

# Housing and Property Chamber

## First-tier Tribunal for Scotland



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

**Chamber Ref: FTS/HPC/PF/20/1855**

**Property address: 2F1 Chilton, Gracefield Court, Musselburgh, EH11 6LL ("the Property")**

### **The Parties**

**Ms Jane Calder, 2F1 Chilton, Gracefield Court, Musselburgh, EH22 6LL ("the Homeowner")**

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

### **Tribunal Members**

**Ms Helen Forbes (Legal Member)**

**Mr John Blackwood (Ordinary Member)**

### **Decision**

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") determined that the Factor has failed to comply with the duty in Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in respect of compliance with section 6.9 of the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act. The Factor has also failed in carrying out its property factor duties in terms of Section 17 of the Act.

The decision is unanimous.

### **Background**

1. By application received in the period between 2<sup>nd</sup> September and 11<sup>th</sup> November 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed in respect of compliance with paragraphs 2.1, 2.2, 2.4, 2.5, 6.1, 6.3, 6.4 and 6.9 of the Code, and in carrying out its property

factor duties. The Homeowner submitted copy correspondence between the parties, photographs and the Factor's Written Statement of Services ("WS").

2. The Homeowner notified the Factor of the alleged breaches on 8<sup>th</sup> November 2020.
3. By decision dated 24<sup>th</sup> November 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
4. By emails dated 15<sup>th</sup> and 18<sup>th</sup> December 2020, the Homeowner lodged further representations and productions.
5. By emails dated 18<sup>th</sup> December 2020 and 7<sup>th</sup> January 2021, the Factor lodged written representations and productions.
6. On 18<sup>th</sup> January 2021, the Tribunal issued a Direction to the Homeowner asking for clarification of the allegation of a failure to carry out property factor duties.
7. By email dated 19<sup>th</sup> January, 2021 the Homeowner lodged clarification of the allegation of a failure to carry out property factor duties.

### **The Hearing**

8. The hearing was held on 1<sup>st</sup> February 2021 by telephone conference. The Homeowner was in attendance and represented by Mr Garry Calder. The Factor was represented by Mrs Marianne Griffiths and Mr David Hutton.

### **Findings in Fact**

9. The Tribunal made the following findings in fact.
  - i. The Homeowner is the owner and landlord of the Property, which is a top-floor flat dwelling-house within a block of six flat dwelling-houses. The Homeowner purchased the Property on 8<sup>th</sup> March 2019.
  - ii. The Factor registered as a Property Factor on 7<sup>th</sup> December 2012 under registration number PF000153.
  - iii. The Factor provides factoring services to the block of flat dwelling-houses known as Chilton, which forms part of a larger development at Gracefield Court.
  - iv. The previous owner of the Property was in a care home for approximately two years before the Homeowner purchased the Property.

- v. In or around September 2018, the Factor instructed roof repairs to the roof of the block of flats, following notification by a neighbour of damage to the roof above the Property.
- vi. Insurers were informed by the Factor that the repairs had been carried out, and internal decoration was carried out to the Property to repair the damage from water ingress. The work was covered by insurance.
- vii. During the conveyancing transaction whereby the Homeowner purchased the Property, the Factor provided information to the Seller's solicitor to the effect that repairs had been carried out to the roof above the Property and all works were complete.
- viii. It transpired that the repairs had not been carried out to the area of roof above the Property, and the water ingress continued until it was discovered by the Homeowner in March 2019.
- ix. There were signs of damp on the gable end wall of Chilton, with significant algae staining.
- x. There was a three inch hole in the roof above the Property.
- xi. In or around March 2019, the Homeowner consulted six roofing contractors for advice and a scope of works required to the roof at Chilton.
- xii. On 21<sup>st</sup> March 2019, the Factor wrote to homeowners informing them of water ingress and giving two quotations for work to be carried out.
- xiii. On 27<sup>th</sup> March 2019, the Homeowner and her representative met the Factor's Mrs Griffiths, Mr Nigel Fyffe and another employee of the Factor at the Property. There was discussion between the Homeowner's representative and Mr Fyffe about expanding the existing scope of works, in line with the information received by the Homeowner from six roofing contractors. It was agreed that the scope of works would be changed.
- xiv. The existing scope of works was not expanded and the works were carried out by the Factor's roofer ("T").
- xv. In or around early April 2019, the Factor informed homeowners at Chilton that all works had been carried out and homeowners were invoiced at a cost of £164 each.
- xvi. There were signs of staining and damage in the common stair. The Factor attributed this to a historic leak from 2016. There was a delay by the Factor in arranging remedial works to the common stair.
- xvii. Contractors attended to examine the area for remedial works to the common stair on or around 5<sup>th</sup> April 2019.

- xviii. T was required thereafter to attend Chilton on two occasions to carry out further works.
- xix. A downpipe at the Property was found to be blocked. It had to be broken to clear the blockage.
- xx. Damaged downpipes could not discharge rainwater, resulting in water ingress at Chilton.
- xi. A downpipe with a bung attached caused a large external puddle in the garden ground at Chilton.
- xxii. On 7<sup>th</sup> April 2019, the Homeowner's representative wrote to the Factor's Mr Fyffe requesting sight of the full scope of works, informing the Factor that a downpipe had been damaged, raising concerns about roof maintenance and ingress at the common stair. Mr Fyffe responded by email on 12<sup>th</sup> April 2019.
- xxiii. Throughout April 2019, there was email correspondence between the parties concerning the roof and poor drainage around Chilton. The Factor paid the contractor's invoice, despite the concerns of the homeowners that the full works agreed had not been carried out.
- xxiv. On 5<sup>th</sup> May 2019, the Homeowner's representative wrote a letter of complaint to the Factor. In addition, the Homeowner's representative informed the Factor that works by T were outstanding.
- xxv. On 16<sup>th</sup> May 2019, following several communications from the Homeowner and her representative alleging inadequate works to the roof and continued water ingress, the Factor responded that T would attend at the next rainfall to assess whether or not the roof was leaking.
- xxvi. On 17<sup>th</sup> May 2019, T attended and found the roof at the common stair to be watertight.
- xxvii. On 24<sup>th</sup> May 2019, the Factor responded to the Homeowner's complaint of 5<sup>th</sup> May 2019.
- xxviii. Between 23<sup>rd</sup> and 28<sup>th</sup> June 2019, there was an exchange of emails between the parties, discussing the continued water ingress, the prospect of a re-visit by T and a proposed meeting of homeowners. The Homeowner provided photographic evidence that water ingress continued through the roof.
- xxix. By letter dated 27<sup>th</sup> June 2019, the Factor informed homeowners that reinstatement work would be carried out to the common stair on 15<sup>th</sup> July 2019.

- xxx. By email dated 28<sup>th</sup> June 2019, the Homeowner's representative informed the Factor that the Chilton homeowners did not wish T to attend the Property without formal approval of the homeowners.
- xxxi. On 21<sup>st</sup> July 2020, the Factor confirmed that the Homeowner's complaint had exhausted the Factor's internal complaints procedure.
- xxxii. By letter dated 30<sup>th</sup> July 2019, homeowners were informed by the Factor that further reinstatement works were required to the common stair and would be carried out on 31<sup>st</sup> July 2019,
- xxxiii. By letter dated 21<sup>st</sup> August 2019, the Factor wrote to homeowners stating that further water ingress had been discovered on the common stair, and this would delay works to the interior. The Factor offered two options to progress matters, namely the reattendance of T to undertake warranty repairs on the roof or a new scope of works to be carried out by Mr Fyffe. The Factor recommended option 1 as less costly.
- xxxiv. By letter dated 29<sup>th</sup> August 2019, the Chilton homeowners wrote to the Factor confirming their instruction that the Factor was not to arrange a contractor to attend to the roof issues. The Factor acknowledged receipt of the letter by letter dated 2<sup>nd</sup> September 2020.
- xxxv. In September 2019, works were carried out to the roof as arranged by the homeowners at Chilton at a cost of between £5000 and 6000. There was no further water ingress.
- xxxvi. The insurance excess for homeowners at Gracefield Court has increased over time from approximately £100 to £200.

## **SUBMISSIONS, EVIDENCE AND REASONS FOR DECISION**

### **Representations on behalf of the Homeowner**

10. Mr Calder set out the Homeowner's case. The building has been factored by the Factor for more than ten years. A homeowner reported a hole in the Chilton roof in September 2018. The Factor instructed repairs and it was believed the roof had been repaired. There had been water ingress to the Property and this was repaired through insurers when the Factor reported that the roof had been repaired. The Property was empty from October 2018 to March 2019, when the Homeowner purchased it. There was water ingress and further damage, due to the roof not having been repaired. The seller's solicitor had been informed by the Factor that all work had been carried out and the Property was watertight.
11. On the second day after purchasing the Property, the Homeowner reported water ingress to the Factor and sent photographs of the damage. There were several phone calls and the Factor refused to accept there was water ingress. It transpired that the wrong roof had been repaired in September 2018. There were a number of leaks. There was water running down the gable end of the building, a three inch hole in the roof, and daylight could be seen through

sections of the attic ceiling. It took two to two and a half weeks to get the Factor on site. The Homeowner and her representative consulted six other roofing contractors, who all confirmed the work that required to be done.

12. On 27<sup>th</sup> March 2019, there was a site meeting with the Factor's representatives, including Nigel Fyffe. Mr Fyffe entered the attic at the Property and saw the puddles. He agreed the roof was leaking. There was discussion about the adequacy of the scope of works and it was agreed that the scope of works required to be amended to include further works. The Factor obtained quotes to have the work done. The Factor continued with the inadequate scope of works. When works were carried out to the roof by T, at least three homeowners timed their work and said they only carried out one hour's work on the roof.
13. Mr Calder said that the work carried out by T was inadequate and shoddy. A downpipe was left broken. T returned at the request of the Factor and said the downpipe was so badly blocked, they didn't believe it had been maintained for years. This probably explains the damp on the gable end wall. A large tuffet of grass was pulled out about the Property living room window. Water ingress continued to the attic of the Property.
14. Staining on the common stair appeared to indicate water ingress. The Factor said it was historic and, when challenged, stated that they had not got around to reinstatement works to the common stair. When works were eventually about to commence, contractors said they could not carry out the works because the roof required repair. There were a number of bizarre conversations with the Factor's representatives, who stated that there was no leak to the Property, but the common stair works could not commence due to a leaking roof.
15. In August 2019, the homeowners arranged their own roofing contractor, due to a lack of confidence in the Factor. The work cost between £5000 and £6000. It was completed within a week. There was no further water ingress. Photographs taken by the contractor showed shoddy work on the roof. The wrong type of mastic had been used in one area. There was debris in the watergate. Broken tiles had been siliconed. Debris on the roof was affecting drainage. Gaps that should have been filled had not been filled. Works included in the scope of works had not been carried out. A downpipe had a bung on the end that meant it could not drain. The water was going back up the pipe and overspilling from the gutter, resulting in a large puddle at the rear of Chilton. There had been a general lack of maintenance. Mr Calder said that homeowners had paid out large sums for maintenance over the years.
16. Mr Calder said he carried out the internal work at the Property at a cost of £600 or £700 as the insurers would not pay out a second time.
17. Mr Calder said there are roofing issues throughout Gracefield Court. The block insurance cost has risen significantly and the excess has gone up from £100 to between £2500 and £3000.

## **Representations on behalf of the Factor**

18. Mr Hutton said that the work carried out by T was to stop water ingress. It could be distinguished from the work eventually carried out on behalf of the homeowners, which was fundamentally different and constitutes an overhaul of the roof. The demographic within Chilton is elderly residents who could not afford the cost of a roof overhaul. The work cost significantly more than that carried out by T. This kind of work would only be instructed after full consultation with all owners.
19. T is a member of the Roofing Guild of Master Craftsmen and the Federation of Master Builders. Mr Fyffe was an experienced surveyor with over 20 years' experience. He was on site and saw the work that was required. Two options were given to the homeowners and those were both reasonable. Both options were rejected, and the works carried out were more extensive. The Factor was not provided with the documentation to show what work was carried out, so they did not know if the works carried out were just to stop water ingress or whether it was more extensive than that.
20. Mr Fyffe accepted that there were more works to be done to the roof, but there were concerns about the demographic of the homeowners. That kind of work would normally only be carried out after an annual general meeting. The position taken by the Factor was a reasonable position, as contained in the letter of 21<sup>st</sup> May 2019. The Factor then received the letter of 28<sup>th</sup> August 2019 telling them not to access the roof.
21. In September 2018, the owner of the property was not there at the time at which the roof damage was noted. A neighbour notified the Factor, and the Factor sent a contractor. The contractor must have identified another bit of the roof that required repair. Responding to questions from the Tribunal, Mr Hutton said that it was difficult to see from the ground what was required on the roof and there was the potential of finding more issues after going up on the roof. The contractor identified what they thought was the issue. There was no scope of works as it was a fairly minor repair.
22. Responding to questions from the Tribunal, Mr Hutton said that the Factor is undertaking a review of all the roofs excluding Chilton. Mr Hutton said no survey of the roof had been carried out at any time, but this was offered in the letter of 21<sup>st</sup> August 2019.
23. When the email was received from the Homeowner's representative on 28th June 2019, that was the first notification from the clients that there was an issue. The Factor said they required a signed letter with the signature of all homeowners, and this was provided in August.
24. Responding to questions from the Tribunal as to why the Factor contacted the homeowners in August with the two options, Mr Hutton said they could not leave the matter hanging. When asked why the letter had not been provided earlier, Mr Hutton said that was a fair comment and that the Factor was in a

state of flux. The letter was sent in order to get ratification of the homeowners' instruction.

### **Response from the homeowner**

25. Mr Calder said there was no point in throwing pennies at the problem. The work eventually carried out was not a major overhaul. It was very specific work that was required to the roof and all homeowners were keen to pay. It had been accepted that the scope of works was inadequate. The scope of works was provided to the Factor when the homeowners requested a refund of the money previously spent on the roof. Mr Calder said that he and multiple owners were constantly asking, by email, telephone call and letter, for the contractor to come back between April and August. The Factor's failure to get the contractor to return resulted in the homeowners arranging their own contractor. Mr Calder accepted that £6000 was a lot of money, but it was better than wasting £1000. T spent very little time on site and this was relayed to the Factor by many homeowners. It could not have been made any clearer.
26. Mr Calder said the homeowners did not refuse to allow the roofer to return. From March, they were looking for him to come back. The Chilton homeowners saw the Factor's letter of 21<sup>st</sup> August as tactical. It was only when the Factor discovered that the homeowners had decided to undertake organisation of the work themselves that they did an about turn. The Factor had already had four months to resolve the issue. The email sent on 28<sup>th</sup> June 2019 stated that the roofer could not attend without formal approval of the homeowners. This was not requested.

### **Paragraph 2.1 of the Code**

27. *You must not provide information which is misleading or false.*

### **Representations by the Homeowner**

28. The Homeowner alleged that the Factor provided false and misleading information by informing solicitors during the purchase of the Property that works had been carried out and completed. Further misleading information was provided as to whether or not the roof at Chilton was attended to in September 2018 or whether a different roof was repaired. The Factor had been misleading by saying they did not receive correspondence sent to Mr Fyffe, when it was clear that they did.

### **Representations on behalf of the Factor**

29. Mr Hutton said that the Factor instructed the contractor through a job order to repair the roof at Chilton. The contractor confirmed that the work had been done. the factor had no knowledge that the wrong area had been repaired until March 2019. There was no intention to mislead. The factor did not deny they had received a letter, but said that they hadn't had sight of it.

## **Decision of the Tribunal**

30. The Tribunal did not find that the Factor had failed to comply with this paragraph of the Code. Although misleading information was clearly disseminated to the solicitor, there was no intention to mislead. As far as the Factor was aware, the works had been carried out to the roof, and it is difficult to see how the Factor could have been aware of the mistake, given that there was no occupier in the Property and no report of water ingress until March 2019. There was insufficient evidence before the Tribunal to find that false or misleading information had been given out in relation to the matter of which part of which roof was attended to in September 2018. The Tribunal did not find that there was there any intention to mislead in relation to the correspondence from Mr Fyffe.

## **Paragraph 2.2 of the Code**

31. *You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).*

## **Representations on behalf of the Homeowner**

32. Mr Calder said that the homeowners felt scared after reading the letter of 21<sup>st</sup> August 2019. They felt that option 2 would cost them a lot of money and they couldn't afford to pay for that kind of work. They felt that they were being intimidated and had to choose option 1. That was how they read the letter.

## **Representations on behalf of the Factor**

33. Mr Hutton said there was no intention to intimidate or threaten the homeowners. Homeowners expect this kind of communication.

## **Decision of the tribunal**

34. The Tribunal did not find that there had been a failure to comply with this section of the code. The Tribunal did not find anything intimidating or threatening within the letter.

## **Paragraph 2.4 of the Code**

35. *You must have a procedure to consult with the group of 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. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).*

## **Representations on behalf of the Homeowner**

36. Mr Calder said that the homeowners expected the factor to engage with them. The Factor should have engaged at an earlier stage. The Factor has a high level of authority and they have told homeowners that they must use the Factor.

## **Representations on behalf of the Factor**

37. Mr Hutton said the Factor has the required procedure in place. They have annual meetings and send correspondence. He referred to the Factor's production document 1, a letter to the Homeowner dated 21<sup>st</sup> March 2019, that sets out the proposal and asks for consent. That is the procedure used. Clients are made aware of the issues and instructions are sought. The Factor acts as agent, not principal.

## **Decision of the Tribunal**

38. The Tribunal did not find that the Factor had failed to comply with this paragraph of the Code. The Factor clearly has the required procedure in place.

## **Paragraph 2.5 of the Code**

39. *You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.*

## **Representations on behalf of the Homeowner**

40. Mr Calder said that although the Factor acknowledged his letter of 7<sup>th</sup> April 2019, there was no substantive response. Mr Fyffe's letter of 12<sup>th</sup> April 2019 did not cover all the points that it should have. It was not just a case of missing one letter or email. This happened often. Whenever the Homeowner would write to Mrs Griffiths asking for a response to the letter of 7<sup>th</sup> April 2019, there was no meaningful response. Mrs Griffiths would say that she had already responded. The Homeowner or her representative would ask for a date for a response and the Factor would say that they had already responded. It was difficult to know who to correspond with. Personnel were often changing. The management was atrocious, and the enquiries/complaints procedure was complicated.

## **Representations on behalf of the Factor**

41. Mrs Griffiths said that without dates of the correspondence referred to, it was impossible to respond. She said that after the complaint of 5<sup>th</sup> May 2019, the

representative of the homeowner raised other points and she said she would respond in May. She responded by letter dated 24<sup>th</sup> May 2019.

42. Mr Hutton said a comprehensive response of four or five pages had been provided to the Homeowner in May 2019. Correspondence was routine and regular. Matters had to proceed through their complaints procedure and letters were answered by the appropriate person.

### **Decision of the Tribunal**

43. The Tribunal did not find a failure to comply with this paragraph of the Code. There was insufficient evidence before the Tribunal to show that correspondence had not been responded to within prompt timescales or that response times had not been met in accordance with the written statement. The Tribunal observed that the Homeowner had stated in their application that a random selection of emails had been provided. In order to make a finding under this paragraph, the Tribunal would expect to see copies of the emails and letters that had not been responded to, and, preferably, a timeline or spreadsheet, showing the date of correspondence and the date of response, if any. The Tribunal found that the Factor had responded to the letters cited by Mr Calder, albeit he was not satisfied with the response.

### **Paragraph 6.1 of the Code**

44. *You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*

### **Representations on behalf of the Homeowner**

45. Mr Calder said there was a lack of engagement following the meeting in March 2019. Issues were ongoing. The Factor had told Mr Calder that they had not got around to reinstatement works in the common stair after the water ingress in 2016. The Factor had failed to engage with the homeowners in 2019.

### **Representations on behalf of the Factor**

46. Mr Hutton referred the Tribunal to the Factor's written representations on this point, which stated that the Factor had informed all owners of the works required, the costs involved and had kept them up to date throughout the process, as could be seen from the letters lodged on behalf of the Factor.

### **Decision of the Tribunal**

47. The Tribunal did not find a failure to comply with this section of the Code. While it was clear that there were issues in relation to engagement, there was

insufficient information before the Tribunal to indicate that the Factor had failed to keep homeowners informed of progress of work.

### **Paragraph 6.3 of the Code**

48. *On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.*

### **Representations on behalf of the Homeowner**

49. Mr Calder questioned why the Factor continued to ask a roofing firm ("RR") to quote for work, given past issues with the firm. Responding to questions from the Tribunal as to whether the Homeowner had requested the information required by this paragraph, Mr Calder said information regarding the scope of works had been requested and challenged, with no response.

### **Representations on behalf of the Factor**

50. Mr Hutton said all the required information was in the Factor's letter of 21<sup>st</sup> March 2019.

### **Decision of the Tribunal**

51. The Tribunal did not find a failure to comply with this paragraph of the Code, which requires a specific request to have been made as to how and why contractors were appointed. This does not appear to be the case here.

### **Paragraph 6.4 of the Code**

52. *If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.*

### **Representations on behalf of the Homeowner**

53. Mr Calder said that the factor had been taking money and not doing the work. There were concerns about the broken downpipe, a hole in the roof, and a failure of maintenance. The Factor was undertaking six-weekly inspections and missed the puddle that indicated issues with drainage. Mr Calder said he was not aware if there was a programme of works in place. Regular invoices were issued, but he did not know if the Factor was following a programme.

### **Representations on behalf of the Factor**

54. Mr Hutton said the Factor presents a programme of works at the AGM for the year ahead. There was a distinction to be made between project works and routine works. A document had been issued on 11<sup>th</sup> April 2019 where the Factor set out the programme for project works.

## **Decision of the Tribunal**

55. The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. There appears to be a programme of works in place.

## **Paragraph 6.9 of the Code**

56. *You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.*

## **Representations on behalf of the Homeowner**

57. Mr Calder said the Factor had failed to deal with issues raised by homeowners regarding inadequate work and service provided, in relation to the roof, drainage and the common stairway. Additional expense was incurred in installing scaffolding. Defects with T's work were reported consistently. Timber that was to be fitted to the roof has not been fitted and the downpipe has not been repaired.

## **Representations on behalf of the Factor**

58. Mr Hutton said that the Factor tried to pursue the contractor but was told by the homeowners not to do so. The Factor was unable to have the contractor go back and make good any inadequate work. Responding to questions from the Tribunal regarding the wording of the email of 28<sup>th</sup> June 2019, and whether it prohibited the Factor from carrying out their duties, Mr Hutton referred to the words 'without further notice' as support for the Factor's position. The Factor wrote to all homeowners to ascertain their position and they came back in no uncertain terms, stating that T was not to be engaged. Water ingress is not always straightforward, and contractors are always asked to return and make good as required. The Factor would not carry out works without the permission of the homeowners.

59. Responding to questions from the Tribunal regarding the delay in having T return to check the roof, Mrs Griffiths said they were waiting for rainfall to check if there was water ingress.

60. Mr Hutton said that he was unaware that the downpipe required work. There was no record of the downpipe being damaged by the contractor. He accepted that there may be an issue with timber to be applied, but as T was not allowed to attend, this could not be checked.

## **Response on behalf of Homeowner**

61. Mr Calder said the Factor's response did not explain the position between April and June, and why the contractor was not pursued during that time. He pointed out that the Factor chose to ignore the terms of his email of 28<sup>th</sup> June when it suited them, but relied on its terms to excuse their failure. This is what the Factor does – they spin things constantly. The reason they did not pursue

the contractor is that T reported the work had been done, and the Factor accepted that. The Factor could have tried to arrange a meeting following the email of 28<sup>th</sup> June, but they did not send a letter until August.

62. Mr Calder said there was a visible hole in the roof. It could be seen without accessing the roof, as could the general state of the roof. Water ingress had been reported in April. There was no need to wait for rainfall. The downpipe had been mentioned on several occasions.

### **Decision of the Tribunal**

63. The Tribunal found that there was a failure to comply with this paragraph of the Code. The issues regarding the downpipe and timber appear to have been within the knowledge of the Factor. Notwithstanding those matters, the Factor was aware from April 2019 that homeowners were dissatisfied with the work carried out to the roof and that issues remained. The Factor ought not to have accepted the contractor's request to wait for rainfall before attending, as it would have been entirely possible to have seen the issues without the need for rainfall. It was incumbent upon the Factor to pursue the contractor to remedy the reported defects. Homeowners had paid for a repair, and issues were continuing.
64. The Tribunal did not accept the Factor's explanation that it could not arrange attendance of the contractor after receiving the email from Mr Calder of 28<sup>th</sup> June 2019. The evidence put forward by the Factor was that they could not accept the email from Mr Calder as being on behalf of all homeowners at that time. It is disingenuous to then use the email as an excuse for doing nothing further. If they genuinely considered at that stage that an email from Mr Calder alone was insufficient, there was nothing to stop them instructing T to attend to remedy any defects, or, indeed, calling a prompt meeting of homeowners to discuss the matter. Furthermore, although there was some ambiguity in the wording of the email, it implied that permission might be given if prior approval was obtained. There was no good reason for the Factor's delay until 21<sup>st</sup> August 2019 before trying to remedy the situation.

### **Failure to carry out property factor duties**

65. The alleged failure to carry out property factor duties related to the Factor's Written Statement of Services ("WS") and paragraphs 1.1, 2.1, 2.2, 2.3, 2.4, 7.1, 18.1, 18.6, 18.7, 18.8 and 19.2.

#### **Paragraph 1.1**

*1.1 Charles White Limited (CWL) are the Managing Agents for your development. As Managing Agents, CWL deal with the upkeep, maintenance and insurance of the common areas which are co-owned by all of the proprietors within your development.*

## **Representations on behalf of the Homeowner**

66. Mr Calder said the Factor was paid to look after the property to a reasonable standard. Works were paid for and not carried out. As a consequence, this affected the insurance for the property. The roof was not maintained to a good standard and the work was charged for. The Factor's omissions led to an increase in insurance excess. Maintenance throughout the development has been just as bad as it has at Chilton, and many homeowners are critical of the Factor. The statement by the Factor that they did not get around to remedial works in the stairway confirms breach of this paragraph.

## **Representations on behalf of the Factor**

67. Mr Hutton said this was a subjective view. The Factor has been in contact with the homeowners over a period of years and has provided a large amount of services. Responding to questions from the Tribunal regarding the matter of stating that they had not got round to the remedial works in the stairway, Mr Hutton said he had not seen this recorded anywhere. When asked for the reason for the delay in the works to the common stairway, Mr Hutton said he did not have any comment to make. Mr Hutton said the Factor has a cordial and professional relationship with many homeowners.

## **Decision of the Tribunal**

68. The Tribunal did not find a breach of this paragraph of the WS. It is simply a statement of fact.

## **Paragraphs 2.1 and 2.2**

*2.1 CWL will carry out the services and perform the duties of the Owners' Association with reasonable skill and diligence in accordance with the principles of good estate management.*

*2.2 The Owners' Association will be assigned a dedicated, trained and experienced client relationship manager who will be assisted by other members of the team and will be responsible for providing an efficient service. This will include prompt and courteous responses to communications, records of queries in relation to repair works and other significant matters. All correspondence will be in plain English and provided in a timely manner. CWL will also ensure that all procedures comply with relevant legislation.*

## **Representations on behalf of the Homeowner**

69. Mr Calder referred to previous submissions in relation to paragraph 2.1, as the matter of 'skill and diligence' had been covered. In relation to paragraph 2.2, Mr Calder submitted that the Factor's staff did not appear to have the requisite experience to appreciate the importance of a hole in the roof and the puddle on the ground. There is legislation covering drainage, of which they should be aware, and it was obvious that there were issues with drainage. The service was not efficient.

## **Representations on behalf of the Factor**

70. The Factor's representatives did not make any further representations on this matter, referring the Tribunal to previous submissions.

## **Decision of the Tribunal**

71. The Tribunal found that paragraph 2.1 of the WS had not been complied with, as the Factor did not appear to have carried out the services in relation to the roof and water ingress and associated items with reasonable skill and diligence and in accordance with the principles of good estate management. This constitutes a failure to carry out the property factor duties.

72. The Tribunal did not find that paragraph 2.2 had been breached. There was insufficient evidence before the Tribunal to find that the client relationship manager was not dedicated, trained and experienced, or that they specifically had been responsible for providing an inefficient service. There was no evidence before the Tribunal that relevant legislation had not been complied with.

## **Paragraph 2.3**

*Emergency repairs will be attended to as and when the need arises. If you become aware of any matter requiring urgent attention please contact your client relationship manager immediately. Should an emergency arise out of normal working hours or on a public holiday (e.g. severe water leak, serious electrical fault, storm damage to roof, etc) please call 0131 447 8191. In the event of a gas leak, or if you can smell gas please call Scottish Gas Networks (SGN) on 0800 111999.*

## **Representations on behalf of the Homeowner**

73. Mr Calder said that the Property was being destroyed by the Factor's failures. The scope of works was inappropriate, and a 'sticking plaster' approach was adopted. He was unable to access insurance for the works to the Property interior as the Factor had misrepresented the position to insurers.

## **Representations on behalf of the Factor**

74. The Factor's representatives did not make any further representations on this matter, referring the Tribunal to previous submissions.

## **Decision of the Tribunal**

75. The Tribunal did not find a failure in respect of this paragraph, as the matter does not appear to have been reported as an emergency requiring urgent attention. It appears to have been a situation that has built up over a period of time.

## **Paragraph 2.4**

*A routine inspection of your development will be carried out by a Charles White Ltd representative quarterly once every six weeks.*

### **Representations on behalf of the Homeowner**

76. Mr Calder said he did not dispute that inspections were carried out. He disputed the purpose of the inspections. The roof defects could be seen from ground level, as could cascading water, green staining, the downpipe and the puddle. The inspections did not meet the objective.

### **Representations on behalf of the Factor**

77. Mr Hutton said that inspections were carried out. Responding to questions from the Tribunal, regarding whether or not matters such as the puddle and staining had been picked up on inspection, Mr Hutton said there had been a recent change in procedure, and inspections are carried out by property inspectors with a trades background. They identify and categorises defects. Mr Hutton was unable to say whether the matters referred to had been picked up by the property managers prior to this change in procedure.

### **Decision of the Tribunal**

78. The Tribunal did not find a failure in respect of this paragraph, as it is a statement of fact, and inspections appear to have been carried out. The Tribunal observed with some surprise the fact that obvious drainage defects were not attended to following inspections, which suggests they were not picked up.

### **Paragraph 7.1**

*CWL will actively work with the Owners' Association to manage and maintain common areas within the scope of the management fee*

### **Representations on behalf of the Homeowner**

79. Mr Calder said there was no active working with the owners' association to manage and maintain common areas. Mr Calder is the chair of an informal homeowners' committee for Chilton, so he would know if this paragraph was being complied with. There is no active work between the Factor and the homeowners.

### **Representations on behalf of the Factor**

80. Mr Hutton said there is no formal homeowners' association for Chilton as the last meeting was not quorate. By default, every homeowner is a member of the association. The Factor deals with homeowners on a one-to-one basis, they correspond with homeowners and arrange AGMs.

## **Decision of the Tribunal**

81. The Tribunal found that this paragraph has not been complied with. The Factor does not appear to have endeavoured to comply with the WS and actively work with homeowners and find a resolution to the problems that have arisen. This constitutes a failure to carry out the property factor duties.

## **Paragraphs 18.1 and 18.6**

*18.1 At all times CWL will endeavour to provide a high quality, smooth management service, the main purpose of which is to allow owners within the development to enjoy their homes. If you have any queries about any communal matters please do not hesitate to contact your client relationship manager.*

*18.6 CWL are determined to create a service that not only meets, but also exceeds customer expectation In order to resolve any anomalies swiftly, CWL have created this customer feedback system. May we invite you to put your concerns in writing to the client relationship manager for the property under management. The client relationship manager will:*

- *acknowledge your correspondence within forty eight hours and*
- *seek to correct any problems to your satisfaction within 28 business days.*

## **Representations on behalf of parties**

82. Neither party added anything to their previous submissions in respect of these paragraphs.

## **Decision of the Tribunal**

83. The Tribunal found that these paragraphs have not been complied with by the Factor in relation to the matter of the roof, common stair and drainage. The Factor did not provide a high-quality service, or one that would exceed customer expectation. Problems were not corrected within 28 business days. Issues were not rectified as quickly as possible. This constitutes a failure to carry out the property factor duties.

## **Paragraphs 18.7 and 18.8**

*18.7 Our team of client relationship managers have been equipped and empowered to deal with every aspect of the management of your property and they are best placed to resolve your concerns. The client relationship manager and where appropriate the assistance of our team of specialists, will seek to rectify these issues as quickly as possible.*

*18.8 If for any reason the first tier of resolution is unsatisfactory or does not meet your requirements, we have in place a second tier of resolution to whom you may appeal. The Line Manager will act as a neutral party and will endeavour to look upon the situation objectively.*

### **Representations on behalf of the Homeowner**

84. Mr Calder said that the line manager, Mrs Griffiths, could not act as a neutral party in relation to claims, as she had been involved in the matters complained of. It was impossible to see how she could be objective in these matters.

### **Representations on behalf of the Factor**

85. Mr Hutton said that the procedure has to be simple. The CRM has to act as a neutral party, then the homeowner has recourse to the Tribunal.

### **Decision of the Tribunal**

86. The Tribunal found that paragraph 18.6 has not been complied with. The Factor did not seek to rectify the issues complained of as quickly as possible. This constitutes a failure to carry out the property factor duties.
87. The Tribunal did not find that paragraph 18.7 had not been complied with. The Tribunal felt that Mrs Griffiths could be expected to act in a neutral and objective role when required to do so.

### **Paragraph 19.2**

#### *Complaint Handling Procedure (CHP)*

*The CHP is intended to provide a quick, simple and streamlined process with a strong focus on early resolution by empowered and well-trained staff. The procedure involves up to two stages:*

*Stage 1 - the complaint should be made in writing to the complainants' Client Relationship Manager (CRM) who will seek to resolve straight forward complaints swiftly and effectively at the point at which the complaint is made or as close to that point as is possible.*

*Stage 2 - where a complainant is dissatisfied with the outcome of stage 1 resolution, or is not possible or appropriate due to the complexity or seriousness of the case the CRM will obtain the assistance of their line manager to seek to resolve the matter.*

## **Representations on behalf of the Homeowner**

88. Mr Calder said that the staff were not well trained and they could not deal with drainage matters. Mr Hutton had been engaged to resolve the issue and he sent the Homeowner's complaint back to stage 2 of the complaints procedure. The Homeowner did not want to have to involve the Tribunal, but was left with no choice.

## **Representations on behalf of the Factor**

89. Mr Hutton said that Client Relations Manager did change due to maternity leave. The procedure is set out clearly and followed.

## **Decision of the Tribunal**

90. The Tribunal found that this paragraph has not been complied with. Although the procedure may have been followed, there appeared to be no proactive work undertaken by the Factor to manage and resolve this matter early. Although the Homeowner attempted to find a solution, the Factor did not engage, and the aim of this paragraph was not met. This constitutes a failure to carry out the property factor duties.

## **Observations**

91. While the Tribunal was concerned at the report that insurance costs have increased, in particular the significant increase in excess, due to lack of roof maintenance throughout the development, it did not make any findings in relation to the reason for this situation, as there was insufficient information before the Tribunal to link this to any failure by the Factor.

92. The Tribunal considered it unfortunate that the Homeowner was required to pay for remedial works to the Property, and that the works were not covered by insurance, however, no finding was made to link that to any failure of the Factor, given that the Tribunal found that the Factor could not have been aware that the wrong area of roof had been repaired.

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

93. Having determined that the Factor has failed to comply with the Code and failed in carrying out its property factor duties, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.

94. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failures. The Tribunal also took into account the fact that the Factor paid the contractor's invoice despite concerns of the homeowners about the fact that the agreed changes to the scope of works had not been carried out.

95. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.

96. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

### **Right of Appeal**

97. In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member and Chairperson

11<sup>th</sup> February 2021