

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**Decision on Homeowner's application: Property Factors (Scotland) Act 2011  
Section 19(1)(a)**

**Chamber Ref: FTS/HPC/PF/19/0680**

**553 Mossspark Drive, Mossspark, Glasgow G52 1QP  
("the Property")**

**The Parties:-**

**Mr John Garrett, 553 Mossspark Drive, Mossspark Drive, Mossspark, Glasgow G52 1QP  
("the Homeowner")**

**Your Place Property Management Limited, Wheatley House, 25 Cochrane Street, Glasgow G1 1HL  
("the Factor")**

**Tribunal Members:**

**Graham Harding (Legal Member)  
Andrew Taylor (Ordinary Member)**

### **DECISION**

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 6.1, and 6.9 of the Code

The decision is unanimous.

### **Introduction**

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 6 September 2017 following its change of name and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 4 March 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1A & B, 2.1, 2.2, 2.4, 2.5, 3.3, 4., 4.4, 4.9, 5.4, 5.7, 6.1, 6.3, 6.4, 6.9 and 7.1 of the Code as well as failing to carry out its Property Factor's duties.
2. By Minute of Decision dated 19 June 2019 a legal member with delegated powers accepted the application and referred it to a Tribunal.
3. A hearing was arranged to take place on 7 August 2019 at the Glasgow Tribunals Centre, 20 York Street, Glasgow.
4. The Homeowner submitted written representations to the Tribunal. No written submissions were submitted by the Factor.
5. The hearing assigned for 7 August 2019 was adjourned due to the non-availability of the Factor's representative, Donna Baillie and a fresh hearing assigned to take place on 19 August 2019.

## **Hearing**

6. A further hearing was held at Glasgow Tribunals Centre, 20 York Street, Glasgow on 19 August 2019. It was attended by the Homeowner. On the morning of the hearing the Tribunal received an email from the Factor's representative Ms Donna Baillie, to the effect that due to unforeseen circumstances she was unable to attend the hearing and no-one else from the Factor was able to attend. The Factor did not seek an adjournment of the hearing. The Tribunal was of the view that as this was the second occasion on which the Factor's representative had failed to attend a hearing and as the explanation on this occasion was entirely inadequate the Tribunal was entitled in terms of Rule 29 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 entitled to proceed with the hearing in the absence of the Factor.
7. In the circumstances the Tribunal determined to hear oral submissions from the Homeowner in support of his application.

## **Summary of submissions**

8. The Homeowner presented an opening statement outlining his case in which he submitted that he had lost confidence in the Factor as a result of its management failing to properly scope, cost and programme work for repair. He submitted that the Factor had shown complete disregard for the Homeowner's health, safety and welfare and as a result the Homeowner had suffered flooding below his kitchen, rising damp and spalling to a concrete

soffit slab. He also submitted that the Factor had falsified records and taken money under false pretences. The Homeowner went on to say that the Factor had failed to call a meeting when requested and had misinterpreted the Deed of Conditions affecting the Property. He further submitted that the Factor's processes and procedures were not fit for purpose by failing to comply with its remit, restricting consultation and posting correspondence to the wrong address. As a result, the building of which the property forms part has fallen into disrepair. The Homeowner was also critical of the way in which Wheatley Housing Group Limited had set up as subsidiaries the Factor and City Building (Glasgow) LLP as he believed it led to anti-competitive practices.

### **Section 1A of the Code**

9. The Homeowner explained that he took possession of the property from his father in 2013 following his return from living and working in England. At that time the Factor's predecessors Glasgow Housing Association had been the Factor. The Homeowner felt that on the change of ownership there ought to have been an opportunity for a review of the Factoring arrangement. The Factor should apply for renewal of its appointment. The Factor referred the Tribunal to the Factor's Written Statement of Services. He submitted that it was written in generic terms that left an owner to try to work out for himself the basis on which the Factor had authority to act. He was of the view that it should specifically state how there was authority. In response to a query from the Tribunal the Homeowner appeared to be unaware if he had ever received a copy of the Property Services Schedule referred to in the document "Key updates to our Written Statement of Services booklet."

### **Section 1B of the Code**

10. The Homeowner submitted that the Written Statement of Services failed to provide explicit details as to the services that would be provided by the Factor. It talked about being able to access a range of services but they were implicit rather than explicit. The Homeowner felt that the Factor lacked the necessary expertise to be able to provide the services offered.

### **Section 2.1 of the Code**

11. The Homeowner directed the Tribunal to paragraph 121 of his written submissions as being examples of the Factor providing information that was misleading or false. These were issues that had not been recorded correctly by the Factor's staff and as a result the necessary repair work had not been properly scoped or instructed. The Homeowner said that the Factor's staff had shown indifference in dealing with the issues. In response to a query from the Tribunal it appeared that the issues as recorded may have been related to the diagnostic software used by the Factor when noting reports of faults from owners. If that was the case the Homeowner suggested that a better system that accurately recorded the issue should be used. The Homeowner also submitted that as it was the position in his title deeds that once Glasgow City Council no longer owned any of the properties in the block the Factor should be appointed by the owners but that had never happened. The Homeowner

referred the Tribunal to a repair account that made mention of clearing a blocked drain when in fact the drain had not been blocked. The issue was pools of water in the solum. The Homeowner also referred to the rendering of the building being cracked. Mr Colin Irvine had inspected the property and reported to Mr Tom Cuthill. According to the Homeowner the render on two elevations of the building was affected and required to be re-rendered. The Factor only proposed to re-render one elevation around the kitchen window. The remedial works proposed was only a patch repair. The Homeowner suggested that the scope of the proposed repair should be agreed in the first instance by the owners. The Homeowner submitted by proceeding in the way that it had the Factor had provided information that was false or misleading.

### **Section 2.2 of the Code**

12. In support of his submission that the Factor had breached this section of the Code the Homeowner referred the Tribunal to document 40 in his written representations. This was an email from Tom Cuthill, the Factor's Common Repairs Team Manager to the Homeowner dated 4 December 2017. The Homeowner submitted that he had a legitimate grievance that he had acted upon and being used to dealing with Property Management Companies from his many years of living in England had sent the Factor a Section 20 Notice. The Homeowner said he found the Factor's response to the Section 20 Notice even although it was relevant to English law abusive. Furthermore, the Homeowner said that subsequently in a telephone call Mr Cuthill had hung up on him and that was abusive. He found that the way that Mr Cuthill came across showed a complete disregard for his wishes.

### **Section 2.4 of the Code**

13. It was the Homeowners position that the scope of any repairs had to be agreed by the majority of the owners. The Factor's Written Statement of Services was inconsistent with the terms of the title deeds of the property. It had been the Factor's position that it was only necessary to arrange a meeting of owners to consider major works and not for common repairs. The Homeowner referred the Tribunal to pages 10 and 13 of the Written Statement of Services and also to document 71, the Stage 1 Complaint response from Donna Baillie, the Factor's Regional Business Manager. The Tribunal queried with the Homeowner if he accepted that the Factor had ultimately upheld his complaint in this regard in the Stage 2 Complaint response from Catherine Wilkie (Document 73). The Homeowner indicated that this simply said it was Ms Wilkie's view that a meeting should have been held.

### **Section 2.5 of the Code**

14. The Homeowner stated that the Factor had been aware that there were pools of water in the solum of the property before during and after contractors had been instructed to deal with the complaint. The Homeowner referred the

Tribunal to Document 56. This was an email from Mr Cuthill to the Homeowner dated 8 February 2018. The email makes reference to the Homeowner sending a further email but does not specify the date. The Homeowner said he had written on 25 January but that letter had been ignored and he had written again on 5 February. The Homeowner explained that previously he had contacted his MP and that following on from that a Councillor McSporran had become involved and a meeting had been arranged but had been cancelled due to extreme weather and no buses had been running. The Homeowner said that he had insisted that he would only attend a meeting if a member of the Factor's senior management was present due to his lack of confidence in Mr Cuthill.

### **Section 3.3 of the Code**

15. The Homeowner referred the Tribunal to the documents that he had submitted as productions on 14 August 2019. Although these had been lodged less than 7 days prior to the hearing the Tribunal was of the view that the Factor would have been aware of their existence and there would be no prejudice in allowing them to be received late. The Homeowner said that the documents were of the type he received from the Factor. The Repair Account dated 05/01/2018 referred to clearing a blocked drain and investigating blockage using CCTV when there was no blocked drain. In another instance a neighbour had built into the roof space. A cold-water header tank had previously been removed but the cold-water service pipe had been left in situ. When this had leaked the neighbour had contacted the Factor and it had been dealt with as a common repair although it was the sole liability of the upstairs neighbour. The Homeowner said he was disputing liability for payment. The Homeowner confirmed that he was now getting annual statements from the Factor.

### **Section 4.1 of the code**

16. The Homeowner referred the Tribunal to the Written Statement of Services as being the only reference he had to debt recovery procedures. The Tribunal pointed out that the Factor's policy was available on the Factor's website and this was mentioned in the Written Statement of Services. The Homeowner said that the Factor was claiming that he owed £233.73 but this was disputed and no action had been taken against him thus far.

### **Section 4.2 of the Code**

17. The Homeowner said he was no longer insisting in his complaint in respect of this section of the Code.

### **Section 4.4 of the Code**

18. The Homeowner submitted that when essential works need to be done it should not be left for a Homeowner to pay for the cost of the repair if other

homeowners won't agree to the work being done. The Homeowner went on to say that for the past three years he had been unable to have the use of his kitchen as the concrete soffit dividing the Homeowner's property from the flat above was spalled and the steel reinforcement bars had corroded. This was an essential repair. Because the Factor had not been sending correspondence to one owner at the correct address he had not been replying to the Factor. The upstairs neighbour who had originally been prepared to agree to obtaining a report from a structural engineer had then changed his mind as he thought the cost was too much. The Factor had been asked to convene a meeting but he had not done this. The Homeowner had been left to try to progress matters himself. The Tribunal queried why the Homeowner thought that the repair to the concrete soffit would be a common repair to be shared between the four owners in the block as opposed to a mutual repair between the Homeowner and the upstairs neighbour. The Tribunal referred the Homeowner to the Deed of Conditions burdening the property. It did not make any reference the horizontal divisions between properties being common. The Tribunal referred the Homeowner to the Law of the Tenement and the Tenement (Scotland) Act 2004.

#### **Section 4.9 of the Code**

19. The Homeowner referred the Tribunal to Document 77 and an exchange of emails between the Homeowner and Steven Burnett, Business Adviser with the Factor. The Homeowner explained that the sums mentioned in the emails were in dispute. He submitted that the tone of the emails from the Factor was intimidating and did not show respect. The Homeowner confirmed that no further action had been taken by the Factor since the application had been made to the Tribunal.

#### **Section 5.4 of the Code**

20. The Homeowner explained that in June 2016 he had discovered that a plastic pipe in his kitchen that passed through the wall into a metal pipe hidden in the wall had been leaking at the joint. It had opened up over time and under certain circumstances water had leaked over a prolonged period. The result had been that the wall had been soaked and the carcase of the kitchen cupboard damaged beyond repair. The floor was also damaged and contained asbestos. This was deemed to be requiring an insurance claim and the Homeowner was directed by the Factor to make the claim. According to the Homeowner his kitchen had been ruined but the maximum cover offered by the insurance for water damage was £2500.00. the insurers had offered to replace the cupboard carcase but not the sink above. It was the Homeowner's position that a reading of the Deed of Conditions required the Factor to have a comprehensive policy of insurance for the full reinstatement value. The Homeowner submitted that a previous policy with Sun Alliance offered much better cover and the Factor had not been interested in checking that the claim was dealt with properly.

## **5.6 of the Code**

21. According to the Homeowner he had raised the issue of why the Factor had appointed the insurers with Mr Cuthill but did not refer the Tribunal to any correspondence in support of this.

## **Section 5.7 of the Code**

22. In response to a query from the Tribunal the Homeowner confirmed that he had not asked the Factor for any tender documentation.

## **Section 6.1 of the Code**

23. It was the Homeowner's position that the procedure for intimating a matter requiring repair, maintenance or attention was cumbersome. It involved spending ages on the phone sometimes up to 20 minutes firstly answering numerous security questions before trying to explain to someone who did not really understand the issue involved. The Homeowner said it was as if the person at the other end of the phone did not want to know. Thereafter there was a failure to notify the owner as to how an issue was progressing. The Homeowner said he found it very difficult to deal with. He thought that once an issue had been identified it should be handled by a single person from start to finish. Instead he had to keep explaining to different people every time he called what he was phoning about. The Homeowner referred the Tribunal to paragraph 194 of his written submissions and to Documents 65-69 in support of his position.

## **Section 6.3 of the Code**

24. The Tribunal queried whether the Homeowner could provide the Tribunal with any documentary evidence to show that he had requested an explanation from the Factor as to how and why contractors had been appointed but the Homeowner was unable to provide any such documentation.

## **Section 6.4 of the Code**

25. The Homeowner advised the Tribunal that the Factor had provided a Property Maintenance Report in 2013 but since then no further reports had been issued. It therefore was not clear to the Homeowner if the core service provided by the Factor included periodic property inspections or a planned programme of cyclical maintenance.

## **Section 6.9 of the Code**

26. The Homeowner referred the Tribunal to the issues that he had experienced with regards to the water in the solum of the property. He submitted that the contractors C Hanlon had failed to properly identify the source of the problem which had been coming from a corroded down pipe but had instead used

CCTV equipment to look for a blocked drain when the drain was not blocked. The contractor had carried out a pointless dye test when there was an obvious smell of foul water. The Homeowner said he had sent Mr Cuthill various emails with regards to the issue which had been ignored. The homeowner said that eventually he had picked up a spade himself and dug around the pipe and discovered the problem. The Homeowner again made reference to the issues that he thought created a conflict of interest arising between the Factor and City Building (Glasgow) LLP.

### **Section 7.1 of the Code**

27. The Homeowner referred the Tribunal to document 71 in support of his contention that the Factor did not have a clear written complaints procedure. In response to a query from the Tribunal the homeowner confirmed that his complaint had gone through a two-stage complaint procedure and that it appeared that there was a complaints procedure referred to in the Written Statement of Services.

### **Property Factors Duties**

28. The Homeowner submitted that the block in which the property forms part had been subjected to serious neglect for decades. The owners were relatively poor. It therefore needed a Factor who was diplomatic to bring about consensus to carry out repairs. This Factor was not capable of doing the job. There needed to be a meeting of owners arranged to discuss what was needed to maintain the property and prioritise essential repairs. Mr Cuthill was not the right person for the job. The Homeowner submitted that the Factor had a duty of loyalty to the Homeowner as well as a duty to obey instructions; a duty to act with skill and care; a duty to notify; and a duty to account. In the Homeowner's submission the Factor had failed in its duties. The Homeowner said that it was not reasonable that he had been left in a property that did not meet the tolerable standard as a result of the failures of the Factor. He had been left with a property that had suffered from flooding, rising damp and structural damp. The Factor had proposed carrying out patching to the roughcast on one wall at an unacceptable cost to owners when it was necessary to roughcast two walls and not just do minor patching.

### **The Tribunal make the following findings in fact:**

29. The Homeowner is the owner of 553 Mossspark Drive, Mossspark, Glasgow ("the Property")
30. The Property is a flat within the block of four flats forming 547 – 553 Mossspark Drive, Mossspark, Glasgow (hereinafter "the Development").
31. The Factor performed the role of the property factor of the Development.

32. The Factor was previously known as GHA(Management) Limited and changed its name to Your Place Property Management Limited by a Special Resolution of the company dated 24 February 2016.
33. All of the flats in the Development are privately owned.
34. The title deeds of the property provide for the appointment of a Factor for the Development.
35. It would be open to a majority of owners in the Development to terminate the appointment of the Factor and appoint a new Factor.
36. The Factor's Written Statement of Services is compliant with the Code.
37. Foul water accumulated in the solum of the property from a drainage leak from a downpipe at the Development.
38. The concrete soffit dividing the property from the property above is mutual to the owners of these properties and does not form common property.
39. The Factor failed to differentiate between repairs that may be common to all owners and repairs that were mutual or the liability of a sole owner.
40. The Factor failed to convene a meeting of owners when requested by the Homeowner.
41. It was more likely than not that the Factor wrote to the owner of 547 Mossspark Drive, Mossspark, Glasgow at the wrong address.
42. The Factor failed to adequately keep the Homeowner informed as to progress of work or reasons for work not being progressed.

## **Reasons for Decision**

### **Section 1A of the Code**

43. The Deed of Conditions burdening the property provided for the appointment of a factor. It was prepared by the City of Glasgow District Council at a time when tenants were exercising their right to buy their council property. As long as the council owned a flat in the block the council could determine the factor. The Factoring was passed to Glasgow Housing Association who set up a company GHA (Management) limited in March 2003 to carry out the factoring of the Homeowners property along with many others. That company changed its name to Your Place Property Management Limited in 2016 but was essentially the same organisation. The Tribunal is unaware as to when Glasgow District council or its successor in title ceased to own any property in the Development but at that time and at any time thereafter it became open to the owners to agree to terminate the appointment of the existing factor and appoint a new factor if a majority of owners so wished. Until then the Factor's

authority to act would continue. The Written Statement of Services is quite generic in its terms. It is intended to apply to owners of all the properties it factors. An owner would reasonably be expected to know what is in their title deeds. That is an important document that sets out an owner's responsibilities with regards to their property and in this case confirms how he factor is to be appointed. It was unfortunate that the Homeowner was unable to confirm if he had ever received the Property Services Schedule or indeed if such a document existed. The lack of participation by the Factor throughout this application has been disappointing and is the subject of comment below. However, the Tribunal was satisfied that the terms of the Written Statement of Services were adequate and there was therefore no breach of this section of the Code.

### **Section 1B of the Code**

44. Again the Tribunal's consideration of this element of the complaint was not helped by not knowing whether or nor there was a Property Services Schedule to be read along with the Written Statement of Services but despite that the Tribunal was satisfied that although again written in general terms the information supplied was sufficient to satisfy the terms of the Code in respect of response times and the core services available. The Tribunal therefore did not find a breach of this section of the Code.

### **Section 2.1 of the Code**

45. The Homeowner was clearly very aggrieved at what he perceived as a lack of understanding on the part of the Factor to properly identify the problems with the property and deal with the issues correctly. However, the examples provided by the Homeowner did not in the Tribunals view amount to providing misleading or false information except that the Factor ought to have known that the concrete soffit dividing the kitchen in the Homeowner's property from the property above did not form common property. By failing to point this out to the Homeowner and by indicating that it was common property the Factor did provide misleading and false information. Had the Factor advised the Homeowner that the soffit was mutual between the Homeowner and the upstairs proprietor and therefore outwith the scope of the Factor the Homeowner could have taken steps himself to engage with the upstairs proprietor with a view to progressing repairs. Had this formed part of the Homeowner's complaint then the Tribunal would have found the Factor was in breach of this section of the Code. However as it did not the Tribunal was unable to make such a finding.

### **Section 2.2 of the Code**

46. The Tribunal considered the Homeowner's verbal and written submissions in support of this alleged breach. However, the correspondence referred to by the Homeowner was not abusive, intimidating or threatening. It may well have been the case that Mr Cuthill hung up on a telephone call with the

Homeowner as the Tribunal had no evidence from the Factor to contradict the Homeowner's account but whilst that might be considered rude and unprofessional it would not be abusive, intimidating or threatening in the normal meaning of the words. The Tribunal was therefore not satisfied that the Factor was in breach of this section of the Code.

#### **Section 2.4 of the Code**

47. As has been indicated above the Factor failed to call a meeting of owners when requested by the Homeowner and initially at the Stage 1 complaint stage it was suggested by the Factor that it was entitled to refuse to call a meeting. However, at the Stage 2 complaint stage the Factor acknowledged its mistake. The Written Statement of Services does set out procedures for consulting with owners and obtaining approval for work or services that incur charges above the consent limit for the Development and makes reference to the title deeds affecting the property. The Tribunal was therefore satisfied that the Factor was not in breach of this section of the Code.

#### **Section 2.5 of the Code**

48. It did seem to the Tribunal that there had been a considerable delay on the part of the Factor in dealing with the Homeowner's complaint regarding the pools of water in the solum of the property. It should have been obvious to those instructed by the Factor that there was a leak from a drain and steps taken to remedy the problem. However, this section of the Code is primarily concerned with the time it takes a Factor to respond to an owner's enquiry or complaint. The Factors Written Statement of Services states that these will be replied to within five working days. The Homeowner referred the Tribunal to his correspondence to Mr Cuthill dated 25 January 2018. Mr Cuthill acknowledged this email and provided a response on 2 February 2018 within the 5 working day period. The Homeowner then sent a further email on 5 February 2018 and received a response from Mr Cuthill on 8 February 2018 again within the five-day time period. It is possible that there may have been other occasions when the Factor did not respond within the set timescales but the Tribunal was not directed to any further examples and therefore it does not find that the Factor is in breach of this section of the Code.

#### **Section 3.3 of the code**

49. The documents provided by the Homeowner and his oral evidence tended to support the position that the Factor did provide a detailed financial breakdown of the charges made and a description of the activities carried out. The Tribunal acknowledged that the Homeowner disputed that the work invoiced relating to clearing a blocked drain was incorrectly described and that he was in dispute with the Factor regarding payment but this was a separate issue and the Tribunal did not find that the Factor was in breach of this section of the Code.

#### **Section 4.1 of the Code**

the property with the need for the policy to cover the full cost of damage from water ingress. It may well be the case that the cover in this regard was inadequate and another insurer may have offered better cover but that is not the purpose of this section of the Code. The Tribunal was not satisfied from the evidence submitted by the Homeowner that the Factor was in breach of this section of the Code.

### **Section 5.6 of the Code**

55. As the Homeowner was unable to refer the Tribunal to any documentation or correspondence to show that he had requested information on how and why the insurers had been chosen the Tribunal was unable to find that the Factor was in breach of this section of the Code.

### **Section 5.7 of the Code**

56. As the Homeowner confirmed that he had not requested sight of any insurance tender documentation the Tribunal did not find that the Factor was in breach of this section of the Code.

### **Section 6.1 of the Code**

57. The Tribunal did not have the benefit of any input from the Factor. It did not submit any written submissions and despite being given ample opportunity to attend a hearing did not do so and did not offer any substantive reason for its non-attendance. The Tribunal was on the other hand presented by a very compelling case from the Homeowner that indicated a lack of understanding and a degree of indifference on the part of the Factor's staff as regards the issues that had been raised by the Homeowner and his concerns at the lack of progress. The Tribunal was therefore persuaded that the Factor was in breach of this section of the Code.

### **Section 6.3 of the Code**

58. Although the Factor had produced a property maintenance report in 2013 there was nothing to suggest from the evidence of the Homeowner or his written submissions that the core service provided by the Factor included periodic property inspections or a planned programme of cyclical maintenance. The Tribunal therefore did not find the Factor in breach of this section of the Code.

### **Section 6.9 of the Code**

59. It appeared to the Tribunal that the contractor employed by the Factor to investigate the water in the solum of the property had failed to do an adequate job despite the best efforts on the part of the Homeowner to indicate the

nature of the problem. This issue is in some ways related to the problems identified in relation to Section 6.1 of the Code. It is unacceptable that the Factor has adopted such a cavalier attitude to the Tribunal and indeed it would seem to the Homeowner who was apparently left to identify the problem with the leaking drain himself. The Tribunal found that the Factor was in breach of this section of the Code.

### **Section 7.1 of the Code**

60. Despite the Homeowners criticism of the Factor's handling of his complaint, the Tribunal was satisfied that the Factor did have a written complaints resolution procedure that was in satisfactory terms. The Tribunal therefore did not find the Factor in breach of this section of the Code.

### **Property Factor's Duties**

61. In this case the complaint with regards to the Factor failing in its property factor duties is largely connected to the Homeowner's complaints regarding the alleged breaches of the Code. The Factor's duties arise out of its obligations set out in the title deed of the property and in particular the Deed of Conditions. It is clear from the Deed of Conditions at Clause 10(a) that if a proprietor makes a written request to convene a meeting of owners the Factor must arrange one. The Factor failed to do so after the Homeowner made such a request and therefore failed in its duty. The Deed of Conditions also defines the common parts at Clause 1.(2). Nowhere in the definition does it suggest that the horizontal divisions between the properties such as the concrete soffit above the homeowner's kitchen would be common. It is mutual with the owner of the property above. It should have been within the Factor's knowledge that as the soffit was not a common part any repair needed to it would be out with the scope of the Factor's remit and the Factor ought to have told the Homeowner that he would have to take the repair of this up with the upstairs proprietor as the Tenement (Scotland) Act 2004 would apply. By not doing so the Homeowner was unable to take the steps necessary to progress the repair of this part of his property. This was a further failure on the part of the Factor. It is not entirely clear as to whether or not the Factor was writing to one of the owners at the wrong address. The Homeowner has alleged that this was the case in his application and written representations. It would have been relatively straightforward for the Factor to have rebutted this suggestion had it submitted written representations rebutting the allegations or been represented at the hearing. It chose to do neither and that leaves the Tribunal to determine the application without the benefit of any input from the Factor. That is not a satisfactory situation. If the Factor has been sending correspondence to an owner at an incorrect address then it would make it much more difficult to obtain a majority vote in favour of works being carried out and that could lead to a serious deterioration in the condition of the property. In the absence of any information to the contrary and from the evidence submitted by the Homeowner the Tribunal has concluded that it is more likely than not that the Factor was sending correspondence to the owner

of number 547 Mossspark Drive at the wrong address. In the particular circumstances pertaining to this Development this would be a failure to carry out its property factor's duties.

62. Having carefully considered all of the oral submissions made at the hearing by the Homeowner and the lengthy written submissions and documents lodged in support of his application the Tribunal is satisfied that the Factor was in breach of Sections 6.1 and 6.9 of the Code and failed to carry out its property factor's duties.
63. The Homeowner has been put to a considerable amount of trouble, inconvenience and expense. Whilst some of this expense would necessarily have had to have been met by him in any event some might well have been shared among the other owners if majority consent had been forthcoming. He has not had the use of his kitchen for a lengthy period. His property has suffered from damp. He has suffered from foul smelling pools of water under his floor. The Factor appears to have relied on being unable to obtain majority consent to works being carried out when it seems that it may not have been communicating correctly with one owner who had 25% of the votes.
64. The Tribunal was surprised that the Factor chose not to submit any written representations in this case given the extensive nature of the complaints made by the Homeowner. This was made all the more surprising when the Factor then did not attend the hearing to answer the allegations made by the Homeowner. The Tribunal found that an email from the Factor's representative citing "unforeseen circumstances" as an explanation as to why no-one from as large an organisation as that of the Factor totally unacceptable.
65. In the circumstances the Tribunal is of the view that it is appropriate to make a Property Factor Enforcement Order including an order for payment to the Homeowner that reflects the serious nature of the breaches of the Code and property factor's duties.
66. The decision of the Tribunal is unanimous.

### **Proposed Property Factor Enforcement Order**

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

### **Appeals**

A homeowner or property factor 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.

Graham Harding

Legal Member and Chair

28 August 2019  
Date