

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber Ref: FTS/HPC/PF/22/0311 and FTS/HPC/PF/22/0312

Property: Flat 25, Montgomerie Crescent, Saltcoats, Ayrshire KA21 5BT ("the Property")

The Parties:-

Mrs Angela Cook, Flat 25, Montgomerie Crescent, Saltcoats, Ayrshire KA21 5BT ("the homeowner")

Rentolease Property Management Limited, registered in Scotland (SC530685) and having their registered office at 123 Main Street, Prestwick, Ayrshire KA9 1LA ("the property factors")

Tribunal Members:

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

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the property factors have not failed to comply with their duties in under the Code of Conduct for Property Factors, effective from 16 August 2021 or the Code of Conduct for Property Factors effective from 1 October 2012, both made under Section 14 of the Property Factors (Scotland) Act 2011 but that they have failed to comply with the property factor's duties. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By applications, dated 28 January 2022, the homeowner sought a Property

Factor Enforcement Order under Sections 17 and 20 of the Property Factors (Scotland) Act 2011 (“the 2011 Act”) in respect of a failure by the property factors to comply with OSPs 2.4 and 9 and Sections B(4), D(14), 2.4, 2.7, 6.4, 6.7, 7.1 and 7.4 of the Code of Conduct for Property Factors effective from 16 August 2021 (“the 2021 Code of Conduct”), Sections 1.B and C, 2.1, 2.4, 2.5, 6.1, 6.6, 6.9, and 7.1 of the Code of Conduct for Property Factors effective from 1 October 2012 (“the 2012 Code of Conduct”) and a failure to carry out the Property Factors’ duties.

2. It was necessary for the homeowner to make two applications, as the conduct complained of began before 16 August 2021 but continued beyond that date. For ease of convenience, however, as the evidence was substantially the same, the Tribunal conjoined the applications and considered them together.
3. The homeowner provided the Tribunal with copies of the property factors’ Written Statement of Services, and copies of correspondence between the Parties between March 2021 and November 2021. The correspondence centred on the positioning of the recycling bins within the development. The Applicant provided a copy of a letter from North Ayrshire Council dated 9 February 2021, in which the Council stated that for many years, the large metal recycling bins had been located at the drop-off point within the car park area, but the Council’s crews had reported that they had been moved from the roadside on to the kerb. The bins had to be lifted off the kerb to be emptied and this had caused damage to the wheels of one container, requiring it to be replaced. The Council suggested that the residents should approach the property factors about dropping the kerb as it was their responsibility to ensure containers are accessible for servicing.
4. The property factors wrote to the residents on 5 March 2021, advising that it had been suggested that the best course of action would be to remove the kerb and slab a level area for the bins. They said that they were obtaining prices for this work.
5. On 5 May 2022, the Tribunal advised the Parties of the date and time of a Case Management Discussion, and the property factors were invited to make written representations by 26 May 2022.
6. The property factors submitted written representations to the Tribunal on 30 May 2022. They stated that they had been factors since 16 December 2016 and provided a copy of their Written Statement of Services issued on 28 January 2017, which they said had been hand delivered. As the homeowner had advised them that she had not received this copy, a further copy had been issued to her in 2019. Their system shows the date of printing, not the start date of the contract, so the second copy showed the printing date.
7. The property factors stated that no work at the development had ever been approved without all owners being aware. A few years ago, a number of residents decided to form an association and appointed a representative in each block, the aim being to speed up communication and works. When roof repairs were carried out in November 2020, the appointed member in each

close spoke with each owner to gain approval. The property factors then wrote to each owner to advise of works and ingather funds. Following feed-back from the homeowner, they had decided to revert to sending letters to each homeowner. The next major works were new alarms and lighting within each close. The property factors wrote to all owners and received no objections, with the exception of the homeowner, who did not feel the work was essential at that time. Given the majority response, however, the work did proceed. The residents in Close 1 would only pay for their share of communal work or work done within their close, so are not paying for any works within any other close.

8. In relation to the bins, their first step had been to ask their builder to price lowering of the kerb. The builder advised that due to gas pipework this would not be possible. The property factors had no reason not to believe this. They had then been notified by South Ayrshire Council that the Council had been contacted by a homeowner (from the committee) to advise of a new location for the bins. The owner had said that a vote had been carried out. The property factors and a number of residents were unaware of that vote and the property factors told the Council that they would have to communicate this information to all owners and give them a chance to vote and to give any other comments. The property factors had not, in carrying out that vote, added any further options as they did not see any great solution and wanted to limit the choices. Eleven owners had voted for Option 3, one for Option 2, three for Option 4 and one owner wanted a different location for the bins. The Council were notified of the vote but were also advised that there would be strong opposition. A meeting had been arranged involving the property factors, the Council and the representatives of Closes 1 and 2, but before the date of the meeting, the homeowner contacted the property factors to say the bins had been moved by another owner. The two owners and the Council then backed out of the proposed meeting. The property factors believed that the Council wanted to see how things played out.
9. The property factors said that they believe that the other owners would like to erect screening or a bin store, but the property factors had held off doing anything about it pending the outcome of the ongoing complaint. The development had not been built for bins of the size that were now there and really did need an area to store bins, ideally where they were out of vision of all owners.
10. The property factors added that they act impartially and equally in favour of all owners and always try their best. They had, for instance, recently helped the homeowner with an internal insurance claim, work which was over and above their service. They had contacted her to confirm that if the resolution she had put on her application form was what she is looking for, the property factors would try their best to help with it, subject to agreement from other owners. The property factors pointed out that the title deeds do not allocate parking spaces. All decisions at the property are made by majority, as provided for in the Deed of Conditions.

11. The property factors provided a timeline for their dealing with the homeowner's complaint. It had been sent in on 15 September 2021, acknowledged the following day with confirmation that a full reply would be sent within 15 working days. The response had been sent on 6 October, within that period. A second complaint had been received from the homeowner on 29 October 2021, acknowledged on 2 November and the property factors' final response sent on 15 November.
12. The property factors provided with their written representations a copy of their letter to all owners seeking their preference amongst four suggestions in relation to the location/relocation of the bins, together with copies of the responses received from the owners. Returning the bins to their original location and lowering the kerb was not one of the options offered. The homeowner's response stated that on 9 February 2021, North Ayrshire Council had written to all owners requesting them to approach the property factors regarding dropping the kerb at the then current location of the bins. The property factors also provided photographs showing the bins as relocated, copies of correspondence with owners in 2020 in relation to roof repairs and in 2021 with regard to replacement of stair lighting and installation of smoke alarms in the stairwells. They also included copies of detailed Block Management Reports dated 11 January 2022, 13 May 2022 and 2 March 2020, and copies of their responses to the homeowner's complaint.
13. In their response of 6 October 2021 to the homeowner's letter of complaint of 15 September, the property factors stated that they had received an Invoice from North Ayrshire Council on 15 April 2021 for the replacement of wheels on the bins, but that the first contact they had received from the Council with regard to the relocation of the bins had been on 6 July, after the Council had been contacted by a resident in relation to a vote that had taken place amongst some residents. That vote had been brought to the attention of the property factors on 20 June and, following the discussion with the Council on 6 July, the property factors had agreed to communicate with all owners to make them aware of the vote and give them the option to make a decision. They stated that they did not and had not carried out work or authorised work on the instruction of any committee or group of residents and that any decision must be agreed by the majority of owners.
14. Following the vote referred to in paragraph 12 above and prior to their sending out letters confirming the outcome, the property factors were contacted by one of the owners and provided that owner with information regarding the outcome. They accepted that they should not have disclosed this information to an individual resident until all owners were notified and they apologised for that.
15. The relocation of the bins was being pushed by the Council because their workers had made them aware of the bins being up on a kerb. The property factors had throughout advised the residents of Close 1 to make contact with the Council, as the Council were the only ones who could potentially stop the moving of the bins. The property factors had never asked for the bins to be removed, nor had they wanted them to be removed, and they had asked the

Council that the bins remain in situ. Any decision to remove or move them was made by North Ayrshire Council and was not requested by an owner or by the property factors. In relation to the kerb being lowered, the property factors had been advised by builders that this was not an option due to gas pipes. By the time the property factors spoke to the homeowner on comments by Scottish Gas Network, it was too late, as other residents had moved the bins on their own accord. The property factors had passed on this information to the Council, who appeared to think it best to leave it as it was.

16. The Property factors sought to assure the homeowner that they act on behalf of all owners equally and, if they were contacted by the committee in relation to work, it would never be approved without all owners being made aware and approval given. There was no legal authority for any committee or residents' association to instruct or authorise work, but any committee or association can request, as any owner can, that the property factors obtain quotes for required improvement or work. The property factors would never instruct or otherwise authorise any work without the agreement of the majority of all the owners.
17. The property factors asked the homeowner to accept their apologies that one owner had been informed of a vote prior to all owners being informed. This had been a genuine error and they would work on improving their communication.
18. The second letter from the property factors to the homeowner followed her request for a review of the original decision in relation to her complaint, namely their letter of 6 October 2021. In it, the property factors said that they understood the complaint to be that they had not involved all owners in votes or decisions, that they had accepted votes from the committee and that, having advised that they would obtain a quote for lowering the kerb, they failed to do so and that by moving the bins, three flats had lost parking spaces. The property factors stated that they had always sought to involve all owners in votes and to ensure that all owners had input into any decision. Having investigated all the decisions taken recently they could not see any decision made or instructed by them that was not agreed by the majority of owners. The property factors would ensure that minutes are taken of all future meetings with the committee and sent to the homeowner. The property factors stated that they had not been involved in or made aware of the vote taken on 20 June 2021 and that, when they were made aware of it, they advised the committee that before any decision was made, all owners would be made aware of, and have an input into, the decision to relocate the bins. Accordingly, they had written to all owners on 14 July 2021 and an official vote had been taken and a clear majority had been reached.
19. In relation to obtaining quotes for lowering the kerb, the property factors noted that they had contacted all owners to suggest this action, but the contractor had advised that due to gas pipework, this would not be possible. They did understand from the homeowner's discussion with SGN that it was possible but, as this was after the bins were moved, a further quote was not requested. The property factors apologised for this but, given the contractor's opinion

they did not see it as a viable option until the owners had voted. The property factors repeated that the decision to move the bins was never one made by them or by any other owners. It was a decision by North Ayrshire Council.

20. Regarding parking spaces, the property factors confirmed that all parking spaces are shared and that there are no allocated spaces. They accepted that the decision of the owners had resulted in a loss of parking spaces and would be more than happy to contact the owners to see if they are happy with the arrangement.
21. In conclusion, the property factors accepted that they were at fault for not obtaining a quote after they were advised that lowering the kerb could not be done. This had been due to their being advised by a contractor that they have used for a few years that lowering the kerb was not an option. They accepted, however, that they should have followed this up with SGN. They said that they would now contact contractors for further quotes and advise the committee at the next meeting that they are doing this. With regard to any decisions made and agreed only by the committee, the property factors would only have instructed work if a majority agreed. The decision made by the majority of owners would be binding on all. They had never instructed or carried out work on the basis of any vote made only by the committee. The property factors concluded by assuring the homeowner that they "will arrange a quote for lowering the kerb and will advise the committee of this at the meeting arranged with them."
22. On 17 June 2022, the property factors provided the Tribunal with an email from TM Roofing & Builders, Saltcoats, confirming that, following a site visit in 2021, they had advised the property factors that lowering the kerb in the back car park to allow for large commercial bins to be stored was not, in their professional opinion, a viable option due to the location of gas pipework.

Case Management Discussion

23. A Case Management Discussion was held on the morning of 28 June 2022. The homeowner was present. The property factors were represented by Mr Craig Scott. The Legal Member of the Tribunal outlined the purpose of the Case Management Discussion, which was to clarify the issues if required, to identify areas of factual dispute and to determine whether to adjourn the case to a full evidential Hearing and what further information/documentation was required by the Tribunal in advance of such Hearing.
24. The homeowner told the Tribunal that there are 21 flats in the development of which the Property forms part. The development comprises three blocks, each containing six flats, and a further block of three flats. For the purposes of this Decision, each Block is referred to as a "Close", and the Property is in Close 1.

25. Most of the discussion at the Case Management Discussion centred on the question of the relocation of the bins at the development. The homeowner said that the property factors had advised the Council on 20 August 2021 that she had told them that SGN were happy with the kerb being lowered and, on 5 March 2021, the property factors had advised her that they were obtaining quotes for this work, but even at the date of the Case Management Discussion some 15 months later, no quotes had been produced. More generally, the homeowner wanted to see, before maintenance is carried out, reports and specifications. She instanced repairs to the roof and soffits, where the first she had heard was when she was told the work was to be carried out. She understood that the matter had been discussed at a meeting between the property factors and the committee. The property factors told the Tribunal that they partially agreed with the homeowner. The residents had set up an association with one representative for each stair. They had been given the go-ahead for the work by the stair representative (RA) for the block of which the Property forms part, but they stressed that they did not proceed with the work until everyone had paid their shares. Since then, however, they had reverted to lettering all owners. The homeowner stated that her concern was that she had not been informed until after the meeting had taken place.
26. With reference to OSP2 in the 2021 Code of Conduct, the homeowner told the Tribunal that the property factors had denied receiving emails from a co-resident in relation to her complaint and that no timescales had ever been given for responding to enquiries. She also contended that no professional assessment of Block 1 had been carried out in 12 years and the property factors had denied receiving emails from her keeping them up to date regarding her complaint about the communal bins. In the application, the homeowner also referred, under the OSPs to an alleged failure by the property factors to provide her with a copy of their Written Statement of Services until three years after their appointment.
27. In relation to Section 6.4 of the 2021 Code of Conduct, the homeowner told the Tribunal that owners had never been given a timescale for works that are going to be carried out and some repairs have been outstanding for a considerable time. She instanced a water leak into Flats 27 and 29. The property factors responded that they had attended to a water leak at Flat 27, but that they were unaware of any other ongoing issues.
28. Referring to the complaint under Section 6.7 of the 2021 Code of Conduct, the property factors told the Tribunal that there is no programme of cyclical maintenance for the development of which the Property forms part.
29. Under Section 7.1 of the 2021 Code of Conduct, the homeowner stated that she accepted there is a written complaints procedure. Her complaint was that the property factors did not adhere to it.
30. Finally, in relation to the 2021 Code of Conduct, the property factors, referring to Section 7.4, told the Tribunal that they had retained all correspondence.

Findings in Fact

31. The homeowner is the proprietor of the property, which comprises a ground floor flat in a block of six flats, being part of a terraced development of three blocks of six flats each and a further block of three flats, making 21 flats in total.
32. The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
33. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
34. The date of current Registration of the property factors was 8 January 2019.
35. The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
36. The homeowner made two applications to the First-tier Tribunal for Scotland Housing and Property Chamber, both dated 28 January 2022, under Section 17(1) of the Act.
37. The concerns set out in the application have not been addressed to the homeowner's satisfaction.
38. On 5 March 2021, the property factors advised the homeowner that they would obtain a quote for lowering the kerb, as a possible solution to the issue of the location of the communal refuse and recycling bins at the development of which the Property forms part. They did not obtain that quote. On 6 October 2021, they stated that they would now obtain a quote. As at the date of the Case Management Discussion, they had not obtained any quotes for this work.

Reasons for Decision

39. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to decide the application without a Hearing. The Parties agreed that a Hearing would not be necessary.
40. This application is fundamentally about one issue, namely the location and re-location of the large communal refuse/recycling bins at the development of which the Property forms part. They were originally sited on the level of the car park, but at some point were moved on to the kerb, resulting in the local authority personnel having to lift them down in order to empty them. This caused damage to the wheels of one of the bins and the local authority asked

the owners to find a solution. The homeowner's view is that lowering the kerb should be considered and her contention is that the property factors failed to obtain a quote for this work, having agreed with her that they would do so. A group of owners had formed a committee and took it upon themselves to hold a vote on the matter. The property factors told the committee that the vote that they had taken was not sufficient, as it did not involve seeking the views of all residents. The factors then conducted a poll on behalf of the owners, giving them a number of options from which to choose, but the options did not include the homeowner's suggestion of lowering the kerb. The property factors' position is that they were advised by the contractor they approached for a quote that lowering the kerb would not be possible because of the location of gas pipes beneath the ground, but they accept that they should have taken the matter further with Scottish Gas Networks, particularly when the homeowner told them that she had done so and that there was no issue, as the pipes were sufficiently deeply buried.

41. The upshot of the failure of the property factors to proceed with the obtaining of a quote and their reliance on the initial comments from the contractor was that lowering the kerb was not included amongst the options given to owners when the property factors carried out their poll. The homeowner had told the property factors that one owner had offered to pay £5,000 towards the cost of lowering the kerb. The result of the poll was a majority in favour of moving the bins to a different location which involved the loss of a number of car parking spaces, albeit the spaces are not allocated to individual flats. The property factors, in response to an enquiry from one owner, disclosed the result of the poll to that person and, before the other owners were advised of the outcome of the poll, one of the owners or a number of owners took it upon themselves to move the bins to the "preferred" site in terms of the voting.
42. The Tribunal accepted that the actual moving of the bins was not authorised or arranged by the property factors, who had no advance knowledge that it was happening, and that the property factors did not have the power to require them to be moved back. The Tribunal found no evidence to suggest that the property factors acted in bad faith in relation to the issue. The Tribunal also accepted that the owners might still have voted the same way had the lowering of the kerb been amongst the options given to them. These facts do not, however, excuse the failure of the property factors to follow through on a specific undertaking given to the homeowner on 5 March 2021 that they would obtain a quote for lowering the kerb. As a result, the homeowner was denied the opportunity to ensure that this was one of the options put to owners and, even at the date of the Case Management Discussion, a quote had not been obtained, despite the property factors stating, in their final response of 15 November 2021 to the homeowner's complaint, that they would now obtain quotes for the work.
43. The view of the Tribunal was that the property factors had demonstrated complacency in relation to what they must have realised had become a matter of dispute amongst the owners. They should have taken a more pro-active approach. They failed to follow up with SGN the question of whether the location of gas pipes precluded the possibility of lowering the kerb. They were aware

by August 2021 that SGN were unconcerned, but did not proceed to instruct contractors to provide the estimate that they had promised to obtain on 5 March 2021. They were well aware of the homeowner's objection to the arbitrary action of one or more of the owners in moving the bins. They informed the Council that they could expect strong opposition to the outcome of the vote, but they did not intervene in August 2021 to at least advise the owners that a solution not put to them in the options vote was now possible and merited consideration. By then, one or more owners had taken unilateral action to move the bins, but the property factors ought to have made owners aware, without taking sides, that the option existed. The property factors stated in their written representations that they wanted to "limit the choices" and, whilst that might be understandable, they ought to have reported to the owners the fact that a contractor had advised that lowering the kerb was not a viable option. It may be that they reported that to the "committee", but by the time of the full vote, they had decided to revert to lettering all owners and were not taking instructions from any "committee".

44. It is not part of the function of the Tribunal in this application to examine in detail the manner in which the "committee" was set up or the way in which it functions, but it is clear from the evidence provided by the homeowner that it was not constituted as a result of a decision made by all the owners, so cannot claim to represent them all. The Tribunal would also comment that a voting system by which properties have two votes if they are in joint ownership is manifestly wrong and completely unfair to those owners who live alone. The property factors appear to have recognised that the "committee" had no authority in refusing to act on the first "vote", insisting instead on a development wide vote, but they do not appear to have taken control of the framing of the options, despite already having been asked to explore the possibility of lowering the kerb.
45. At the end of the day, the owners are responsible for coming up with a solution for bin storage that is acceptable to the Council to whom the bins belong and by whom they are emptied and serviced. It was not a decision for the property factors to make, but the view of the Tribunal was that, in conducting the vote, the property factors should have included the option to lower the kerb, as they were aware that some residents at least were already in favour of it.
46. The Tribunal considered the two applications in order to determine whether the failings of the property factors that the Tribunal had identified constituted breaches of either Code of Conduct and/or a failure to carry out the property factor's duties. The Tribunal dealt firstly with the complaint that the property factors had failed to comply with Sections 1.b and c, 2.1, 2.4, 2.5, 6.1, 6.6, 6.9, and 7.1 of the 2012 Code of Conduct.
47. Section 1B of the 2012 Code of Conduct relates to Services Provided and Section 1C to Financial and Charging Arrangements. The homeowner's complaint under Section 1 appeared to be a failure by the property factors to issue a Written Statement of Services until 22 January 2019, having taken over the

previous factoring company on 17 December 2016. The Tribunal did not uphold the complaint under Sections 1B and 1C, as the property factors had provided the Tribunal with a copy of their Written Statement of Services letter sent to the homeowner, bearing the date 28 January 2017.

48. Section 2.1 of the 2012 Code of Conduct states that property factors must not provide information that is misleading or false. The homeowner's complaint appeared to be that the property factors had misled some owners on a number of occasions by referring them to the Council to sort out the bins issue. The Council had in turn stated that they had no jurisdiction as it was a private development. The view of the Tribunal was that, whilst a decision by the owners to relocate the bins did not require Council approval as such, the Council would have to be content that their operatives could safely access the bins for emptying and cleaning. Accordingly, the Tribunal did not regard the position taken by the property factors as false or misleading,
49. Section 2.4 of the 2012 Code of Conduct requires property factors to have in place a procedure to consult with homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. The property factors' Written Statement of Services sets out the Core Services and provides that where written approval of homeowners is appropriate prior to instructing common works and services, the property factors will consult with all homeowners in writing seeking their views and/or instructions. Accordingly, as the procedure was in place, the Tribunal did not uphold the complaint under Section 2.4 of the 2012 Code of Conduct. The homeowner's complaint was, in essence, that the property factors were dealing with a self-appointed committee, and the property factors did acknowledge that in relation to roof and soffit repairs in 2020, they had done so, but, whilst the homeowner may not have been as well informed as she would justifiably have liked, it appears she was the only owner to query the process and, having done so, the property factors reverted to sending letters to all owners.
50. Section 2.5 of the 2012 Code of Conduct states that property factors must respond to enquiries and complaints received by letter or email within prompt timescales and that overall, their aim should be to deal with enquiries and complaints as quickly and as fully as possible and to keep homeowners informed if they require additional time to respond. Their response times should be confirmed in the Written Statement. The Tribunal did not uphold this head of complaint. The property factors demonstrated in their written representations that they had complied with the timescales set out in their complaints procedure and the Written Statement of Services states that details of the procedure can be obtained upon request by hard copy.
51. Section 6.1 of the 2012 Code of Conduct provides that property factors must have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention. They must inform homeowners of the progress of this work, including estimated timescales for completion. The Tribunal did not uphold the homeowner's complaint under this Section. The procedures for homeowners to notify them of matters requiring repair are clearly

set out in the Written Statement of Services. There was no evidence that the property factors had failed to inform homeowners of the progress of any work instructed by them. The homeowner complained that the property factors had failed to obtain an estimate for lowering the kerb, but this was not work instructed by the owners as a group and the view of the Tribunal was that this was more appropriately dealt with as a complaint that they had failed to carry out the property factor's duties.

52. Section 6.3 of the 2012 Code of Conduct states that property factors must be able to show how and why they appointed contractors, including cases where they decided to carry out a competitive tendering exercise or use in-house staff. No evidence in relation to this head of complaint was offered and it was not upheld.
53. Section 6.8 of the 2012 Code of Conduct requires property factors to disclose to homeowners, in writing, any financial or other interests that they have with any contractors appointed. The complaint under this Section was not upheld. The Written Statement of Services clearly states that the property factors do not receive any commission, fee, payment or any benefit from any contractor or service provider appointed by them, neither do they have any financial or other interest in any contractors appointed by them.
54. Section 6.9 of the 2012 Code of Conduct states that property factors must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. No evidence was presented to support the contention that this Section had not been complied with, so the complaint was not upheld.
55. Section 7.1 of the 2012 Code of Conduct requires property factors to have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the Written Statement, which the property factors will follow. This procedure must include how they will handle complaints against contractors. The Written Statement of Services advises that a copy of the complaints procedure can be obtained upon request, and the property factors provided copies of their responses to the complaint at the Stage 1 and Stage 2 level. There was no evidence that they had failed to comply with Section 7.1, so the homeowner's complaint was not upheld.
56. The Tribunal then considered the homeowner's complaints that the property factors had failed to comply with OSPs 2.4 and 9 and Sections B(4), D(14), 2.4, 2.7, 6.4, 6.7, 7.1 and 7.4 of the 2021 Code of Conduct.
57. OSP2 of the 2021 Code of Conduct states "you must be honest, open and transparent and fair in your dealings with homeowners." In evidence, the homeowner stated that the property factors had denied receiving emails from a co-resident in relation to her complaint and that no timescales had ever been given for responding to enquiries. She also contended that no professional assessment of Block 1 had been carried out in 12 years and the prop-

erty factors had denied receiving emails from her keeping them up to date regarding her complaint about the communal bins. In the application, the homeowner also referred, under the OSPs, to an alleged failure by the property factors to provide her with a copy of their Written Statement of Services until three years after their effective appointment. The property factors provided the Tribunal with copies of three professional assessments, two of which predated the application, and with evidence that they had distributed their Written Statement of Services to owners approximately six weeks after they began acting as factors for the development.

58. OSP4 of the 2021 Code of Conduct states “You must not provide information that is deliberately or negligently misleading or false.” The Tribunal did not uphold this head of complaint for the reasons set out in Paragraph 48 of this Decision, in relation to the equivalent provision of the 2012 Code of Conduct, namely Section 2.1 thereof.
59. OSP9 of the 2021 Code of Conduct states “You must maintain appropriate records of your dealings with homeowners. This is particularly important if you need to demonstrate how you have met the Code’s requirements.” The property factors stated in evidence that they retain all records and, as no evidence to support the complaint under this Section had been presented, it was not upheld by the Tribunal.
60. Section B(4) of the 2021 Code of Conduct requires the Written Statement of Services to include the core services that the property factor will provide to homeowners and that this must include the target times for taking action in response to request from homeowners for both routine and emergency repairs and the frequency of property visits (if part of the core service). The Written Statement of Services lists the core services and sets out the timescales within which the property factors will endeavour to deal with identified or reported common works, including emergency matters. Accordingly, the Tribunal did not uphold the complaint under this Section of the Code of Conduct.
61. Section D(14) of the 2021 Code of Conduct provides that the Written Statement of Services must include procedures and timescales for responding to enquiries and communications received from homeowners in writing and by telephone (including details of the property factors’ standard working hours). The Tribunal did not uphold the complaint under this Section of the Code of Conduct, for the reasons set out in the immediately preceding Paragraph relating to Section B(4) of the Code of Conduct. The Written Statement of Services does not state the property factors’ standard working hours, but the version seen by the Tribunal pre-dates the coming into force of the 2012 Code of Conduct and the Tribunal was not prepared to make a finding that the property factors had failed to comply with that particular aspect of the 2012 Code of Conduct.
62. Section 2.4 of the 2021 Code of Conduct states that “Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and

make the information available unless there is good reason not to.” No evidence relevant to this Section was presented to the Tribunal and the complaint was not upheld.

63. Section 2.7 of the 2021 Code of Conduct states that a property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their Written Statement of Services, “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 did not uphold this head of complaint for the reasons set out in Paragraph 50 of this Decision, in relation to Section 2.5 of the 2012 Code of Conduct, namely that the property factors demonstrated in their written representations that they had complied with the timescales set out in their complaints procedure and the Written Statement of Services states that details of the procedure can be obtained upon request by hard copy.
64. Section 6.4 of the 2021 Code of Conduct provides that “Where a property factor arranges inspections and repairs this must be done in an appropriate time-scale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required”. The Tribunal did not uphold this head of complaint for the same reasons as are set out in Paragraph 51 of this Decision in relation to Section 6.1 of the 2012 Code of Conduct, namely that the homeowner complained that the property factors had failed to obtain an estimate for lowering the kerb, but this was not work instructed by the owners as a group, so would be more appropriately dealt with as a complaint that they had failed to carry out the property factor’s duties.
65. Section 7.1 of the 2021 Code of Conduct specifies that a property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. The Section continues that it is a requirement of Section 1 of the Code that the property factor must provide homeowners with a copy of its complaints handling procedure on request. The Section then sets out a number of items that the procedure must include. The Tribunal had already considered at Paragraph 55 of this Decision the equivalent Section of the 2012 Code, also Section 7.1 The Written Statement of Services advises that a copy of the complaints procedure can be obtained upon request and there was no evidence before the Tribunal to indicate either that they had failed to comply with any request to provide a copy or that that the property factors had not applied the procedure consistently and reasonably, so the Tribunal did not uphold the complaint.
66. Section 7.4 of the 2021 Code of Conduct states that a property factor must retain (in either electronic or paper format) all correspondence relating to a homeowner’s complaint for a period of at least 3 years from the date of the receipt of the first complaint. The property factors stated in their written repre-

sentations that they retain all records and, as no evidence to support the complaint under this Section had been presented, it was not upheld by the Tribunal.

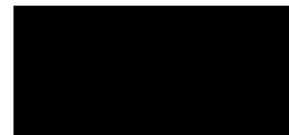
67. The Tribunal then considered the homeowner's complaint that the property factors had failed to carry out the property factor's duties. The property factors told the owners on 5 March 2021 that they would obtain an estimate for lowering the kerb. The only contractor that they contacted expressed his professional opinion that the location of gas pipes underground meant that this was not a viable option, but the property factors then simply discounted it, instead of reporting back and asking owners if they wished them to pursue with Scottish Gas Networks the question of whether lowering the kerb was an option. In the event, the homeowner herself was able to find out the answer in a matter of a few days, but by then it was too late to enable the option to be included in the vote carried out by the property factors on the owners' behalf. The property factors accepted and apologised for the fact that they had failed to obtain the promised quote, and the view of the Tribunal was that they had failed to carry out the property factor's duties in relation to this matter. Their failure was then compounded by the fact that they advised the homeowner on 15 November 2021 that they would now obtain a quote, but they appear to have taken no steps to do so. Their first failure had very significant consequences for the homeowner, as it effectively denied her the opportunity of insisting that lowering the kerb was one of the options put to the vote of the owners. They may have taken the view that it was unlikely to achieve a majority, as it would involve cost, but the property factors were not entitled to speculate on the likely outcome.
68. The property factors also failed to carry out the property factor's duties in that they disclosed to one owner the outcome of the vote, before sharing it with all the owners in the development. This may or may not have precipitated the unilateral decision by one owner or a small group to move the bins when they did, but it was clearly wrong, particularly when the property factors knew that the decision would not be well received by a section of owners, namely some or all of those in Close 1, including the homeowner, whose properties lay closest to the new location.
69. Having considered carefully all the evidence before it and having decided that the property factors had not failed to comply with any of the particular Sections of the two Codes of Conduct stated in the application, but that they had failed to carry out the property factor's duties, the Tribunal then considered whether to make a Property Factor Enforcement Order ("PFEQ"). The Tribunal's view was that, although there was no evidence of actual loss, the property factors' failings had caused enormous inconvenience and considerable distress to the homeowner, so some form of compensation should be made. The Tribunal determined, therefore, that it proposed to make a PFEQ as set out in the accompanying Notice under Section 19(2)(a) of the Act. The Tribunal considered that an award of compensation to the homeowner of the sum of £250 would be appropriate in all the circumstances.

70. In arriving at its Decision, the Tribunal expresses the hope that the issue of the location of the bins will eventually be resolved by agreement, but it is not for the Tribunal to express a view as to what the best solution might be. It is for the owners as a collective to make the decision and the Tribunal hopes and expects the property factors to now obtain the quote for which the home-owner has been waiting so long, so that the owners of the development can make a fully-informed choice.

71. The Tribunal's Decision was unanimous.

Right of Appeal

72. In terms of Section 46 of the Tribunal (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.



George Clark
Legal Member/Chair
27 July 2022