

# 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: HPC/LM/22/0360**

**5 Hillpark Grove, Edinburgh, EH4 7AP ("the Property")**

### **The Parties:**

**Aylmer Millen, 5 Hillpark Brae, Edinburgh, EH4 7AP ("the Homeowner")**

**Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD  
("the Property Factor")**

### **Tribunal Members:**

**Josephine Bonnar (Legal Member)  
John Blackwood (Ordinary Member)**

### **DECISION**

**The Tribunal determined that the Property Factor has failed to comply with OSP 11 of the Property Factor Code of Conduct as required by Section 14(5) of the Act.**

**The decision of the Tribunal is unanimous**

### **Introduction**

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 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 2016 are referred to as "the Rules"

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

### **Background**

1. On 9 February 2022, the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with

Overarching Standards of Practice (OSPs) 2, 4, 6, 8 and 11 and Sections 1.1 and 7.1 of the Code. The Homeowner also sought a determination on whether the Property Factor had failed to carry out its property factor duties as required by Section 17(1) of the Act. The Homeowner stated that the Property Factor had appointed an untrained and inexperienced Client Relationship Manager and then failed to acknowledge this or take appropriate remedial action.

2. On 4 March 2022, a Legal Member with delegated powers of the President accepted the application and referred it to a Tribunal. The parties were notified that a case management discussion ("CMD") would take place by telephone conference call on 27 May 2022 at 10am.
3. Prior to the hearing the Homeowner lodged written representations and further documents. The Property Factor did not lodge written representations but confirmed they would participate in the CMD.
4. The CMD took place on 27 May 2022. The Homeowner participated. The Property Factor was represented by Mr Hutton, Managing Director and Ms Borthwick, Associate Director, and Customer Relations Manager ("CRM") for the development which is the subject of the application.

## **The Application**

5. The Homeowner's complaints are outlined in an email sent to the Property Factor on 27 January 2022. These can be summarised as follows: -
  - (a) Section 1.1. Breach of Sections 2.1 and 2.2 of the Written statement of services ("WSS"). Failure to carry out services with "reasonable skill and diligence", failure to assign a "dedicated, trained and experienced Client relations Manager". Appointment of a CRM with no relevant experience in the factoring industry or of co-ordinating a multidisciplinary team in face-to-face delivery of services to homeowners. No training on the Deed of Conditions ("DOC"), the 2011 Act, the Code and the WSS.
  - (b) Section 1.1. Property Factor is unable to demonstrate how their actions compare with the WSS. Appointment of untrained and inexperienced CLR breaches this section.
  - (c) OSP 2, 4, 6 and 8. Failure to comply with the requirements to be honest, open, transparent, and fair. Providing information which is deliberately or negligently misleading or false. Failure to use reasonable skill and care in the provision of services or make sure that staff have the training and information they need to be effective. New CRM has (i) declared work to be complete when evidence showed otherwise (tree pruning and drainage work), (ii) invoicing work in advance of completion, (iii) attempted instigation of proxy and majority voting when both are contrary to the DOC , (iv) Failure to consult with the residents designated steering group on drainage, (v) Last minute cancellation of residents meeting without reasonable explanation and (vi) Fundamental errors in January 2022 account and failure to address disputed

items in this account.

- (d) Property Factor duties and OSP 6. Failure to carry out duties to a reasonable standard and with reasonable care and skill and in a timely way. Inexperienced CRM appointed without proper training.
  - (e) OSP 11. Failure to respond on time to enquiries and complaints.
6. In his written representations Mr Millen states that the CRM is “transfixed by manifest ignorance of corporate memory, difficulties in command of a multi-disciplinary in-house team and lack of experience and training in the central management instruments” – the DOC, Code and WSS. He adds that there has been “little or no tangible progress” in relation to the storm drain maintenance, playpark improvements and tree pruning works. There has also been no residents meeting in the last 6 months or planned. These failures are due to the Ms Borthwick’s lack of “knowhow and training” and a “telling testament to the reckless judgement of the Factor’s Managing Director” in making the appointment.

## The CMD

### Preliminary Matters

- 7. The Tribunal noted that the application included a complaint under Section 7.1 of the Code. However, the email to the Property Factor which notified it of the complaints (27 January 2022) made no reference to this section. Mr Millen conceded that this was the case but asked the Tribunal to consider this complaint, nonetheless. Mr Hutton stated that it should not be discussed.
- 8. The Tribunal also noted that Mr Millen had lodged correspondence between him and the Property Factor from April and May 2022 prior to the CMD. The Tribunal asked the parties to make submissions as to whether this correspondence was relevant to the application which had been submitted and accepted by the Tribunal on 9 February 2022. Mr Millen said that these emails illustrate that there is disarray in the way in which the Property Factor has been operating since the appointment of Ms Borthwick, due to her inexperience. He also said that he understood that parties were allowed to submit further information if this related to the original complaint. Mr Hutton said that he had no submissions to make.
- 9. After a short adjournment the Tribunal determined that it could not make a determination about the 7.1 complaint. Section 17(3) of the 2011 Act states that an application to the Tribunal may not be made unless the homeowner has notified the Property Factor of the complaint, in writing. As no written notification had been given, the complaint could not be considered. On the issue of the April and May correspondence the Tribunal advised parties that it would decide on this issue after hearing the parties’ evidence and submissions.

### The Property Factor’s response to the application.

10. The Tribunal noted that the Property Factor had not submitted any documents or written representations prior to the CMD and that it would be appropriate to establish their response to the application. Mr Hutton said that the core of the complaints related to the allegation that Ms Borthwick was an inexperienced CRM. He referred the Tribunal to the emails sent to Mr Millen in December 2021 and January 2022 as these outline the Property Factor's position. He said that Mr Millen had not fully complied with the complaints procedure although he is very familiar with it, because he wrote to him at stage one rather than to Ms Borthwick. He provided the following responses.

- (a) 5(a) and (b) – the Property Factor's position is as outlined in the emails sent to Mr Millen on 16 December and 3 January. In the latter he offered Mr Millen the opportunity to explain what he expected of the service, the expertise required and where this is to be found in the recruitment market. He did not take up this offer. Mr Millen quoted sections 2.1 and 2.2 of the WSS. Ms Borthwick has 10 years of experience as a CRM. She managed a large team. She does not have a factoring background but is aware of the DOC, the 2011 Act, the Code and the WSS.
- (b) 5(c) – Mr Millen has his own views on how things have been managed. Over the 8 months since her appointment there have been some errors but that is usual. Ms Borthwick is a competent CRM.
- (c) 5(d) – This is disputed. The day-to-day reality is that a range of expertise is required from difference sources. It cannot all be found in-house.
- (d) 5(e) – Mr Millen did not respond to the offer to explain what he thought was required of a CRM. He just repeated his complaint.

### **The Homeowner's evidence and submissions**

11. Mr Millen told the Tribunal that the substance of his complaint is illustrated in the correspondence between the parties, documents numbered 5/1 to 5/6. He said that Ms Borthwick is inexperienced and untrained in the context of the factoring industry, and this has had an impact on the progress of certain matters. Mr Millen advised the Tribunal that the development is complex, and the title deeds are not straightforward. Some level of experience is required to understand them. He believes that Ms Borthwick was thrown in at the deep end and there is no evidence that there will be any improvement in the short to medium term. Mr Millen added that Ms Borthwick's predecessor and colleagues have considerable experience, and that the CRM's remit is the delivery of services by a multi-disciplinary team. Her failures have resulted in a breakdown of trust with particular concerns relating to the maintenance of the storm drains.

12. Mr Millen advised the Tribunal that scheduled tree pruning at the development was supposed to include the tree outside number 5. This was admitted. An invoice was issued for the whole amount although the work had not been completed as this tree had not been pruned. Both Ms Borthwick and her

predecessor were notified. The matter was discussed at a residents meeting in October 2021 although no minutes were taken. The storm drain work is still not complete and this has been acknowledged by the Property Factor. He has made enquiries with Ms Borthwick about the issuing of invoices before completion of the work, but no proper response has been provided. This is due to her lack of experience and competence.

13. Ms Millen told the Tribunal that Ms Borthwick issued voting slips to the Homeowners although the DOC (page D12) stipulates that decisions must be taken at meetings, provided there is a quorum present. The custom and practice have been for meetings to take place by Zoom since the start of the pandemic. Ms Borthwick also instigated proxy voting which shows her lack of familiarity with the DOC as this makes provision for mandatories and not proxies. A mandatory requires to attend the meeting to vote. Mr Millen conceded that Ms Borthwick said that she would rectify her error but there hasn't yet been a meeting arranged.
14. Mr Millen told the Tribunal that the Homeowners appointed a steering group to deal with the drainage issues in 2020. There were originally 4 in the group, now just 2. The steering group meets with the Property Factor and provides a report at residents' meetings. Ms Borthwick was told about the steering group but has failed to liaise with it. She also cancelled the last residents meeting three hours before it was due to start with no proper explanation given. This has not been re-arranged. The drainage plans referred to in her email have still not been made available to the steering group although there was a meeting with the steering group 2 or 3 weeks ago. In response to questions from the Tribunal about the errors in the January 2022 account and failure to address enquiries regarding this account, Mr Millen referred to his email of 3 January 2022. There were three issues. Firstly, it included a charge for communal electricity which only applies to the flats. This has now been addressed by a credit note. The second issue he raised was about whether the contractor had complied with the agreed specification of work. This has not been addressed. Lastly, he had asked about the increase in the management fee as it appeared to be premature. Mr Millen said that an experienced CRM would not have made these mistakes. In terms of the last complaint listed in the application and email of 27 January 2022, Mr Millen said that he did not get a response to his email to the Property Factor dated 14 January 2022.

### **The Property Factor's submissions/evidence**

15. Ms Borthwick told the Tribunal about her experience. She said that she had recently been employed as the Contracts Manager with a Petrol Maintenance Company which managed the maintenance of 500 sites. This involved liaising daily with contractors in relation to planned and ad hoc maintenance. Prior to that she had worked for a utility company for ten years. She had been a customer services manager, managing 70 employees and dealing with approximately 30000 clients. She had been responsible for a Fuel Poverty Project funded by the Scottish Government. She advised the Tribunal that she has qualifications in client services and experience of managing a team which

includes surveyors and inspectors. In response to questions from the Tribunal she said that she had undergone in house training when she started in her current role. This involved a 2-week induction with training on the WSS, 2011 Act and arranging homeowner meetings. Training and mentoring have continued since that time. In response to further questions Ms Borthwick said that in her previous post the company was regulated by the Scottish Government as the scheme was grant funded and they were dealing with vulnerable clients. In terms of the factoring training, Ms Borthwick said that she had participated in development sessions on all the processes, the 2011 Act, understanding title deeds, the WSS and the complaints procedure.

16. Mr Hutton told the Tribunal that the Hillpark development is made up of 155 properties. He said that Ms Borthwick's experience of working for a large corporate and in diverse rolls meant that her current role was "scaling down rather than up". In terms of the first 2 complaints (Section 2.1 and 2.1 of the WSS and section 1.1 of the Code) he said that Ms Borthwick's previous experience was such that there was no breach or conflict between her appointment and the Code and WSS. He conceded that there had been some issues and challenges along the way but that it was about transferable skills. She has been in the post for 8 months and has a good grasp of the role. Furthermore, she does not work in isolation. She is supported by a team.
17. Mr Hutton referred to the complaint about the tree pruning. He said that this related to the tree at Mr Millen's own property. However, following the failure by the contractor to attend to this tree, Mr Millen sent an email saying that this had been lucky. The contractor's failure was due to oversight and the invoice was issued before Mr Millen brought the matter to their attention. Mr Hutton told the Tribunal that the drainage maintenance is a wide-ranging issue. Ms Borthwick said that, before she started, it was thought that area 1 was complete. However, that may not have been the case. She arranged a meeting with the homeowners. On the day of the meeting a potential issue with the drawings was identified. The matter had to be referred to an expert to ensure that the drawings are correct. That has now been done and a meeting will be arranged.
18. Mr Hutton told the Tribunal that the reason for the steering group was that it is very difficult to get quorate meetings. Although there is no provision in the title deeds for the group, the Property Factor accommodated the arrangement. However, they were notified by one of the 4 members of the group that it had disbanded. According to Mr Millen, this was not the case, but it was the reason for the change. Mr Hutton advised the Tribunal that Ms Borthwick had used "proxy" as the generic term for the process. It is not the term used in the title deeds and was an oversight. The issuing of voting slips was also incorrect. Both issues were addressed as soon as they were raised by Mr Millen. Neither error establishes that Ms Borthwick is not suitable for the post.
19. In relation to the complaint about the January 2022 account, Mr Hutton said that the inclusion of the communal electricity charge had been a systems error and nothing to do with Ms Borthwick, as the CRM is not involved in the

accounts. However, when it was brought to her attention, it was addressed timely. The increase in the management fee was also a systems error. It is conceded that the tree work was invoiced before it was complete but that was because they were not notified that the tree had been missed until later. The TGI services invoice had been processed before Ms Borthwick joined the company. She started on 29 September 2021. The invoice was issued on 24 September and the error has now been addressed.

### **Further submission from the Homeowner**

20. Mr Millen told the Tribunal that he had been unaware that a former member of the Steering group had said that the group had been disbanded. He also said that drainage work had been invoiced before completion and that it was issues regarding the drainage work for areas 2 and 3 was which led to the meeting being cancelled. Although the group has no authority to make decisions it provides information to the Homeowners at the meetings.

### **Findings in Fact**

21. Prior to her appointment as Client Relationship Manager, Ms Borthwick had significant experience of managing a diverse team of employees and dealing with clients and contractors.
22. The Property Factor provided Ms Borthwick with relevant training on their written statement of services, deeds of conditions, the Code of Conduct and the 2011 Act.
23. Ms Borthwick was not aware that the tree pruning work which had been carried out at the development was incomplete when the invoice for this work was issued to the Homeowner.
24. Ms Borthwick erroneously issued voting slips to the homeowners when the Deed of Conditions stipulates that voting must take place at a quorate meeting.
25. Ms Borthwick cancelled a residents meeting three hours before it was scheduled to begin. She did so because a problem with the storm drains drawings had been identified which required to be addressed before the meeting could proceed. The meeting has not been re-scheduled.
26. The account issued to the Homeowners on 30 December 2021 erroneously included a communal electricity charge and an increase in the management fee.
27. Ms Borthwick failed to provide a full response to an enquiry about the storm drain works, sent to her by the Homeowner on 3 January 2022.

28. Mr Hutton did not respond to an email sent to him on 14 January 2022. The email did not contain any new enquiries.

## **Reasons for Decision**

29. Although the Homeowner provides examples and illustrations of the CRM's alleged inexperience and unsuitability for the post, his complaints are not about failures in service delivery but about the failure by the Property Factor to appoint a suitably qualified person or ensure that she had the required training for the role. It is the appointment and lack of training which he argues breach the Code and amount to a failure to carry out property factor duties. There appear to be three main aspects to Mr Millen's principal complaint. The first is that Ms Borthwick has not previously worked in the factoring industry. This is not disputed by the Property Factor. The second is that she does not have suitable experience of managing a multidisciplinary team or dealing with clients. Thirdly, she has not been provided with appropriate training. The second and third aspects of the complaint are disputed.
30. Prior to the hearing, the Homeowner lodged email correspondence with the Property Factor which took place between April and May 2022. The Homeowner advised the Tribunal that he understood that he was permitted to lodge further evidence in advance of the hearing. The Tribunal notes that the Procedure Rules do permit the lodging of further documents. However, the Homeowner's application was submitted in February 2022. His complaints relate to the appointment of Ms Borthwick in September 2021, the handover/training period which followed and the correspondence with the Property Factor up to and including 2 February 2022. Although the April/May correspondence may provide further illustrations of his concerns, they postdate his complaints, and the Tribunal is satisfied that they should not be considered when assessing whether there was a breach of the Code or a failure to carry out duties in the period prior to submission of the application.
31. **Complaint 1 and 2.** Although listed as two separate complaints in the email of 27 January 2022, the Tribunal considered these complaints together as it appears that the Homeowner is relying on Section 1.1 of the Code when he states that the Property Factor has not complied with sections 2.1 and 2.2 of the WSS. Section 2.2 states that there will be an assigned "dedicated, trained and experienced" CRM. It is the appointment of Ms Borthwick and training provided to her which is being challenged. From the information provided at the CMD, the Tribunal is satisfied that Ms Borthwick was given relevant training following her appointment. The Tribunal is also of the view that the word "experienced" is open to interpretation. Section 2.2 does not state that the experience will be in the factoring industry. As Mr Hutton pointed out, Ms Borthwick was appointed because of her experience in managing a large, diverse team and of dealing with clients and contractors. She had transferable skills. It is difficult for the Tribunal to take issue with the appointment. If the

appointee had been manifestly unsuitable for the post, such as a 16-year-old school leaver with no work experience, then Mr Millen may have had grounds for complaint. But recruitment of staff is a complicated matter, and it is for the Property Factor to decide on the suitability or otherwise of a candidate. There is no guarantee in their WSS that the CRM will have a background in factoring and any issues or errors which may have occurred during her first few months in post could not necessarily have been predicted at the time of her appointment. As was pointed out, Ms Borthwick does not work in isolation, but is supported by an experienced team. Section 2.1 requires that "services" and "duties" will be carried out with "reasonable skill and diligence". As staff recruitment is neither a property factor service nor a "duty", the appointment and training of the CRM do not appear to be covered by this provision. However, if it does apply, the Tribunal is not persuaded that the Homeowner has established a lack of reasonable care or diligence by the Property Factor. The Tribunal determines that there is no conflict between the provisions of the WSS and Ms Borthwick's appointment and no breach of section 1.1 of the Code.

32. Complaint 3. OSP 2, 4, 6 and 8. The Tribunal considered each of the examples/illustrations provided by the Homeowner.

(a) **Declaring work to be complete when the evidence showed otherwise and invoicing work before completion.** The Property Factor conceded that the tree pruning work had been invoiced before it was completed. This was because the contractor said the work was finished, the invoice was issued and then Mr Millen notified them that the tree at his property had been missed. Mr Millen did not dispute this at the hearing. The Tribunal considered the documents lodged and notes that the tree pruning was challenged in a letter from Mr Millen dated 12 January 2022, which followed an invoice being issued on 30 December 2021. It is not clear from the letter whether the invoice included the charge for tree pruning (the invoice was not lodged) or whether this was an outstanding charge carried forward from an earlier invoice. There is reference to an email of 2 October 2021 (also not lodged) and a discussion with Marianne Griffiths. However, no evidence was led about either of these. Following the letter of 12 January, Mr Millen sent a further email on 31 January which refers to the tree at number 5 having "escaped, presumably because it was overlooked, despite assurances from Mrs Griffiths it was included". This suggests the discussion and email of 2 October may have predated the work and that the letter and email of 12 and 31 January (following the invoice) were what Mr Hutton was referring to when he said that they were only made aware of the incomplete work after the invoice was issued. On the basis on the available evidence, the Tribunal is not satisfied that Ms Borthwick was aware that the work was not complete when the invoice was issued.

33. **Instigation of majority and proxy voting.** From the correspondence lodged, and the evidence given at the CMD, the Tribunal notes that Mr Millen is not complaining about "majority voting" which is permitted by the title deeds. His complaint is about voting slips being sent to the Homeowners rather than a vote being taken at a meeting. The Property Factor conceded that this was an

error. Mr Millen lodged the relevant correspondence. On 1 November 2021, a letter was issued to the homeowners with a voting slip. The letter says that the slips were being issued to “gauge interest” but goes on to say that if “majority agreement is obtained”, an advance invoice would be issued, and the work instructed when 75% of the funds were obtained. There is no reference to a meeting being convened. On 2 November 2021, Mr Millen sent an email to Ms Borthwick pointing out the error. On the same day a reply was sent confirming that the error would be rectified. The Tribunal is persuaded that this was a simple error and not an attempt to “instigate” a new process which did not comply with the title deeds. The Tribunal is also satisfied that it had no adverse impact as Ms Borthwick agreed to rectify the error immediately.

34. The Tribunal is also persuaded by the explanation offered for the use of the word “proxy”. Mr Millen states in his correspondence that mandatory and proxy are quite different things. The Tribunal is of the view that the difference is a marginal one and that the use of the word “proxy”, a concept which is more widely used and generally known, was understandable. Again, when the matter was brought to her attention Ms Borthwick confirmed that she would address the issue and there was no evidence of any adverse impact arising from the minor error.
35. **Failure to consult with the steering group.** The Tribunal notes that although there is no provision in the title deeds for a steering group, the Homeowners in the development were in favour of it and the Property Factor agreed to accommodate the arrangement. Mr Millen was unable to challenge the Property Factor’s explanation for the failure, as he was unaware of any discussions between Property Factor staff and one of the former members of the group. Although he denied that the group had been disbanded, he confirmed that two of the four members had left. The Tribunal is satisfied that Ms Borthwick’s failure to liaise with the steering group was due to the information provided by the former member of the group. Mr Millen confirmed that a meeting recently took place between the Property Factor and the remaining members of the group, so the issue has now been resolved.
36. **Last minute cancellation of residents meeting without reasonable explanation.** The Tribunal is satisfied that a reasonable explanation was provided for the cancellation, although it is unfortunate that the Homeowners were notified only hours before it was scheduled to begin. The fact that the meeting has still not been re-arranged is perhaps less satisfactory. The Tribunal is not persuaded that the late cancellation can be attributed to the appointment of Ms Borthwick to the post of CRM, or the training provided to her. It is evident that the storm drain maintenance is a complicated issue. Mr Millen indicated in his application that there has been minimal progress in relation to this over the last few months. However, it was not established that this is due to Ms Borthwick, or her alleged lack of experience and Mr Millen did not provide any details or explain what progress he would have expected during this period.

37. **Errors in the account.** Although described as the January 2022 account, Mr Millen's complaint appears to relate to the invoice issued on 30 December 2021. The Property Factor concedes that there were errors in the account, namely a communal electricity charge and a management fee increase. However, Mr Hutton explained that these were system errors and unrelated to Ms Borthwick or her appointment, as she was not involved in the issuing of the account. He also advised the Tribunal that following receipt of Mr Millen's complaints about these items Ms Borthwick took the required steps to have the errors rectified. The Tribunal is satisfied that errors in invoices occur from time to time, sometimes because of human error or (as in this case) a system malfunction. The Homeowner has not established any connection with Ms Borthwick's appointment, and the errors have now been resolved.
38. **Failure to address the disputed items in the account.** Mr Millen confirmed that a credit note has been issued for the communal electricity charge and the Tribunal notes that the premature increase in the management fee has also been addressed. The only other aspect of the account which was raised by Mr Millen was the TGI Services Invoice. In his email of 3 January 2022, he sought clarification of the work carried out and indicated that part of the sum claimed may not be due. The Property Factor did not fully address this issue in their evidence, although it was stated that the drainage works are an ongoing issue and that a problem with drawings was a factor. The Tribunal notes that Mr Millen sent a further email on 31 January 2022. He commented that he had not received a substantive response to the previous enquiry in relation to the drainage. He received a response on 2 February 2022, which only stated that Ms Borthwick was still investigating. The application to the Tribunal was submitted on 9 February 2022, a week after this holding response was received. Although it is evident that the drainage works are a complicated issue, the Tribunal is of the view that Mr Millen ought to have received a fuller response to his enquiry by that date. If Ms Borthwick was unable to provide a full response, she ought to have explained why this was the case and given him a timescale for addressing his enquiry.
39. OSP 2 - There is no evidence that the Property Factor has failed to comply with the requirement to be honest, open, transparent, and fair in their dealings with homeowners. No breach of this section has been established.
40. OSP 4 – The Tribunal is not satisfied that the Property Factor's claim about the new CRM's experience or training was misleading or false. They did not claim that she had a background in factoring. Their information was factually accurate. The Tribunal is also satisfied that the Homeowner's examples of Ms Borthwick's alleged inexperience or incompetence do not support a finding that this section of the Code has been breached. There were errors in procedure and terminology, but these did not amount to the negligent or deliberate provision of misleading information. The errors in the December 2021 account were not attributable to Ms Borthwick or her appointment and have been rectified.
41. OSP 6 – The Tribunal is not satisfied that the staff appointments are a "service" which must be carried out "using reasonable care and skill and in a

timely way". In any event, the errors which have been conceded or established were relatively minor. The Code does not expect perfection. The use of the word "reasonable" indicates that some allowance for minor errors should be made. The Tribunal is also satisfied that the Homeowner has not established that Ms Borthwick did not have the "training and information required to be effective". Ms Borthwick had relevant training when she joined the Property Factor continues to receive training and mentoring. She is aware of the legislation, the Code, the WSS and the DOC. No breach of this section has been established.

42. OSP 8 – As previously stated, the Tribunal is satisfied that Ms Borthwick is aware of the Code and the Property Factor's legal obligations. The minor errors which occurred during her first few months in post do not establish otherwise.
43. Complaint 4 - Property Factor Duties and OSP 6. The Homeowner states that the appointment of Ms Borthwick was "not just unreasonable but reckless" and that this amounts to a failure to carry out property factor duties "to a reasonable standard". The Tribunal is not persuaded that the appointment of staff is a property factor duty. These generally derive from the WSS and DOC. To fulfil their obligations to homeowners, a property factor will require staff, but the Tribunal is not persuaded that recruitment is a "duty" governed by the legislation. The Tribunal's conclusions regarding OSP 6 can be found in paragraph 41.
44. Complaint 5 – OSP 11. Unlike the other complaints, this part of the application does not appear to be based on Ms Borthwick's appointment or training, but a failure by the Property Factor to respond to complaints and enquiries in a timely manner. The Tribunal is satisfied that the Property Factor failed to provide a timely response to the enquiry about the drainage work in the email of 3 January 2022. A breach of OSP 11 is therefore established in relation to this enquiry.
45. Mr Millen's principal complaint under OSP 11 relates to his email of 14 January 2022. This states "Thank you for your email of 5 January 2022, and it would be helpful if you explained acronyms where used – what does XFTs mean? As usual you seek to deflect the issue which is not about diversity of expertise, although the term "expertise" is stretching it, but about the express undertakings in your written statement of services to assign a dedicated, trained and experienced client relations manager; this is glaringly not the case as the current proliferating mistakes and incompetencies illustrate, not to mention the lack of embedded memory and continuity, and as underlined by the start distinctions to be drawn with the 10 year competence of the veteran predecessor. And as for your further appeal to service determination it is not my business to tell you how to run your business or how to recruit. It is my business to hold you to account for the competence of the services you provide, for which I pay. You are hereby on notice that unless you reasonably acknowledge there is a problem with the training, experience and back up of your newly appointed Client relations Manager and describe what you are doing to remedy it I will have little alternative but to pursue a formal

complaint."

46. The words used at the end of this email demonstrate that it is not a complaint but an enquiry which may lead to a complaint. The Tribunal notes that there appear to be two specific "enquires" in the email. The first relates to the meaning of XFTs. The second asks the Property Factor to "acknowledge" the problem and explain what action will be taken to address it. Mr Hutton told the Tribunal that he had not answered the email as the Homeowner was only reiterating the same enquiry, to which a response had already been sent.
47. The Tribunal notes that the email of 14 January 2022 is part of a chain. In his email of 16 December 2021, Mr Hutton referred to XFTs and explained that this means "cross functional teams". This explanation is also provided in his email of 28 January 2022. The Tribunal is therefore satisfied that a response to this enquiry was provided. In the same email of 16 December 2021 Mr Hutton states "I can confirm that my colleague Carrie Borthwick has had many years as a client relations manager including in such a role in a large corporate. Our statement goes on to confirm the CRM will be supported by other members of the team....we are referring to team members with experience and expertise such as detailed above". Mr Hutton then states that a range of experience and expertise is required, and some tasks have to be outsourced when this is recommended by the property inspectors. The CRM passes those recommendations on to the homeowners who then decide. This email was sent in response to an email from Mr Millen, also on 16 December. In this email he asked Mr Hutton to "explain and justify" the appointment given Ms Borthwick's alleged lack of "development knowledge and training and bereft of any experience in the factoring profession". He added that this was not "a reflection on the individual concerned but must reflect on your judgement and responsibility to the Homeowners in the development." Mr Hutton told the Tribunal that he did not respond because the email was simply a repetition of the previous enquiry to which a response had been provided. The Tribunal is of the view that this explanation is a valid one. Mr Hutton had already explained his position. It might have been appropriate to reply, even if only to confirm that he had nothing further to add to his previous response. However, a substantive response was not required. In any event, Mr Millen only waited for 13 days before sending his formal complaint. The Tribunal is not persuaded that Mr Hutton's failure to provide a substantive response to the email of 14 January 2022 was a breach of OSP 11.

## **Decision**

48. The Tribunal determines that the Property Factor has failed to comply with OSP 11. The Property Factor has not failed to comply with OSP 2, 4, 6 or 8 or Section 1.1 of the Code and has not failed to carry out its property factor duties.

## **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) 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.**

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Josephine Bonnar, Legal Member and Chair  
20 June 2022