal makes the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations:

7. The Property is within a modern development undertaken by Scotia Developments Limited in or about 2005 (“the development”). Within the development there are a total of 60 units spread over 8 blocks of varying heights and styles. The Homeowner’s property is registered under Title Number ABN83803 being a top floor penthouse style apartment on the third floor of his block, which he purchased on or about 25 May 2006.

8. The development was originally factored by a company called Bruce & Partners which was purchased by the Factor on or about 2 March 2015 when the assets of that company were taken over by the current Factor. The development has had a factor appointed from the outset and has therefore been managed for a period of approximately 15 years.

9. As part of the management of the development, there is a Residents’ Association Committee which in 2017 consisted of 5 homeowners within the

development with the Homeowner acting as Chair. Decisions affecting the management of the development are made in part at Annual General Meetings of the Residents' Association. Those AGMs are called by the Factor who also produce minutes of those meetings. At the AGM, the quorum for any meeting is 5 votes. Votes may be passed to the Factor. There were 6, 5 and 3 votes passed to the Factor in 2015, 2016 and 2017 respectively. The Tribunal was provided with minutes of AGMs which were held on 23 April 2015, 8 June 2016 and 26 April 2017.

10. Aside from general maintenance and management of the development, the Factor is also responsible for arranging insurance for the block and lifts and a sinking fund. In terms of the Written Statement of Service ("WSS") dated May 2016 provided to the Tribunal, the regular contributions to the sinking fund are set at £25 per month per unit, giving a total of £18,000 per annum. The management fee charged by the Factor amounts to £117.83 plus VAT per property per annum, providing a total charge for the development of £7,069.80 plus VAT.

11. On 11 November 2004, Scotia Developments Limited registered a Deed of Conditions in respect of the Development. Clause (FOURTEENTH) provides for the appointment of a factor. In terms of that clause, the Factor is empowered to set up and maintain a sinking fund: "to finance major or extraordinary items of expenditure (as opposed to minor or routine items of expenditure) that may arise in relation to maintenance, repair or renewal of common or mutual parts of the development." It further provides that: "an annual statement of the sinking fund account will be issued by the Factor or Residents' Association."

12. The global extent of the sinking fund is summarised within the minutes of the AGMs listed above. It is, however, since the Factor took over now sub-divided according to the blocks within the development and then further split in relation to internal and external works. The overall principle of the purpose and extent of the sinking fund remains the same for the purposes of the present decision.

13. A distinction from funds provided for by way of a float is made clear by that clause as shown below. A float of £500 is payable in respect of each property and is refundable at the end of ownership upon sale. The sinking fund does not operate in this way. Moreover, contributions to the sinking fund are not voluntary.

14. Clause (FOURTEENTH) further provides that "Each flat proprietor shall be bound to make a contribution to the sinking fund at the level set by the Factor, acting reasonably, and each proprietor shall require to pay the sum determined by the Factor…The Factor may use part of proprietor's float from time to time in the event of the proprietor falling in arrears but the proprietor will be bound in due course to maintain his appropriate float contribution at the same level as other proprietors and any shortfall can be added to the statement issued by the Factor at the time of the sale of a flat or at the next date a statement is issued. Any sum due in terms of the statement and not settled within twenty-one days of the date of the statement is issued will be subject to penalty interest thereon

at five per cent per annum above the base lending rate of the Bank of Scotland…from the date of statement until paid."

15. The main source of complaint arises from major works which required to be carried out to the common parts of the development, including the roof and balconies. Major external cleaning and painting works have been required with a cost in excess of £50,000 in total. Separately, the Homeowner himself has experienced a leak in the second bedroom to the Property which was visible at the site inspection carried out on 19 December 2017. There was also evidence of damage to parts of the woodwork to the exterior of the Property to the left of the sliding doors on the balcony and on the balcony floor. The leak issue persisted for a number of years (5 in total) without having been remedied. The woodwork issue remained to be remedied as at the date of the inspection with the Homeowner being forced to maintain a makeshift protection over one affected area with a plastic chopping board to cover it to prevent further damage. The Homeowner also provided photographic evidence to vouch these defects.

16. The Homeowner has complaints about the way in which the contracts for the necessary works were awarded, the transparency of that process and the funds which have been used to pay for the works carried out to date. Related to these issues, the Homeowner also has complaints regarding the standard of work carried out and failures on the part of the Factor to deal with complaints and queries timeously and effectively.

17. The Factor has been obliged to comply with the Code of Practice for Property Factors ("the Code") since its registration as a property factor on 23 November 2012.

Further findings

The Tribunal makes the following specific findings in relation to the alleged breaches of the Code:

Section 1 of the Code – Written Statement of Services

18. Section 1 of the Code sets out the minimum requirements of what is to be contained within the WSS. Prior to setting that out, it provides for the obligation on the Factor to provide a WSS to homeowners. This is contained within 4 bullet points in the preamble. The third and fourth bullet points are relevant which state:

"You must provide the written statement:

- to existing homeowners within one year of initial registration. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) …
- to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement."

19. In the Homeowner's notification letter of 24 March 2017, he pointed out that he had requested the Factor's WSS by email on 11 May 2015. It was not supplied to him until 1 June 2016. This represented a gap of well over a year.

20. In their letter of 20 April 2017, Mrs Troup for the Factors stated that she considered that the one-year period was applicable, given the change of ownership in Bruce & Partners. Aside from taking well over a year to provide the WSS, and therefore to be in breach on any view, this statement is to misunderstand the fourth bullet point. The substantial changes referred to are in respect of the terms of the WSS, not in the circumstances pertaining elsewhere. A WSS ought to have provided to the Homeowner by 8 June 2015.

21. The Factor therefore acted in breach of the requirement of the third bullet point in the preamble of Section 1 of the Code.

Section 2.1 – Misleading or inaccurate statements and
Section 2.4 – Written approval for works outwith core services

22. The complaint in relation to section 2.1 of the Code is linked to the obligation under section 2.4. Logically, it is appropriate to consider section 2.4 first.

23. Section 2.4 of the Code requires factors to have a procedure in place whereby they consult with homeowners in relation to works which will incur charges or fees in addition to those relating to the core service. In that event, the written approval of homeowners is required prior to those works being carried out.

24. It is not disputed that extensive external works have been required to the development. The Factor has instructed works totalling £50,486.89. The Homeowner contends that no written approval was obtained for these works prior to their being instructed. As a result, the appropriateness of the contractors or the works actually required were not put before the Residents' Association for discussion and agreement.

25. The entirety of the documents setting out the works to be carried out are listed at pages 3-5 of 19 of the Homeowners notification letter of 24 March 2017. The documents produced to the Tribunal consisted of an undated external painting specification with a notional start date of August 2015; an estimate from M.N. Hamilton and Sons dated 1 September 2016 totalling £34,297.41; a quote from Bell Group dated 7 July 2015 for £81,250.50 and a quotation from A.G. Slating & Building Limited dated 30 September 2015 for £7,775 in respect of washing and rendering repairs. The Homeowner also doubted the need for Messrs J&E Shepherd to be appointed as project managers. The appointment of Shepherds as project managers added 10% to the final contract price. Incidentally, Mrs Troup advised the Tribunal that J & E Shepherd have since been dismissed by the Factor due to poor service provision. Specifically, they were not timely or professional.

26. When Mrs Troup came to give evidence, she stated that the Factors had carried out a tendering exercise on behalf of the homeowners in relation to all works required at the development. The Factor then presented the results of that exercise in relation to the works thereby identified at the 2016 AGM. It was her position that since the AGM was quorate, she obtained the necessary approval from all homeowners in order to allow the works to proceed.

27. Mrs Troup accepted that the approval provided was oral only, stating that it would have been better to have had all of the relevant tenders to hand to present to the AGM. That is what she would prefer to do from now on. However, she was adamant that the AGM was made aware of what the tenders for the works amounted to and that authorisation to proceed was given at that AGM. This was the position as set out in the Factor's letter dated 20 April 2017 in response to the Homeowner's notification. A show of hands was stated as being the method used to obtain approval to the proposed works, and presumably also for the appointment of Shepherds as project managers.

28. Taking the question of section 2.4 first, on the Factor's own evidence, it acted in breach of that section. The obligation is to consult and to obtain prior approval in writing. On Mrs Troup's own evidence, the approval was only ever provided orally and not in writing. Therefore, there was a breach of section 2.4 of the Code.

29. Aside from that, for such an important package of works involving several contracts, the Tribunal would have expected to see the paperwork leading to the appointments made, evidencing proper and meaningful consultation with the homeowners. Even absent the requirement to obtain written approval, the Tribunal would have been of the view that section 2.4 of the Code had not been complied with for this reason. This is a theme which is also touched upon in relation to other sections of the Code.

30. Section 2.1 of the Code states that factors must not provide information which is misleading or false. On 25 April 2017, the Homeowner responded to the Factor's letter of 20 April 2017. He pointed out that in relation to the show of hands which purportedly authorised the works to be carried out at the development, no reference to this was made in the Minutes of the AGM itself.

31. In that letter he also took issue with other statements made which he considered to be incorrect. Of these was the statement (1) "Written approval from the Homeowners Committee was not required as agreement for these works to proceed was given at the AGM prior to the appointment of the Committee." Also, it was stated (2) "owners were consulted at the AGM on 8th June 2016 and agreed to appointed (sic) J E Shepherd to Project Manage the works." Finally, it was stated that (3) "There has been no other objection or further comment from any other owner, either in attendance or otherwise, regarding this item."

32. At least two of these statements are incorrect. In relation to (1) it misrepresents the clear statement of the Code: There is no exception to the requirement to obtain written authorisation where matters have been put before a committee of homeowners. In relation to statement (2), written authorisation would have been required for the appointment of J & E Shepherds also, as that was in addition to the core service provided by the Factor. In addition, the minutes of the AGM do not support either of these assertions. In other words, there is no contemporaneous written record of authorisation having been obtained from the body of homeowners, oral or otherwise.

33. In relation to statement (3), one member of the Residents' Association did apparently raise an objection: Miss Emily Cheyne made her own application to this Tribunal under case reference FTS/HPC/PF/17/0157. At the hearing on 19 December 2017, Mrs Troup stated that Miss Cheyne only objected to the request for payment, not the handling of the works or what was said at the AGM. The Tribunal is not in a position to adjudicate on this particular point since that case has not been finalised. However, the misleading statements listed as points (1) and (2) above are clear evidence of breach of section 2.1 of the Code.

34. Accordingly, the Tribunal finds that the Factor acted in breach of section 2.1 of the Code within its letter of 20 April 2017 in response to the Homeowner's notification of his complaint dated 24 March 2017 in the respects noted above. This is related to the breach of section 2.4.

Section 2.5 – Response to enquiries and complaints

35. Section 2.5 of the Code requires factors to respond to enquiries and complaints received by letter or email within prompt timescales.

36. This complaint was comprehensively notified to the Factor by email from the Homeowner dated 14 September 2016. The issues which the Homeowner reported to the Factor requiring attention were in respect of (1) the roof leak at the Property; (2) balcony rendering and (3) external painting of windows and doors.

37. As noted above, in relation to the first of these issues, as at the date of the formal complaint, the roof leak had not been attended to for a period in excess of 406 days. It was initially reported on 5 August 2015 and was followed up in no fewer than 19 emails subsequently. Works had been carried out to the roof of the Property by the date of the inspection, although damp staining was still evident in the bedroom affected. Similarly, the balcony rendering issue had been outstanding for a period of 5 years as at the date of the formal complaint despite 19 follow up emails. The external painting of doors and windows issue had been brought up in successive AGMs and the Factor had been requested to obtain quotes to rectify the external painting. As a result of no action being taken, there is significant weathering damage and an increased risk to the integrity of the external windows which are of wood and ordinarily should have decorative finishes attended to every five years. Again, these requests and complaints were met with no adequate responses and no action on the part of the Factor.

38. In response to these points, Mrs Troup stated that they were fair comment and that the Factor had to put its "hands up" to these shortcomings. She stated that the responses provided to the Homeowner "had taken longer than we would have liked." This mirrored what was said in her letter to the Homeowner dated 11 October 2016. In that she stated "James Gibb accept totally that the time delays in arranging works have been unusually excessive" and "We accept that the timeframes have been beyond our remit and your complaint re this is

justified." Failures under this heading were also accepted by Morgan Cooper on behalf of the Factor in a letter to the Homeowner dated 18 May 2017.

39. The instances set out in the Homeowner's email of 14 September 2016 were the most flagrant examples of a failure to communicate and to take action in response to complaints. However, there were many others. For example, errors noted in the 2016 AGM minutes were notified to the Factor by the Homeowner immediately following the meeting but no corrections were made, despite numerous requests for it to do so.

40. In the circumstances, the Tribunal had no difficulty in finding that the Factor had frequently and persistently failed in its duty under Section 2.5 of the Code. The Tribunal considered that this would have caused considerable frustration to the Homeowner and involved him expending a great deal of time to follow up matters which were not attended to and correspondence to remind the Factor of those failures.

Section 3.3 – detailed financial breakdown of charges

41. The source of this complaint is in relation to the sinking fund. The logical time to disclose the state of the sinking fund was at the Residents' Association AGMs. Overall figures for the fund were indeed provided in 2015, 2016 and 2017. However, the Homeowner's concern was that the full picture was not provided by the provision of overall figures.

42. As noted above, each homeowner within the development currently requires to contribute £25 each month to the sinking fund. Previously the sum was £15 per month as revealed by a schedule provided to the Homeowner by the Factor and referred to later in this decision. In terms of the title deeds, contributions are not optional and the Factor is obliged to enforce payment. Also, the Factor is obliged to account for the sinking fund annually. Unlike the float, it is not a contribution which is due to be refunded upon cessation of ownership. It is for exceptional payments not covered by normal maintenance and repair charges.

43. In his letter of 24 March 2017, the Homeowner calculated that for the period from May 2006 (when he became a homeowner) until February 2016, there ought to have been £150,900 in the sinking fund, before any deductions for appropriate costs were made. In the minutes of the AGM of 8 June 2016, it was reported that the sinking fund amounted to £78,455. The Homeowner therefore, not unreasonably, sought an explanation as to where the remaining £72,445 had gone.

44. The Tribunal noted in the course of evidence that the figure provided in the 2015 AGM minutes was £71,086. Prior to any expenditure, the 2016 figure ought to have been in the region of £89,000. The 2017 figure of £23,963 was at least explicable, given that certain large sums had been expended in relation to the roofing and balcony works referred to above. The other gaps, however, are not so easily ascertainable.

45. The preamble to section 3 of the Code stresses the importance of clarity and transparency in all accounting procedures. Section 3.3 requires a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for.

46. The Homeowner requested such a breakdown in relation to the sinking fund 23 January 2016. He was provided with a schedule by the Factor on 2 February 2016 which was produced to the Tribunal. The schedule consisted of a long list of his contributions (which the Homeowner confirmed to be accurate) with occasional entries detailing charges paid from the sinking fund. However, this did not confirm the overall picture. The reason given for this limited information was the need for data protection. However, at the hearing, the Mrs Troup accepted that a spreadsheet exists which would show all entries which could be redacted to protect the individual identities of all homeowners who contributed to the fund.

47. It was asserted, without documentary evidence to support it, that at the time of the handover from Bruce & Partners an audited statement had been obtained detailing the amount of the fund which was deemed to be satisfactory. It was also stated by Mrs Troup that Bruce & Partners had refunded some homeowners the contributions which they had made to the sinking fund when they should not have done. It was also stated that certain homeowners had not paid into the fund as they ought to have done. However, the obligation to pay into the sinking fund was not enforced as required by Bruce & Partners during the period they acted as factors. Part of the reason for this was that the accounts for the sinking fund were kept separate from the main maintenance account and therefore the failure to pay was not so clearly visible in relation to the sinking fund.

48. None of this is apparent from what has been supplied to the Homeowner. It is not possible, *as a whole*, to verify which payments were made into the fund, which outgoings were charged against it or how many payments were not made. As at the date of the hearing, it was not possible to ascertain what has happened to the £72,445 apparently missing as at June 2016 or indeed approximately £11,455 so far unaccounted for between 2015 and 2016.

49. Therefore, the Tribunal finds that the Factor has breached section 3.3 of the Code. As part of the Property Factor Enforcement Order to follow from this decision, the Factor will be required to provide the documentation in relation to the sinking fund as discussed with Mrs Troup, as part of an independent audit, in a redacted form which protects the identity of individual homeowners other than the Homeowner as applicant. Whilst the Tribunal cannot order restitution of funds in the event of any unexplained shortfall, the Homeowner will have the information to hand to take further action, if so advised.

<u>Section 6.1 – Carrying out repairs and maintenance</u>

50. Section 6.1 of the Code requires factors to allow homeowners to notify them of matters requiring repair, maintenance or attention. It also requires them to inform homeowners of the progress of works being carried out, including

estimated timescales for completion. Evidently, the requirement to allow notification also carries with it the obligation to ensure that matters requiring repair, maintenance or attention are acted upon by the factor, otherwise the requirement would be devoid of purpose.

51. As noted above, the roof leak affecting the Property was notified on 5 August 2015 and no action was taken for a period in excess of 600 days and 167 days after the Factor's response to the formal complaint in respect of it. The failure in terms of section 2.5 of the Code has been noted above. According to the Homeowner, the failure to respond timeously to this issue also had the effect of allowing the NHBC warranty over the Property to expire. This meant that a sum in the region of £18,000 for the repair was taken from homeowner funds instead of being met by the developer.

52. The Homeowner received an email from the Factor on 5 January 2016 informing him that Scotia had denied that there was any warranty in place by them or their contractor Fowler McKenzie for the roof. Following the hearing, this was confirmed by the Factor who provided the Tribunal with a letter dated 16 December 2015 from Scotia. In that letter, it stated that its only obligation in terms of the development was restricted to the warranty under NHBC10. It stated that it was Fowler McKenzie who had constructed the roof and that any defects required to be taken up with them.

53. Mrs Troup explained that the roof over the Property was highly specialised in nature. The Factor had approached NHBC who had advised that there was no warranty over it. A claim from the block insurers was refused. When the Factor realised how costly the repair would be, it had investigated other possibilities for repair. They did not consider that a temporary repair or patch would be appropriate. Fowler McKenzie had originally quoted £19,000 for the repair. After some negotiation, they had reduced the contract price by £1,000. Water was not actually pouring into the Homeowner's property and the Factor wished to investigate all possibilities. This was partly the reason why the repair had taken so long.

54. The Tribunal observed that it appeared unfair for Fowler McKenzie to be paid to construct the roof in the first place by Scotia and then paid again to repair it. In answer, this was because Fowler McKenzie had informed the Factor that the works were required because of "natural breakdown" and that "blistering and bubbling had occurred due to wear and tear." It was suggested by the Ordinary Member that an independent opinion might have been obtained to verify that claim. Mrs Troup considered that such a course would have prolonged matters yet further.

55. On a separate matter, the Homeowner himself had approached NHBC with regard to works required to the balconies at the development. He took this on himself due to the inaction of the Factor. That claim also failed, as observed by Scotia in its letter of 16 December 2015, because the state of the balconies was caused by neglect and a failure to maintain it. The homeowner gave evidence that the guarantee was vitiated where damage was caused by neglect. This was supported by the NHBC report dated 29 May 2015 provided

in evidence. The Tribunal agrees with that contention. The responsibility for the vitiation of the NHBC guarantee through a failure to maintain falls squarely on the Factor. As another separate, although related matter, the need to paint windows and doors every 5 year was repeatedly raised by the Homeowner at AGMs and in follow-up emails, again without any action being taken by the Factor. It is easy to imagine a repetition of the same outcome in relation to the external windows and doors if a failure to take action continues.

56. In the above circumstances, the Tribunal has little difficulty in finding that the Factor failed in its duty to comply with section 6.1 of the Code. The length of time taken to attend to important structural repairs was particularly egregious. The Tribunal is unable to determine whether Fowler McKenzie ought to have been responsible for carrying out the roof repairs free of charge. However, prompt action might have enabled greater scope for investigating means of repair which might not have called upon the homeowners' funds, or potentially not to the same extent. This was particularly so because the repairs became manifest towards the end of the crucial 10-year period from the date of construction of the part of the development in which the Property is located.

57. In order to fully clarify this issue, the Property Factor Enforcement Order to follow will require the Factor to report on consideration of sources of funding, other than homeowner funds. It will be required to confirm approaches to the developer, NHBC and the block insurers, and the outcomes of those approaches.

Section 6.3 – demonstration of how and why contractors appointed

58. Section 6.3 of the Code requires factors, on request, to demonstrate how and why they appointed contractors. The facts in support of this head of complaint are the same as for sections 2.1 and 2.4. The Factor asserts that a competitive tendering exercise was carried out. The Homeowner has requested an explanation as to how and why the contractors in question were appointed. His request has not been complied with. The Factor has therefore acted in breach of section 6.3 of the Code.

Section 6.4 – programme of works

59. Section 6.4 of the Code applies where the core service agreed with the homeowners includes periodic property inspections. In that event, the factor must produce a programme of works.

60. At paragraph 4.5.1 of the WSS, it is stated that the Factor will make routine property inspections at a frequency set out in Section 06 of the Development Schedule. That schedule provides for property inspections on a monthly basis. The Factor therefore has an obligation to produce a programme of works.

61. At paragraph 5.10 of the 2016 AGM minutes, a maintenance programme is discussed. Messrs J & E Shepherds had provided a quote to carry out that work. As discussed, Shepherds are no longer used by the Factor. In the March 2017 AGM minutes, item 5.10 of the 2016 minutes was raised as still

requiring action. The Factors gave an undertaking there to obtain three quotes for a project manager to create a maintenance plan which will then be supplied to the Residents' Association for comment and instruction.

62. From the Homeowner's evidence, it appears that the maintenance plan discussed in the minutes may be equated to a programme of works as described in the Code. The Homeowner stated that he had never seen such a document, the implication being that one does not exist. Looking at the 2017 AGM minutes, that would appear to be correct on the basis that the Factor has stated that it is still investigating and thus has still not managed to produce one.

63. The Factor is therefore in breach of section 6.4 of the Code.

Section 6.6 – documentation relating to the tendering process

64. Again, the facts in relation to this head of complaint have been set out above. The Homeowner requested details of the tendering process by email dated 27 September 2016. Section 6.6 of the Code requires this to be available for inspection to a requesting homeowner free of charge and for copies to be made available for a reasonable charge.

65. The totality of the tendering information has been set out above in relation to section 2.4. These were singular quotes and estimates and do not amount to evidence of a tendering process. The Factor is therefore in breach of section 6.6 of the Code.

66. Mrs Troup gave evidence that she had in her possession all documentation in relation to the competitive quotes relayed to the 2016 AGM. That was the basis upon which it was contended that section 2.4 of the Code had been complied with. It was stated that the Factor had in fact undertaken a competitive tendering exercise for each major piece of work undertaken. It therefore appeared to the Tribunal to be reasonable to require the provision of all written documentation which was in the hands of the Factor at the time of that AGM to substantiate that assertion. That will form part of the Property Factor Enforcement Order to follow from this decision.

Section 6.9 – pursuing contractors to remedy defects

67. Section 6.9 of the Code provides that factors must pursue contractors or supplier to remedy the defects in any inadequate work or service provided. If appropriate, a collateral warranty should be obtained from the contractor.

68. At page 12 of 19 of the Homeowner's main letter of notification dated 24 March 2017, he lists a number of instances where works had not been completed and had been carried out to an inadequate standard. A site meeting took place on 21 December 2016 where he again raised his concerns. The contractors, M N Hamilton, agreed that the work was inadequate and that rework was required. This was agreed by Mrs Troup in her evidence.

69. Mrs Troup went on to state that at the 2017 AGM, it was confirmed to homeowners that all main works had been completed with only snagging works remaining. This is to be found at paragraph 3.3 of those minutes. She stated that there would be no new costs as far as Hamiltons were concerned as those would only be reworks. A retention has been made in order to ensure that Hamiltons return to finish the works. They have been told that they must come back in order to get the wood work done properly. The desire on the part of the Factor is to get all of the final repairs done at the same time and then to finish the painting works. The Factor does not yet know what the full extent of the works will be. It is an ongoing process to ascertain all of the works which still require to be carried out. This evidence has resulted in the further requirement of the Property Factor Enforcement Order as detailed below.

70. The Homeowner appeared to accept that works were still ongoing to remedy defects in the works carried out. The point which he stressed in evidence is that there should be no additional cost levied to the homeowners within the development since the works have already been paid for. Standing the evidence of Mrs Troup, this appears to have been accepted.

71. However, the Homeowner was of the view that the final project costs have come to a figure in the region of £60,000 which would mean that homeowners have in fact required to pay extra in order to have works carried out properly. To a certain extent, this was accepted by Mrs Troup in her later evidence, despite what had been said by her originally. This is therefore a matter which requires clarification, as discussed below.

72. It appeared to the Tribunal that the Factor is pursuing admittedly defective work carried out at the development, albeit as a result of direct action taken by residents, the Homeowner in particular, and not as part of any systematic survey on their own part. To that extent, the Factor is not in breach of section 6.9 of the Code at present. It is to be noted, however, that defective works have been outstanding for over a year since the original repairs were carried out.

73. In light of the circumstances narrated above, the Tribunal is of the view that the Property Factor Enforcement Order ought to include a requirement for an independent building survey, at the Factor's expense, of the external works to the development. The survey would ascertain the cost of the contractual works carried out in relation to the original works and whether and if so to what extent additional monies have been expended to remedy the original works. It would also ascertain whether those works have now been completed in accordance with the relevant contractual documentation. If the works have not been so completed, the survey report requires to specify the works required to bring them into compliance with the contractual documents and the likely cost of doing so.

Conclusion

74. The Tribunal finds there to have been breaches of Sections 1 (preamble), 2.1, 2.4, 2.5, 3.3, 6.1, 6.3, 6.4 and 6.6 of the Code. A proposed Property Factor

Enforcement Order will therefore follow under separate cover and will accompany this decision.

75. In terms of remedy, the Homeowner made clear that he does not seek any compensation for himself. However, the Tribunal considered that the time spent and irritation and inconvenience which the Homeowner has suffered merited an award of compensation. The award proposed is nonetheless only a token amount if measured against the time evidently spent by the Homeowner in pursuing this application. If the Homeowner is so minded, he could elect to contribute that award to the sinking fund or other purpose for the benefit of the residents of the development as a whole.

Appeals

76. 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 within 30 days of the date the decision was sent to them.

Signed: M O'Carroll Date: 17 January 2018
Legal Member