



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/18/1952; FTS/HPC/PF/18/2008; FTS/HPC/PF/18/2009; FTS/HPC/PF/18/2010 and FTS/HPC/PF/18/2011

6 Circus Drive, Glasgow, G31 2JH ('the Property')

The Parties:

David Niven, residing at Flat 2/1, 6 Circus Drive, Glasgow, G31 2JH; Rhona McColm, residing at Flat 1/1, 6 Circus Drive, Glasgow, G31 2JH; Steve Hollingsworth, residing at Flat 1/2, 6 Circus Drive, Glasgow, G31 2JH; Gil Shaw, residing at Flat 0/2, 6 Circus Drive, Glasgow, G31 2JH and Marie Taylor, residing at Flat 2/2, 6 Circus Drive, Glasgow, G31 2JH ('The Homeowners')

Ross and Liddell, 60 St Enoch Square, Glasgow, G1 4AW ('the Factor')

Tribunal members:

Jacqui Taylor (Chairperson) and Andrew Taylor (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has failed to comply with sections 2.1; 2.5 and 6.1 of the Code of Conduct.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 1st November 2012.
2. By applications dated 9th August 2018 the Homeowners applied to the First-tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also failing to carry out the Property Factor's duties.

- Section 1: Written Statement of Services.

Various sections

- Section 2: Communication and Consultation.

The preamble paragraph and sections 2.1, 2.2 and 2.5

- Section 3: Financial Obligations.

The preamble paragraph.

- Section 6: Carrying out Repairs and Maintenance

Sections 6.1, 6.8 and 6.9

3. The applications had been notified to the Factor.

4. By Minute of Decision by Maurice O'Carroll, Convener of the First- tier Tribunal (Housing and Property Chamber), dated 3rd October 2018, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 2nd August 2018 to 1st October 2018) to a Tribunal.

5. An oral hearing took place in respect of the application on 4th December 2018 at the Glasgow Tribunals Centre, Room 110, 20 York Street, Glasgow, G2 8GT.

The Homeowners David Niven, Mrs Marie Taylor and Steve Hollingsworth appeared on their own behalf. David Niven also represented Rhona McColm and Gil Shaw. The Factor was represented by Brian Fulton, a Director of Ross and Liddell, Gerry Gilroy, a surveyor employed by Ross and Liddell and their solicitor Michael Ritchie.

The Tribunal advised the parties that in terms of Rule 12 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 they were directing that the five applications would be heard together.

At the beginning of the hearing the parties confirmed and agreed the following facts, which were accepted by the Tribunal:-

- The Property 6 Circus Drive, Glasgow comprises a tenement with six flats.
- In June 2016, David Niven, one of the Homeowners sought advice from the Factor regarding some potential repairs to common stone masonry and some cracking to internal living room corners. Following upon consultation discussions between the Factor's property manager, Stuart Clements, and the proprietors, a building inspection report was instructed. The purpose of this report was to identify where works required to be carried out to the Property and to provide a budget estimate for the cost of these works. Paragraph 4 of the report contains the conclusion and recommendations of the building surveyors.

- The Homeowners attended a meeting held on 30th August 2016. The Homeowners agreed at the meeting to move forward with a scheme of repairs based upon the building inspection report.
- Each of the proprietors then signed a mandate appointing the Factor as their agents to organize the extra-ordinary repairs to the Property.
- On receiving the mandates the Factor's surveyor then prepared specification of works to be carried out. This specification was sent to a number of contractors inviting them to tender for the works. The Homeowners had requested that JCJ Group Limited were not invited to tender for the works. Contrary to this, an invitation was sent to JCJ Group.
- The Factor advised the Homeowners that they would require a structural engineer's report to give them a chance to secure Glasgow City Council Grant Assistance. In January 2017 a structural engineers report was prepared at a cost of £425 plus VAT. It was around this time that the Homeowners were advised that they would receive grant assistance on all pre-contract fees associated with the building works.
- The contract terms relating to the extraordinary repairs as per the tender invitation were the Scottish Minor Works Contracts 2011 Edition as revised in March 2016.
- Following upon receipt of the tenders, a report on tenders was prepared by the Factor's surveyors. The report recommended that JCJ Group Limited, who submitted the lowest tender was appointed.
- A meeting of the Homeowners was held on 12th April 2017 to discuss the report on tenders. The proprietors chose to accept the recommendation that JCJ Group Limited be appointed as the contractor to carry out the extra ordinary repairs. This was notwithstanding that they had initially indicated that JCJ were not to be invited to tender for the works after reassurances were made to the Homeowners during a meeting with the Factor
- On 21st April 2017 the Factor confirmed that the outstanding funds (over and above the pre contract fees) were to be transferred to their bank account no later than 19th June 2017, which the Homeowners did.
- At the commencement of the works, the Homeowners had been given sight of the building inspection report, part of the specification of works to be carried out, and the report on tender received.
- It was agreed with the contractor that they would commence works on 31st July 2017. It was anticipated the works would last 12 weeks.

- During the currency of the extraordinary repairs contract, there were a number of updates issued to all proprietors advising them of the progress of the works. Copies of the site meetings were issued to the Homeowners.
- The building works are not yet complete. No certificate of practical completion has yet been issued.

Preliminary matters

The Factor had lodged written representations which, in summary, made the following submissions:

- The Tribunal only have jurisdiction to deal with complaints from Homeowners which relate to common parts of the Property. The common parts are defined in the title deeds, in particular the Deed of Conditions by Beatrice Mary Dick or Mackay recorded 14th December 1960 the details of which is set out in Land Certificate GLA41455, which had been produced. They advised that the windows do not form part of the common part of the development. The internal areas of each flat are not common property and the internal decoration is not within the jurisdiction of the Tribunal.
- A number of the complaints made by the Homeowners relate to the standard of workmanship which was carried out by the contractor. The contract administrator is employed by the Factor. The contractual obligations placed upon the contract administrator are detailed in the Standard Form Buildings Contract. The contract was entered into by the Factor as agents for the Homeowners. It is not possible for the Tribunal to determine whether the repairs to the Property have been carried out in accordance with the terms of the specification of works or whether the contractor has failed to carry out the works in accordance with the terms of the specification. These are matters which would require expert evidence to be led. Also, if the alleged breach of Property Factor duties relates to the certification of the works by the Factor's surveyor, expert evidence would be necessary for the purposes of establishing that the certification of works by the Factor's surveyor breached the Factor's duties to the Homeowners. Until such time as the Factor's surveyor has issued a certificate of practical completion certifying that the works have been carried out in accordance with the terms of the specification of works, there can be no determination that the Factor's surveyor in carrying out his duties as contract administrator has breached his duties in terms of section 17(5)(a) of the Property Factors Act 2011.
- The complaint by the Homeowners in relation to the standard of workmanship of the contractor and related payments made to the contractor are considered to be premature as the contract has not been certified as complete. The contractors have not received their final payment. In addition, a sum will be

retained from the contract price for the period of one year for the duration of the defects liability period.

In response to these preliminary submissions David Niven, on behalf of the Homeowners, advised the Tribunal as follows:

- The Factor owes a duty of care to the Homeowners.
- The surveyor, employed by the Factor, has a moral duty to meet minimum professional standards.
- The mandates signed by the Homeowners specify the duties to be performed by the Factor and their surveyor. The mandates state:
- The Factor has made staged payments to the contractor even although the works have not been completed.
- The contract has taken longer than had initially been anticipated. The contractor is now off site. The Homeowners have not had any evidence of the surveyor completing the outstanding matters.
- The Homeowners' complaints are not solely about defects they are also about the administration of the contract.

The Tribunal were mindful of one of the overriding objectives set out in rule 2(2) of the Tribunal rules which includes dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties. The parties had lodged with the Tribunal extensive productions and consequently the Tribunal considered that it was fitting with this overriding objective to make determinations on these preliminary matters at the beginning of the hearing. Consequently the Tribunal made the following **Preliminary Determinations**, and advised the parties of their preliminary determinations at the hearing, before considering the detail of the applications:

1. As the building contract had not been certified as complete and as correspondence regarding the defects is still ongoing the Tribunal determine that it is premature for them to determine defects in terms of the contract. In any event, without expert evidence being provided the Tribunal would be unable to make any such determinations.
2. The Property Factor's duties are defined in section 17(5) of the Property Factors (Scotland) Act 2011 as being, *inter alia*, 'duties in relation to the management of the common parts of land owned by the homeowner.' Consequently the Tribunal can only make determinations regarding property factors duties in relation to common parts of the Property.

The Deed of Conditions defines the common parts. Clause First states: 'The proprietors Shall possess a right in common with each other and every other proprietor in the tenement in and to (a) the solum...(b) the foundations, front and back walls, gables, roof and chimney heads, the common passage or close, landings and stairway and walls enclosing the same and railings thereof and stair lights and hatchway leading to the roof (c) the drain and soil and main water supply pipes and all other pipes and the rhones, conductors, gutters, common tanks and cisterns and gas and electric cables and ventilating and waste pipes of every description and common doors, gates and paths (d) the boundary walls and fences and mutual division walls and fences (e) the railings and walls enclosing the ground on which the tenement is erected (f) the wash-house and ashbin shelter and fittings therein (g) all other parts of the tenement common to the proprietors.

The Tribunal accept that the windows, internal areas of each flat and the internal decoration are not common property and consequently they determine that they do not have jurisdiction to deal with property factors duties complaints regarding these parts of the tenement.

The parties' representations and the Tribunal's decisions:

The Code Complaints.

The Homeowners had sent the Factor letters dated 17th August 2018 advising the Factor that they considered that they had failed to comply with various sections of the Code of Conduct, which complaints had been numbered 1 to 51.

Section1: Written Statement of Services.

The Homeowners' complaint.

Numbers 1- 12 of the Homeowners letter of notification dated 17th August 2018 related to alleged breaches of Section 1 of the Code of Conduct. In general terms the complaints were to the effect that the Factor had failed to do the various matters specified, which included inter alia, no confirmation of substantial change from the minimum twice per calendar year inspection rate; failure to act on behalf of homeowners; failure to provide a statement of level of delegated authority etc.

The Factor's response.

The Factor replied to each complaint but in general advised that the extra ordinary repair scheme is being progressed under a building contract for minor works and the surveyors administering the contract must comply with the provisions of the contract.

The Tribunal's Decision.

Section 1 of the Code of Conduct provides that the Factor must provide the Homeowner with a Written Statement of Services and specifies the matters to be included within the Written Statement. The Homeowners complaints regarding Section 1 of the Code are in relation to the alleged failure by the Factor to carry out matters which have to be detailed in the written statement of services as opposed to providing a written statement which complies with Section 1 of the Code. Accordingly the Tribunal determine that there has been no breach of Section 1 of the Code.

Section 2: Communication and Consultation.

Preamble: ‘Good communication is the foundation for building a positive relationship, leading to fewer misunderstandings and disputes. In that regard:’

The Homeowners' complaints.

Complaint numbers 13-20 of the Homeowners letter of notification dated 17th August 2018 related to alleged breaches of the preamble of Section 2 of the Code of Conduct. In general terms the Homeowners allege a lack of progress updates and a lack of consultation.

The Factor's response.

The Factor responded to the Homeowners' particular complaints in their letter dated 21st September 2018.

The Tribunal's decision.

The Preamble of Section 2 of the Code of Conduct states in general terms that good communication is desirable. It does not contain a specific duty to be followed. The details of the good communication required is set out in the detailed paragraphs of section 2. Accordingly the Tribunal determine that there has been no breach of the preamble provisions of section 2 of the Code.

2.1: 'The Factor must not provide information which is misleading or false.'

Complaint number 21

The Homeowners' written complaint.

'The ongoing scheme of extra ordinary repairs were sold to the homeowners by the Factor as being based on the findings of the Factor's building survey report, however it became evident that this was not the case through informal conversations on site- and evidenced through various email correspondences querying the scope and repeatedly seeking for confirmation of inclusion and completion of 'snagging' works (e.g. stone repairs) that should have been addressed during the height of the works and not at the end, and only once raised by the homeowners. An excess of workmanship issues were encountered and are still evident- this suggests the budget was spread thin in an attempt to cover off unexpected scope items. Also an item within the building survey report (gap at close door) was not included within the contract. An excessive number of variations confirms items were omitted from the original contract bill of quantities, further demonstrating the scope be amended afterwards to suit and leaving the homeowners exposed to excessive costs unless necessary due diligence applied.

The Homeowners' oral representations.

David Niven advised the Tribunal that the Factor had sent the Homeowners an email which stated that everything identified in the survey would be included in the scope of works and carried out as part of the repair works.

The Factor's written representations.

With the exception of 'replacing FAI's and removing tree and grubbing up roots (which was omitted from the scope of the extraordinary repair works as the tree is on adjoining property) all the recommended and budgeted for works as stated within the initial survey report were included within the description of works for the extraordinary common repairs as instructed.

The Factor's oral representations.

The variations and additions to the contract are not misleading or false. Also the survey report lists recommended works and does not say that gap at the close door is an essential repair. The Homeowners were provided with both the details of the survey report and the scope of works.

The Tribunal's Decision.

The first paragraph of the letter from Brendan McCaughey, building surveyor for the Factor, dated 29th July 2016 to Rachael McQueen, the Factor's Property Manager, states:

'Offer to organise Building Repair Works at 6 Circus Drive, Glasgow.

We understand that you require professional services to organise and oversee the proposed building repair works at the above property; entailing possible repairs to structural timbers to eradicate fungal outbreak within the roof void and associated works, overhaul the roof covering, rainwater goods, stone repairs to all elevations, overhaul replace common windows, plaster repairs, redecoration as highlighted within the building survey report...

Works are carried out in two stages, Pre contract and Post Contract Services as detailed below....

This letter clearly states that the offer to organise and oversee the building repair works was in relation to the works highlighted within the building survey report.

The building survey report was prepared by Brendan McCaughey a surveyor employed by Ross and Liddell. The report was dated 27th June 2016 and was 37 pages long.

Paragraph 2.6.3 of the report relates to Window and Door Openings. The last paragraph states:

'The close entrance door operates reasonably well. The door to the back court is in a similar condition although there is a large gap which will allow vermin and small animals to enter the close. The gap should be covered and the common door sets should be regularly overhauled as part of a routine maintenance programme.'

Paragraph 4 of the report is headed 'Conclusions and Recommendations includes:

'The defective FAI's must be replaced to allow air to ventilate the sub floor areas and prevent vermin entering the property. The mature tree in the neighbouring backcourt is not a suitable specimen in this location should be cut down and removed. We would also recommend that the remnants of the tree is grubbed up and also removed, although permission would be required from the neighbours whose land the tree is growing on.'

As stated the survey report includes the said repairs needed to cover the gap above the close door; replace the defective FAI's and remove the mature tree in the neighbouring backcourt. The said letter from Brendan McCaughey, building surveyor for the Factor, dated 29th July 2016 states that professional services being offered were to organise and oversee the proposed building repair works at the above property..... as highlighted within the building survey report'

However the Report on the Tenders by Brendan McCaughey, surveyor employed by the Factor dated 17th February 2017 clarified that following instructions to obtain competitive tenders for the building works at the property contract documentation was prepared and issued to tender. The Scope of the building works described in the tender document comprise of re-tiling the roof, repairs to structural timbers within roof void, repairs and repointing of the sandstone elevations, lead flashing replacement in isolated areas, investigation of timber lintels and possible replacement above common windows including replace common window units, repair and redecoration of the common close walls and ceilings, repairs to balusters.'

The Tribunal determine that the fact the said letter from Brendan McCaughey, building surveyor for the Factor, dated 29th July 2016 states that professional services being offered were to organise and oversee the proposed building repair works at the above property..... as highlighted within the building survey report' but the Scope of Works referred to in the said Tender Report do not specifically refer to the said survey report to be misleading as it was not been clearly stated that tender report does not include the said repairs that were detailed in the survey report namely the closing of the gap above the close door; the repair to the defective FAI's and the removal of the mature tree in the neighbouring backcourt. However the Tribunal acknowledge that if these items had been included in the specifications the contract costs would probably have been higher.

In connection with the contract variations, the Tribunal do not consider these to be misleading or false. In the experience of the Tribunal there will always be variations to building contracts of this kind.

Complaint number 22

The Homeowners' written complaint.

'Inappropriate and non-timeous correspondence to homeowners on 28th February 2018 seeking additional funds to undertake reinstatement of ceilings without providing any indication as to how much this may cost and also suggesting David Niven was requesting this to be included within common works, although this was previously confirmed as common to David Niven in response to initial formal complaint on 12th September 2017.'

The Homeowners' oral representations.

Requesting money from the Homeowners without specification of the amount is misleading.

The Factor's written representations.

'Damage to one ceiling at 2/2, 6 Circus Drive. Currently decorated at own cost. Although this cost should be covered in the contract ie. as part of temporary works, like for like reinstatement. No response has been received from the request to assess, therefore no comment can be made.'

The Tribunal's Decision.

The email from Brendan McCaughey to David Niven dated 12th September 2017 referred to having the cornices replaced and redecoration of the affected rooms. The email clearly states 'The works are all regarded as common so the cost of the works within flats is shared amongst the six proprietors.'

The Homeowners referred to correspondence dated 28th February 2018. On reviewing the written representations and productions the Tribunal believe that the correspondence the Homeowners are referring to is in fact an email from Brendan McCaughey to the Homeowners dated 22nd February 2018. The said email dated 22nd February 2018 stated, inter alia:

'Lastly in relation to item 14 above, Mr Niven has requested that the cornice within his flat is reformed as part of the common repair project. I have informed Mr Niven that GCC will not assist with this cost and that he would require to seek approval of his fellow proprietors to utilise any remaining sums left in the contract. Therefore can all proprietors confirm that you are willing to include the cornice repairs as part of the project and as such confirm that you will accept liability for 1/6th cost of the cornice renewal, If we get a unanimous agreement then we will approach the contractor for costs to have the cornices replaced'

This position is also set out in the email from Fiona Church-Michael to David Niven dated 20th November 2017. That email states:

'As you'll be aware, I can only obtain quotes for common repairs. As we were trying to make an insurance claim from a common aspect, I was able to be involved.

As the insurers did not recognise this claim as being common, this reinstatement work is now a private matter, as its within your Property, therefore I am unable to obtain quotes for you or obstruct any work. I would also like to advise that I cannot split the charge of this reinstatement work between all of the owners in the stair as it is for private work within a private property, not a communal area.'

The said emails dated 20th November 2017 and 22nd February 2018 conflict with the said email dated 12th September 2017 and accordingly the Tribunal determine that the said email of 12th September 2017 is false and misleading.

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

Complaint number 23

The Homeowners' written complaint.

'Inappropriate language and unprofessional remarks to David Niven from the Property Manager on 20th November 2017 confirming his dissatisfaction and intention of having to resort to seek legal counsel to resolve the matter would be noted on his file i.e. after the homeowner sent multiple correspondences leading up to this point in an attempt to resolve the situation with lowest risk and cost to the residents and then the property manager states the works were not common even although previously confirmed as such on 12th September 2017.'

The Homeowners' oral representations.

The email dated 20th November 2017 is intimidating. In the email Fiona Church-Michael, the Factor's property manager, replied to David Niven's email dated 20th November 2017. In the email of 20th November 2017 David Niven stated that he would 'defer to his legal council who will be able to bring this matter to a close'. In her response Fiona Church- Michael stated 'Thank you for your reply. I'll make a note of this on your file.'

David Niven explained that he considered this to be intimidating.

The Factor's written representations.

There is no acceptance of any unprofessional behaviour on the part of the Factor's property manager.

The Factor's oral representations.

Michael Ritchie, the Factor's solicitor, advised that he did not consider the email of 20th November 2017 to be intimidating.

The Tribunal's Decision.

The Tribunal determine that the email of 20th November is not abusive or intimidating.

Complaint number 24

The Homeowners' written complaint.

'Lead flashing concerns and queries were called criticisms.'

The Homeowners' oral representations.

David Niven explained that he considered the reference to 'criticisms' to be derogatory.

The Factor's written representations.

The Factor referred to their letter of 23rd July 2018.

The Factor's oral representations.

Michael Ritchie advised that he did not consider this to be abusive or intimidating.

The Tribunal's Decision.

The Tribunal determine that the reference to 'criticisms' is not abusive or intimidating.

Complaint number 25

The Homeowners' written complaint.

Homeowners received insulting remarks stating works were 'least expensive grant funded project'.

The Homeowners' oral representations.

David Niven explained that the Factor's comments imply that they do not deserve a high quality finish.

The Factor's written representations.

The Factor advised that it is not known who made these remarks, but they may have been made by an employee of the contractor. Whilst any such remarks are unacceptable they suggest that they have been taken out of context.

The Factor's oral representations.

Michael Ritchie advised that he did not consider this to be abusive or intimidating.

The Tribunal's Decision.

The Tribunal determine that the reference to 'least expensive grant funded project' is not abusive or intimidating.

2.5: 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 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.

Complaint number 26

The Homeowners' written complaint.

Response times were excessive e.g. for initial response to the Factor's complaint.

The Homeowners' oral representations.

The Homeowners raised many issues in 2017 and lodged a formal complaint on 6th April 2018. The Factor did not respond until 15th June 2018.

The Factor's written representations.

The Factor referred to their response of 2nd July 2018 when they advised that all homeowner enquiries and concerns would be addressed and they will answer each question or concern raised when a definitive answer can be given, not before, and at completion of the contract administration process a summary of all will be produced. This summary will be tabulated against the reference numbers used within the homeowner's emails of 6th and 27th April 2018.

The Factor's oral representations.

Michael Ritchie accepted that there was a gap in responding to the Homeowner's questions but explained that this was due to a change of personnel employed by the Factor and also due to the volume of correspondence and paperwork.

The Tribunal's Decision.

The Factor's Service Level Agreement states at paragraph 10(ii):

'We will respond to written queries within 7 working days of receipt. In the event that a full response cannot be provided within this period, we will confirm this is writing and intimate to clients our intended actions and timescale for returning a full response.'

The Factor took approximately 70 days to reply to the Homeowners complaint dated 6th April 2018.

The Code of Conduct requires the Factor to respond to complaints as quickly and fully as possible, and to keep homeowners informed if they require additional time to respond. The Tribunal determine that the Factor did not meet the terms of paragraph 10(ii) of their Service Level Agreement or the terms of section 2.5 of the Code of Conduct.

Section 3: Preamble: While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

Complaint numbers

Numbers 27-48 of the Homeowners letter of notification dated 17th August 2018 related to alleged breaches of the preamble of Section 3 of the Code of Conduct. In general terms the Homeowners allege a lack of transparency in managing the Homeowners funds and dealing with the contract payments. They state that a number of items charged for have not been carried out and or completed.

The Factor's response.

The Factor responded to the Homeowners' particular complaints in their letter dated 21st September 2018. In general terms they advised that the final account under the building contract has not yet been agreed. It will not be agreed until the end of the defects period which runs for the period of one year from the date of practical completion. The contract is not deemed to be at the stage of practical completion until all prior advised defects are rectified, consequently the formal account has not been agreed. For practical purposes for the administration of grant assistance from Glasgow City Council a conditional final account is agreed and presented to Glasgow City Council at the stage of practical completion. As practical completion has not been granted to the contractor by the Factor, no conditional final account has been presented to Glasgow City Council.

The Tribunal's decision.

The Preamble of Section 3 of the Code of Conduct states in general terms that the Homeowners must know what they are paying for, how the charges were calculated and that no improper payment requests are involved. The Building Contract is still ongoing. No final accounts have been prepared. The defects period has still to pass. Accordingly the Tribunal determine that there has been no breach of the preamble provisions of section 3 of the Code as the final accounts have still to be prepared and agreed.

Section 6.1: 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.

Complaint number 49

The Homeowners' written complaint.

The Factor provided a lack of updates on progress and completion with no end date confirmed or estimated timescales provided.

The Homeowners' oral representations.

David Niven explained that he considered that the Factor has been reactive by which he means that they have replied to requests for updated made by the Homeowners but they have not been proactive in providing updates. The contractor was last on site in February/ March 2018 and he is concerned that he has not been given information as to when the defects will be rectified and the contract completed.

The Factor's written representations.

The Factor referred to their letters dated 28th August 2018 and 19th September 2018.

The Factor's oral representations.

Michael Ritchie advised that the Homeowners have been kept updated and informed. He referred the Tribunal to the letters from the Factor to the Homeowners dated 15th June 2018 to 26th November 2018 which had been produced.

The Tribunal's Decision.

The Tribunal acknowledges that the Factor has sent letters to the contractor regarding the outstanding works (for example letter dated 27th August 2018) and

advised the Homeowners of their position regarding the defects (for example the letters from the Factor to the Homeowners dated 15th and 28th June 2018, 2nd, 17th and 23rd July 2018, 1st August 2018, 5th, 26th and 27th November 2018). However this correspondence has not advised the Homeowners of timescales for completion of the works or an estimated end date which is surprising given that the contractor was last on site in February/ March 2018. The Tribunal realise that the end date may not be known but the correspondence does not address this uncertainty or give the Homeowners any indication of the time likely to be taken to bring matters to a conclusion. Accordingly, the Tribunal determine that the Factor has breached section 6.1 of the Code of Conduct.

Section 6.8: You must disclose to homeowners in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

Complaint number 50

The Homeowners' complaint.

No confirmation or full disclosure of all other interests with contractor involved was provided.

The Factor's written representations.

The contractor is an independent contractor listed on the Factor's approved contractor list, and who have won a number of contracts for similar works in competition. The Factor has no interests in the contractor company and vice versa.

The Tribunal's Decision.

The Tribunal accept the Factor's representations that the Factor has no interests in the contractors company and determine that the Factor has not breached section 6.8 of the Code of Conduct.

Section 6.9: 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.

Complaint number 51.

The Homeowners' written complaint.

There are numerous quality/ workmanship related issues that are waiting an update on. Homeowners have sight additional extend warranty (collateral- or otherwise) however the Factor advised that this was not possible.

The Homeowners' oral representations.

David Niven advised that he does not consider that the Factor has been actively pursuing the defects. He believes that it is the Homeowners themselves who have been proactively pursuing the defects.

The Factor's written representations.

The Factor referred to their letters to the Homeowners dated 28th August 2018 and 19th September 2018.

The Factor's oral representations.

Michael Ritchie advised that the matter is still ongoing. The building contract has not been certified as being complete. A collateral warranty is not relevant in relation to these works as they were carried out under the building contract.

The Tribunal's Decision.

The Tribunal accept that there is evidence that the Factor is pursuing the contractor to remedy the defects but acknowledge that the situation is an ongoing fluid situation. They accept that a collateral warranty is not relevant to these works as they were carried out under the building contract. The Tribunal determine that the Factor has not breached section 6.9 of the Code of Conduct.

Alleged Breach of Property Factor Duties.

The written representations by David Niven dated 2nd August 2018, which form part of the application, detailed the following alleged breaches of Property Factors' Duties:

- A. Design and Specification of the works- Building Survey Report paid for by the Homeowners and findings not included in the specification.
- B. Preparation of the description of the works production of the bill of quantity for the works.

- C. Administration of the terms of the Contract.
- D. Negligent when managing clients' funds.
- E. Damage to Property.
- F. Monitor the progress and quality of the works.
- G. Communication Agreement.

In light of the Preliminary Determinations made by the Tribunal, the Tribunal advised the parties that they could only consider the alleged breach of Property Factors Duties set out at paragraphs A, B and G of the written representations by David Niven dated 2nd August 2018.

- A. Design and Specification of the works- Building Survey Report paid for by the Homeowners and findings not included in the specification and**
- B. Preparation of the description of the works production of the bill of quantity for the works.**

The Homeowners' representations.

The written representations by David Niven dated 2nd August 2018 set out additional works which the Homeowners believed should have been included in the contract specification as they had been referred to in the original survey and/or items were redundant items in the Bill of quantities as no application for payment had been made.

These property factor's duties stem from the terms of the mandates that the Homeowners had signed and also the Factor's Service Level Agreement. He believes that the Homeowners paid for a quality service but they did not receive this level of service.

The Factor's representations.

Michael Ritchie agreed that the Factor's duties stem from the mandates signed by the Homeowners. He confirmed that the Factor has a duty to fulfil their contract and not to do anything that could be deemed to be negligent. He submitted that the Homeowners have not identified any breach of contract or evidence of negligence. Also, the building contract is not complete and consequently it is premature to make any determination in connection with these matters.

The Tribunal's Decision.

The Tribunal acknowledges that the Factor is under property factor's duties which stem from the terms of the mandates that the Homeowners have signed and also the Factor's Service Level Agreement. However as the building contract has not yet been completed and is still ongoing it would be premature for the Tribunal to determine if there have been breaches of the stated property factors duties.

G. Communication Agreement.

The Homeowners' representations.

The Homeowners applications state that the Factor has failed in its Property Factor's duties by not properly communicating with the Homeowners with regards to the repair works. They listed extensive examples of poor communication (I-VIII). David Niven explained that the Homeowners had employed the Factor to manage and oversee the building contract. They engaged professionals and expected a good professional standard of communication. He believes the Factor is under a duty to communicate to ensure satisfactory completion of the works.

The Factor's representations.

Michael Ritchie advised that he does not see where a duty to communicate arises beyond those duties set out on the Code of Conduct.

The Tribunal's Decision.

The Tribunal do not consider that the property factor's communication duties detailed in the Homeowners application are duties above and beyond the communication obligations contained in the Code of Conduct, which have already been considered.

Decision and Property Factor Enforcement Order.

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Sections 2.1; 2.5 and 6.1 of the Code of Conduct.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

The Tribunal acknowledged that the breach of section 2.1 of the Code of Conduct affects the Homeowner David Niven in particular. Also David Niven had prepared the extensive representations and supporting documentation and out of all of the Homeowners had suffered the most stress and inconvenience.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

'Ross & Liddell Limited are directed to pay (1) each of the Homeowners Rhona McColm; Steve Hollingsworth; Gil Shaw and Marie Taylor the sum of £150 and (2) the Homeowner David Niven the sum of £300 as compensation from their own funds and at no cost to the owners. The said sums to be paid within 28 days of the communication to them of the Property Factor Enforcement Order. Ross & Liddell Limited are directed to provide the Tribunal with evidence that the said sums have been paid within seven days of the payment being remitted to the Homeowners'

Appeals

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.

J Taylor

Signed
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Date: 7th January 2019

Chairperson