

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

Chamber Reference: FTS/HPC/PF/20/2432 & FTS/HPC/PF/21/0476

Property address: 27 Dempsey Court, Queens Lane North, Aberdeen, AB1 54DY (“the House”)

The Parties

Mr David Gordon, 27 Dempsey Court, Queens Lane North, Aberdeen, AB1 54DY (“the Homeowner”)

James Gibb, 2 Thistle Street, Aberdeen, AB10 1XZ (“the Property Factor”)

Tribunal Members:

Ms H Forbes (Legal Member) and Mr A Anderson (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with paragraphs 2.1, 2.5, 3.3, 5.7 and 6.1 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”). The Tribunal also determined that the Property Factor has failed in carrying out its property factor duties.

The decision is unanimous.

Background

1. By applications received in the period between 23rd November 2020 and 15th February 2021 (PF/20/2432) and on 2nd March 2021 (PF/21/0476), the Homeowner applied to the Tribunal for a determination on whether the Property Factor had failed to comply with various paragraphs of the Code. The Homeowner also alleged a failure in carrying out its property factor duties.

Details of the alleged failures were outlined in the Homeowner's application and associated documents.

2. By decisions dated 1st and 15th March 2021, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the applications to a Tribunal for a hearing.
3. The applications were conjoined in order that they could be heard together, and a combined decision issued.
4. Both parties lodged extensive written representations and productions.

The Hearing

5. A hearing took place by telephone conference on 3rd September, 27th October and 3rd November 2021. The Applicant was in attendance. The Property Factor was represented by Ms Suzanne Cameron and Mr Nick Mayall.

Preliminary Matters

Previous decision - Chamber Ref: FTS/HPC/PF/17/0274

6. The Tribunal raised an issue as to whether it would be competent to hear evidence related to alleged false and misleading information put forward to a tribunal by the Property Factor at a previous hearing, that had since been shown to be incorrect. The Homeowner said he was unable to disprove the evidence put forward at the previous hearing, but evidence came to light subsequently. It was then too late to ask for permission to appeal. The Tribunal decided to hear the evidence and reserve judgement on whether it was an appropriate matter to put before another tribunal.

Property Factor Responses

7. The Tribunal raised an issue in regard to a lack of written response and representations in the case FTS/HPC/PF/20/2432 from the Property Factor. There also appeared to be issues in terms of indexing and numbering of the Property Factor's productions. Following discussion, it was apparent that the Property Factor had not appreciated that both cases were due to be heard, and had only responded to the case FTS/HPC/PF/21/0476. The Tribunal adjourned to consider matters, and decided to hear evidence in the case FTS/HPC/PF/21/0476 at the first hearing date, in expectation that written representations would be provided before the next hearing date.
8. It was agreed that the hearings would be structured around the section 7B Word documents submitted by the Homeowner. Due to the lack of proper indexation of submissions, it has been necessary within this Statement to refer to some evidence in terms of its page number out of total number of pages within a PDF, e.g. "page 9/114 of PF's productions".

Item 1(i)

Request for details of all maintenance carried out – alleged failures to comply with paragraphs 2.1, 2.5, 6.1 and 6.4 of the Code

9. Representations by the Homeowner

With reference to his written submission, the Homeowner said he had asked on several occasions for details of all the maintenance carried out by the Property Factor since 2015, including details of the roof maintenance as there had been a leak in the roof that had taken four years to fix. The Homeowner had been concerned that charges made did not add up, and that the present situation, where the roof requires complete replacement at a significant cost, was due to lack of maintenance. He had been provided with some invoices, but it was not what he had asked for. He was then given a spreadsheet detailing cyclical maintenance (Production 2) but the roof maintenance was not included. He had also asked for information in relation to the security gate in the carpark. He accepted that he was provided with invoices, but he would expect a detailed log of all maintenance so that he could keep track of what had been done and how much it cost.

Paragraph 2.1

The Homeowner said he had asked for details of development maintenance and had been sent the cyclical maintenance spreadsheet. This was misleading as it infers there is cyclical maintenance. Responding to questions from the Tribunal as to false or misleading information, the Homeowner said the spreadsheet omitted areas that should have been included.

Paragraph 2.5

The Property Factor had not provided the requested information 323 days after the request had been made. Although some of his queries had been responded to, as reflected in 13 pages of email correspondence (Production 1), the Homeowner had not received a definitive response to his follow-up queries

Paragraph 6.1

The Homeowner said the security gate in the carpark had been locked open since at least 04.12.20, and his car had been vandalized. He believed this would not have occurred if the security gate had been maintained in accordance with the manufacturer's maintenance requirements and was operational. The Property Factor had sent a letter to homeowners dated 4th December 2020 (Page 9/114 – PF's productions) in regard to this matter. The Homeowner had asked for updates on progress and had not been provided with an update.

Paragraph 6.4

The Homeowner said the maintenance plan provided for the development, which was created on 26th January 2021, does not include all fabric and systems in the building – it is missing various common areas, gutters, downpipes, drains and sewers, roofs and tiles, external building maintenance, internal areas including entrance halls, corridors and stairs, common lighting (internal and external), security entry systems, TV aerials and telecoms networks. It does not include a programme of works.

10. Response on behalf of Property Factor

In their written representations on the above items, the Property Factor stated that information relating to specific works had been provided to the Homeowner, with reference to several appendices lodged. The Property Factor did not believe they were in breach of paragraphs 6.1 and 6.4 of the Code.

Ms Cameron said the Homeowner had asked for information in relation to cyclical works and had been provided with the spreadsheet referred to by the Homeowner. The Property Factor has a list of works that are carried out. The information provided to the Homeowner had been sufficient. The spreadsheet covers some items. Others are contained within the development schedule, which was circulated to homeowners annually in July. Responding to questions from the Tribunal as to whether this information had been shared with the Homeowner, Ms Cameron said she assumed so, but would have to check back to find out. Mr Mayall said the development schedule is referred to in the WSS, which defines the core services, cleaning and grounds work specifications.

Responding to questions from the Tribunal regarding roof maintenance, Ms Cameron said details of reactive repairs would have been circulated to homeowners in the form of invoices. A report on the condition of the roof was circulated on 24th March 2021 (p45/131). It was her position that a response had been provided in respect of all works carried out. She referred to Appendix 30 (p64/131), an email of 16th June 2021 from the Property Factor's Susan Rylie, to the Homeowner, as evidence that responses had been provided. Ms Cameron referred to Appendices 93 and 94 (p125-127/131), which detailed work carried out to the guttering, as evidence that the Property Factor had maintained the guttering. Appendix 96 (p128/131) was an invoice for decking and flat roof repairs. Responding to questions from the Tribunal as to when these documents were provided to the Homeowner, Ms Cameron did not know, but she said the costs for the works were detailed on quarterly invoices, so homeowners would be aware of them. Ms Cameron said the roof was installed by the development builder.

11. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There was no false or misleading information

provided.

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code, by failing to respond to enquiries and complaints within prompt timescales.

Paragraph 6.1

The Tribunal found there had been a failure to comply with this paragraph of the Code by failing to inform homeowners of the progress of the works in relation to the gates.

Paragraph 6.4

The Tribunal did not find there had been a failure to comply with this paragraph of the Code, as there was evidence of ongoing roof and gutter maintenance and there appears to be a programme of works, albeit contained in different documents. The Tribunal observed that it was difficult for homeowners to find the information. It would be good practice to list everything in one document.

Item 1(ii)

Request for details of legislation covering statutory and non-statutory inspections – alleged failure to comply with paragraphs 2.1 and 6.4 of the Code and 4.1 of the Written Statement of Services

Representations by the Homeowner

On 23rd February 2021, the Homeowner requested a list of the statutory/non-statutory inspections carried out by the Property Factor, and details of best practice referred to by the Property Factor. This was not provided. It was his position that it should have been a simple matter to provide this list.

Paragraph 2.1

The Homeowner submitted that by referring to statutory inspections and best practice, and failing to detail those, this was false and misleading.

Paragraph 6.4

The Homeowner said the list he had requested should be included in a list for the development.

WSS paragraph 4.1

This paragraph mentions statutory inspections. The Homeowner asked for details and they were not provided. The Homeowner said he had to assume in

the absence of the information requested that the Property Factor was not carrying out the duties referred to in the WSS.

12. Response on behalf of Property Factor

Ms Cameron said there is no document to list best practice – it is just a term used to indicate reasonable/ethical working, and is tied back to the WSS, and to working appropriately in the interests of the owners. She referred to the Property Factor's management system that deals with cyclical works. She was not sure if the specific details were shared with homeowners. The WSS sets out the best practice. Some communication had been issued in this regard, but she did not have it in front of her. Ms Cameron referred to Appendix 13 (p39/131) which was an email dated 8th July 2020 from Susan Ryrie to the Homeowner with several attached documents. Appendices 48 to 52 (p115/131 onwards) showed annual testing of the smoke vent system since 2013. Appendices 45 to 48 showed repair works to the smoke vent system. The specific questions asked by the Homeowner had been answered. There was no direct list of statutory and non-statutory items. Paragraph 4.1 of the WSS had not been breached. There was evidence that gutter cleans and other works were being carried out regularly.

13. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. Failing to respond to a request for information does not constitute false or misleading information. Best practice is a concept aspired to by the Property Factor.

Paragraph 6.4

The Tribunal did not find there had been a failure to comply with this paragraph of the Code, which is specific to the preparation of a programme of works. The Tribunal observed that there should be a clearly defined list of core services. Clarity is fundamental to the relationship between the Property Factor and homeowners.

WSS paragraph 4.1

The Tribunal noted there was evidence that the Property Factor had commissioned routine maintenance and inspections and were carrying out their duties in this regard.

Items 1(a), (b) and (c) and Item 2

Instructing EICR – alleged failure to comply with paragraphs 2.1, 2.5, 3.3, 6.3, 6.6 and 6.9 of the Code

14. Representations by the Homeowner

The Homeowner said the Property Factor has instructed work that is not appropriate and has advised that any charge under the authority to act cannot be contested. The Property Factor had arranged for an Electrical Installation Condition Report (“EICR”) to be carried out. This was advised to homeowners on the client portal on 9th March 2020. The portal is not an appropriate way to inform homeowners as they are not all computer savvy. The Homeowner was not aware of an EICR having been completed before. Such reports are only required for private landlords in Scotland. The contractor carrying out the EICR failed to notice a loose electrical socket. The homeowners were charged for rectification of this problem. The Homeowner would expect to see details of the tendering for this work to show the best use of homeowners’ funds.

Paragraph 2.1

The Homeowner said the Property Factor told homeowners they had instructed the EICR and it could not be challenged. This was false and misleading information. False information had also been provided in relation to the contractor for the EICR, when the work had actually been carried out by a sub-contractor.

Paragraph 2.5

Information requested by the Homeowner had not been provided. The Homeowner had asked for information on 5th February, and it was 21 days before he received a response.

Paragraph 3.3

The Homeowner said he had requested documentation from the Property Factor to indicate where it was stated that an EICR must be carried out, and this had not been provided. Invoices had to be paid within 14 days. When he queried an invoice, he was chased for payment, but it took a long time to get a response to his queries.

Paragraph 6.3

The Homeowner said he had asked the Property Factor for details of the firm to which the EICR work was sub-contracted. He also asked how and why the sub-contractor had been appointed. This information had not been forthcoming. The Property Factor eventually stated that they did not have any further documentation.

Paragraph 6.6

On 5th February 2021, the Homeowner requested the documentation relating to the tendering process for the EICR. On 26th February 2021, the Property Factor responded, but did not provide documentation relating to the tendering process. The Homeowner said that, as a minimum, he would expect to see an invitation to tender, scope, normalisation and a recommendation to award.

Paragraph 6.9

The Homeowner said the contractor had missed a loose socket. This should have been noticed. He thought a revised EICR had not been provided.

15. Response on behalf of Property Factor

The written representations on behalf of the Factor indicated that the main contractor for the EICR, MS Services, was the most competitive, and they had sub-contracted the work to JR10. The work was carried out after communication with homeowners and was within the delegated authority limit. Ms Cameron said the Property Factor felt it was within their remit to ensure that all electrical systems were tested. This was authorised in clause EIGHTH and FOURTEENTH of the Deed of Conditions for the development. It falls under maintenance, and is also authorised by paragraph 5.2.1 of the WSS. This was the first time EICRs were carried out across the portfolio of developments to fall in line with safety checks. Ms Cameron was unable to say why this has not happened before. Homeowners were notified through the client portal on 9th March 2020. Homeowners are advised to keep an eye on the portal. This is referred to in all correspondence.

The contractor was entitled to sub-contract. The Property Factor does not have to approve the sub-contractor. The charges were transparent.

Paragraph 2.1

Ms Cameron said her colleague's email correspondence to the Homeowner was not worded well. Her colleague ought to have said they had the authority but it could be queried. Under the WSS and the Code, the Property Factor has authority and would not accept a dispute over the matter, but better clarity could have been given to the Homeowner. There was no false or misleading information provided.

Paragraph 3.3

Ms Cameron said there was a high volume of correspondence and discussion about why the contractor was appointed. She said the response from the Property Factor to the Homeowner could have been better.

Paragraph 6.3

Ms Cameron referred to appendices 101 to 104 which showed email correspondence with three contractors requesting quotes. There was a screenshot of the client portal showing notification to the owners that MS Services had been engaged to undertake the work, based on their competitive price. She said she did not believe that the full details had been shared with the Homeowner but the Property Factor was not in breach of this paragraph. The only information that had not been shared was the breakdown of the development.

Paragraph 6.6

Ms Cameron said the scope was shared but the attachment was not shared. It was her position that the scope was sufficient to satisfy this paragraph of the Code.

Paragraph 6.9

Ms Cameron said there was no evidence to confirm that the socket was loose at the time of carrying out the EICR.

16. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There was no false or misleading information provided.

Paragraph 2.5

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Homeowner received a response to his request for information within a reasonable timescale.

Paragraph 3.3

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Factor provided the necessary information to the Homeowner as required by the Code.

Paragraph 6.3

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Property Factor showed how and why they had appointed the main contractor to carry out the EICR. The main contractor was entitled to sub-contract.

Paragraph 6.6

The Tribunal found there had been a failure to comply with this paragraph of the Code. There was an unreasonable delay in providing the documents and the documentation was incomplete, in that the response from the unsuccessful contractors was not provided, even in a redacted format.

Paragraph 6.9

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There was insufficient evidence before the Tribunal to indicate when the fault occurred, and whether or when it was reported.

Item 3

Utility Splits – alleged failure to comply with paragraphs 2.5 and 3.3 of the Code and paragraph 5.2.1 of the WSS

17. Representations by the Homeowner

The Homeowner said he requested information in relation to utility splits on many occasions. He was concerned that the utility split is based on a 2016 valuation report which means that several owners may be overpaying the utility charges. He had requested supporting invoices for the utility charges, and found they referenced a different block and periods outwith the factoring invoice issued. Some months were missing. In 2021, he was provided with invoices for 2018. He said he had first asked for the information at the 2016 AGM but received no response. The Homeowner said he had checked clause THIRTEENTH of the Deed of Conditions, having been told by Ms Cameron that this was the basis for apportionment, but he could see no apportionment therein. There did not seem to be a basis for the apportionment of 2.36% and he could not be clear that he was not paying too much or too little. There was no clarity on this or why homeowners were only now being asked to pay 2018 invoices. These were breaches of paragraphs 2.5 and 3.3 of the Code.

18. Response on behalf of Property Factor

Ms Cameron said she had referenced an incorrect clause in the Deed of Conditions. She would have to look at matters further to see why there was an issue in 2018. It may be the case that the 2018 charges were in dispute at the time. Responding to questions from the Tribunal as to whether the information requested had been provided, Ms Cameron said some information had been provided, but the matter of provision of the wrong information had not been resolved. This was not a matter she had been involved with. The matter is being looked at by a third party broker. With regard to paragraph 3.3, quarterly invoices are provided with a breakdown including utilities.

19. Decision of the Tribunal

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code, in that the Property Factor had not responded within prompt timescales.

Paragraph 3.3

The Tribunal found there had been a failure to comply with this paragraph of the Code, in that the Property Factor had failed to provide supporting

documentation upon request. The Tribunal observed that there was a lack of clarity in relation to the utility split and how charges were calculated.

Paragraph 5.2.1 of the WSS

The Tribunal did not find a breach of this paragraph, which states that the communal costs will be shared as appropriate.

Item 4

Insurance – how and why the current insurer was appointed – alleged failure to comply with paragraphs 2.1 and 5.6 of the Code

20. Representations by the Homeowner

Upon being notified of a new insurer, the Homeowner requested information from the Property Factor as to how and why the insurer was appointed, by email dated 15th December 2020 (Production 1 p12/13). The Homeowner was provided with an undated letter by the Property Factor (Production 12). This letter did not address the Homeowner's questions regarding how or why the insurer had been appointed. The Homeowner was told that the letter was only provided to homeowners that queried the insurance. The Property Factor stated in the letter that they were recommending the new insurer, yet the insurer had been in place for three months. All information regarding the change of insurer was provided retrospectively to the cover starting.

21. Response on behalf of Property Factor

Ms Cameron said there was no false and misleading information provided. The summary documents provided the requested information, and showed how and why the insurer had been appointed. The Summer Address discusses the block insurance policy.

22. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. No false or misleading information was provided.

Paragraph 5.6

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Homeowner was informed upon request how and why the insurance provider was appointed. The Tribunal observed that the manner in which it was handled, with the provision of retrospective information and an undated letter provided only to those that enquired, was not satisfactory, as homeowners would not have been able to make representations prior to the appointment of the insurer. In effect, the matter had been decided prior to the provision of information

Item 5

Insurance – different amounts being paid by homeowners – alleged failure to comply with paragraphs 3.3 and 5.2 of the code of conduct

23. Representations by the Homeowner

The Homeowner is paying a 2.06% share of the insurance, yet another homeowner with a property of the same size is paying 1.52%. The Homeowner requested clarification of this matter by email dated 18th January 2021 (Production 1 p7/13). By email dated 25th January 2021, the Property Factor stated that they could not provide any further clarity and that the information was based on the valuation survey carried out in 2016 (Production 19). The Homeowner said the survey that apportioned the insurance did not determine the cost per property by floor area.

24. Response on behalf of the Property Factor

Mr Mayall said clear information had been given to the Homeowner on his quarterly invoices. Responding to questions from the Tribunal as to whether the matter had been raised with the surveyors that completed the report, Mr Mayall said he did not have that information. Neither did he have specific information on how the report had been carried out. All relevant information would have been provided to the surveyor.

25. Decision of the Tribunal

Paragraph 3.3

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Property Factor has provided the financial information requested.

Paragraph 5.2

The Tribunal did not find that there had been a failure to comply with this paragraph of the Code, in as much as the information for the basis of the share of insurance premium was provided. The Tribunal observed that the situation where the Homeowner is paying more insurance than a neighbour for the same type and size of property is entirely unsatisfactory and inequitable, and that the Property Factor ought to be taking this matter up with the surveyor who completed the report, to ensure the matter is looked at again with a view to finding an equitable solution.

Item 6(a)

Insurance – benefit, fee or commission paid to the Property Factor – alleged failure to comply with paragraphs 2.1 and 5.3

26. Representations by the Homeowner

On 18th January 2021 (Production 1 p7/13), the Homeowner asked the Property Factor for details of any benefit, commission, admin fee or rebate that they received for buildings insurance. On 4th February 2021, the Property Factor informed the Homeowner that the commission was outlined in the development schedule. On 5th February 2021, the Homeowner requested further information, including historical information, and was informed by the Property Factor on 22nd February 2021 that no further information was available. The Homeowner said he was trying to establish if the Property Factor had changed insurers because of an increased rate of commission.

Responding to questions from the Tribunal as to how this might be a failure to comply with paragraph 2.1, the Homeowner said if the Property Factor cannot provide the information, that is misleading.

The Homeowner said he had not been informed by the Property Factor that the information was available on the client portal. The way in which the percentages were provided meant he could not calculate the commission, as the brokerage fee was not included.

27. Response on behalf of the Property Factor

Mr Mayall said the historical information was available on the client portal. He could not point to anything that would indicate that the Homeowner had been given this information. The current development schedule was provided, and there is information in the WSS at paragraph 8.5 to inform homeowners how to access information on commission. The commission did not change when the new insurer was appointed.

28. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. No misleading or false information had been provided.

Paragraph 5.3

The Tribunal found there had been a failure to comply with this paragraph of the Code. Although some information on commission is available to homeowners in various documents, the Property Factor could not be certain that the information had been provided to the Homeowner. The information that was only provided at the stage of the hearing required homeowners to undertake an arithmetical exercise to calculate the amount, by perusing historical versions of the WSS and every invoice. This was not sufficient to fulfil the requirements of the Code.

Item 6(b)

Insurance – failure to show break-down of cover – alleged failure to comply with paragraph 5.2 of the Code

29. Representations by the Homeowner

The Homeowner said that insurance invoices sometimes showed the premium for buildings and engineering elements separately, and sometimes just the buildings insurance. Upon request, the Property Factor was unable to provide a response in relation to this matter. Responding to questions from the Tribunal as to what the current situation is, the Homeowner said the current policy does not mention engineering works, but he has given up asking due to the difficulty in getting a response.

The Homeowner said the Property Factor had not mentioned index-linked inflation when he requested information.

30. Response on behalf of the Property Factor

Mr Mayall said that buildings and engineering elements are insured separately. Sometimes the insurance broker shows both on the same certificate. Sometimes they are broken down. Both elements are always shown on quarterly invoices. Mr Mayall referred the Tribunal to page 28/166, which was a quarterly invoice dated 2nd June 2020, which showed both elements. He said the Property Factor had not responded specifically in those terms to the Homeowner.

31. Decision of the Tribunal

Paragraph 5.2

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The decision as to how the policies are completed appears to lie with the broker. The quarterly invoices give the required information. The Tribunal observed that it was unfortunate this matter was only answered at the hearing, rather than at an earlier stage, when the Homeowner raised this issue.

Item 6(c)

Insurance – building reinstatement values – alleged failure to comply with paragraph 5.2 of the Code and Sections 8.8 and 8.9 of the WSS

32. Representations by the Homeowner

The Homeowner complained that the reinstatement value for the development has been inflated from the original 2016 report value when no further valuations have been performed for the declared value. In 2017 the insurance increased by £2,566,240.00. In 2018, it increased by a further £349,725. In 2019, it increased by a further £267,539. The total increase in declared value was £3,183,505. He had requested information as to where the inflated building reinstatement values came from and who advised the increase on the building reinstatement value when no further valuations were performed. The Property Factor advised that they could not provide any further information.

33. Response on behalf of the Property Factor

Ms Cameron said the Property Factor is not required to carry out an annual survey. Mr Mayall referenced section 8.8 of the WSS, which states a survey will be carried out every 5 years. In their written representations, the Property Factor stated that the insurance broker applies a rate of inflation annually, index linked, to the reinstalment value to ensure that a property is sufficiently insured.

34. Decision of the Tribunal

The Tribunal did not find that there had been a breach of this paragraph of the Code. Although the information was provided at a late stage, the insurance figure was increased by inflationary index, in accordance with paragraphs 8.8 and 8.9 of the WSS, and this was explained to the Homeowner.

Item 7

Insurance – failure to provide requested tendering information – alleged failure to comply with paragraphs 2.1, 5.6 and 5.7 of the Code

35. Representations by the Homeowner

On 5th February 2021 (Production 1 p4/13), the Homeowner requested copies of written quotes for insurance and all tendering documentation. The Property Factor responded that the quotations received were not development specific, but were for the entire portfolio, so the information would be irrelevant in the main, referring the Homeowner to previous summary documents already provided, which comprised Production numbers 7, 9, 10, 11 and 14. This was mostly information in relation to the new insurer. The Homeowner said the Summer Address (Production 22) gave some information on renewal of insurance, but not the information he was requesting. He wishes to see details of how the Property Factor had tendered, as he has concerns as to how the insurer was appointed. The Homeowner said he cannot understand how the Property Factor can quote sums if there are no quotes. They either have the information and have not provided it, or they have given false information. They have failed to demonstrate it is the cheapest insurer for the development.

36. Response on behalf of the Property Factor

The Property Factor's representatives said specific quotes are not available. Information was provided in general terms. The quotes are provided to the Property Factor on a renewal spreadsheet which is commercially sensitive. The insurer was approved as they provided the cheapest quote. That was passed on to homeowners in the Summer Address and the undated letter from David Reid.

37. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. It was not apparent that any false or misleading information had been provided.

Paragraph 5.6

The Tribunal did not find there had been a failure to comply with this paragraph of the Code for the reasons set out at paragraph 22 above.

Paragraph 5.7

The Tribunal found there had been a failure to comply with this paragraph of the Code, in that the Property Factor had failed to provide the documentation requested. The Tribunal considered there must be documentation available, setting out the alternative premium apportionments for this development, together with the excesses applicable and broker commission. Such information is necessary for transparency and to substantiate the statement made by the Property Factor that the selected insurer was the "best deal possible" for the Homeowner. The Code allows the Property Factor to remove any commercially sensitive information and it was not clear why this had not been done.

FTS/HPC/PF/20/2432

Item 1

Gate works – alleged failure to comply with paragraphs 2.1, 2.4 and 2.5 of the Code

38. Representations by the Homeowner

Paragraph 2.1

The Homeowner said he received a letter from the Property Factor dated 10th July 2020 (Production 1), stating that a risk assessment had been carried out, which had identified failures that could be a potential risk to people and vehicles, therefore it was imperative that work be carried out. The Property Factor stated that the risk assessment was enclosed; however, the enclosed documents were test force measurements (Productions 2 – 4). These were unreadable to the average person. When further information was requested, the Property Factor said there were no further details available.

It was also stated in the letter that only one quote had been returned. However, it was clear from the productions lodged by the Property Factor that two other firms had also quoted for the work. The information provided, therefore, was false and misleading.

Paragraph 2.4

The Homeowner said the Property Factor failed to consult with homeowners on these works. The letter of 10th July 2020 was not a consultation, but a recommendation. It informed homeowners that the Property Factor had already approached contractors. The quote that was included was months out of date. The Homeowner felt there should have been multiple quotes from contractors.

Paragraph 2.5

The Homeowner had asked for further information by email dated 10th July 2021. He received an acknowledgement from the Property Factor 14 days later. He chased the matter up on 24th August 2020 and received a response on 3rd September 2020. This was 55 days after his initial request. The Homeowner then requested clarification on various matters on 7th September 2020 and this was acknowledged on 11th September 2020, however, there has been no further response.

39. Response on behalf of the Property Factor

Paragraph 2.1

Mr Mayall referred to the written submission by the Property Factor, which stated that the letter and report were self-explanatory and could be considered a risk assessment. There was no attempt to mislead or present false information. He said the Property Factor had a concern and had endeavoured to have the gates examined, which resulted in a recommendation of works. Mr Mayall was unable to say why the Property Factor had only referred to one quote.

Paragraph 2.4

The written representations on behalf of the Property Factor stated that the carrying out of the Beattie Test Report fell within the delegated level of authority and required no consultation with owners. Mr Mayall said the further works recommended by Beattie were not carried out, so there could be no breach of the Code.

Paragraph 2.5

The Property Factor acknowledged in their written representations that there were a number of outstanding points that had not been addressed. In mitigation, they stated that the volume of correspondence from the Homeowner is significant and they had endeavoured to answer his queries. The Homeowner had not followed up on the outstanding points.

Responding to questions from the Tribunal as to why works to the gates had not yet been carried out, Mr Mayall said the Property Factor did not want to

'go to war' with the Homeowner. They wanted to sort matters out before they took action.

40. Decision of the Tribunal

Paragraph 2.1

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor, for whatever reason, stated that there was only one quote obtained, when this was clearly not the case. The Tribunal did not find the reference to a risk assessment to be false and misleading.

Paragraph 2.4

The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. The tests were within the delegated level of authority, therefore this paragraph does not apply. The Tribunal observed that the Property Factor, being satisfied that the further rectification work was required, should now be progressing the matter.

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor had not responded to the Homeowner's enquiries within a reasonable timescale.

Item 2

Invoice clarifications – alleged failure to comply with paragraphs 2.1, 2.5 and 3.3 of the Code

41. Representations by the Homeowner

Paragraph 2.1

The Homeowner said he had requested clarification in relation to various matters mentioned in an invoice dated 2nd June 2020, including asking for clarification as to whether testing of the smoke vent system was carried out under Health and Safety legislation or British Standards. He had also requested details of whether the development was insured while there were faults with the smoke vent system. He was informed that testing was carried out within BS Standards, and that the insurers had confirmed they would still likely pay out on any potential claim if the claim was an insurable peril. It was his position that the information provided was misleading or false.

Paragraph 2.5

The Homeowner said there had been some email correspondence between himself and the Property Factor after he requested the clarification referred to above, however, further clarification sought by the Homeowner on 7th

September 2020 had not been answered, despite an acknowledgement from the Property Factor on 11th September 2020.

Paragraph 3.3

The Homeowner said the Property Factor was unable to provide clarity and transparency in relation to accounting procedures, particularly in relation to the costs of electricity at the development. He had requested electricity bills in 2016 or 2017 at an AGM, but several were missing. The Property Factor was unable to provide the total cost of electricity and could not confirm that the owners had not been overcharged or mischarged.

42. Response on behalf of the Property Factor

Paragraph 2.1

It was the Property Factor's position that there was no reason to believe the development was not covered by insurance at all times, and this information had been provided to the Homeowner. No false or misleading information had been provided.

Paragraph 2.5

The Property Factor acknowledged in their written representations that there were a number of outstanding points that had not been addressed. In mitigation, they stated that the volume of correspondence from the Homeowner is significant and they had endeavoured to answer his queries. The Homeowner had not followed up on the outstanding points.

Paragraph 3.3

Mr Mayall said invoices were provided quarterly and all information requested had been provided. Responding to questions from the Tribunal regarding the missing invoices, Mr Mayall said they would have to look back at this. They could only provide invoices that they had.

43. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find that there had been a failure to comply with this paragraph of the Code. It was not apparent that any false or misleading information had been provided. The Tribunal observed that the Property Factor has shown an unfortunate reluctance to share documents with the Homeowner. There is a lack of clarity in relation to what the Property Factor does and on what authority.

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor had not responded to the Homeowner's enquiries within a reasonable timescale.

Paragraph 3.3

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor had not supplied supporting documentation and invoices on request.

Item 3

Flooding of Lift Shaft – alleged failure to comply with paragraphs 2.1 and 2.5 of the Code

44. Representations by the Homeowner

Paragraph 2.1

The Homeowner said the Property Factor had stated in an email dated 24th March 2021 that 'as previously advised' paint work had not been included in an insurance claim following flooding of the lift shaft, as it was damaged prior to the flooding. It was the Homeowner's position that the paint work was damaged as a result of the flooding and should have been included in the claim. He had provided photographs to the Property Factor showing the paint work intact and the tideline from the flooding, which proved the paint work was not damaged before the flooding incident. Furthermore, he had not been previously advised, as stated by the Property Factor, so that was also false and misleading.

Paragraph 2.5

The Homeowner emailed and telephoned the Property Factor on 12th August 2020 to inform them of flooding in the lift shaft. He followed his email up on 14th and 24th August. The Property Factor responded on 3rd and 7th September. Further information was requested by the Homeowner and this has not been provided.

45. Response on behalf of the Property Factor

Paragraph 2.1

Ms Cameron said the Property Factor had initially understood that the damage had occurred prior to the flooding, so it could not have been included in the insurance claim. After seeing the photograph referred to, it was accepted that the damage may have occurred during the flooding and it could have formed part of the claim. The position was not clear, but there had been no false or misleading information provided.

Paragraph 2.5

Ms Cameron reiterated the previous submissions that it was accepted that there had been delays in responding to requests for information.

46. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. Although the Property Factor may have been mistaken in their interpretation of events, this appeared to be down to genuine error. No false or misleading information had been provided.

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor had not responded to the Homeowner's enquiries within a reasonable timescale.

Item 4

Roof Condition Survey Report – alleged failure to comply with paragraphs 2.1, 2.5, 6.4 and 6.9 of the Code

47. Representations by the Homeowner

Paragraph 2.1

The Homeowner said the Property Factor had provided misleading or false information by stating that a quote had been provided by two contractors. The Property Factor then informed the Homeowner only one quote had been provided. When he requested further information, he was told one quote was not available as it was not a written quote.

Paragraph 2.5

By letter dated 24th March 2020, the Property Factor sent a copy of a roof condition survey report to homeowners, recommending replacement of the roof. The Homeowner requested clarification on 25th March, following up on 15th and 16th June 2020. There was some correspondence between the parties, culminating in a request for further information from the Homeowner which was acknowledged by the Property Factor on 11th September 2020. The information has not been provided.

Paragraph 6.4

It was the Homeowner's position that the roof had not been inspected and maintained, thus requiring replacement after 15 years. The Homeowner quoted various sections of the survey report in his written representations to support his position. Roof inspections were included within the WSS and the development

schedule. It was his position that the roof should be inspected rather than fixed when it failed. The Homeowner said he felt another surveyor should be engaged to provide an opinion on the roof.

Furthermore, the intumescent protection to structural steelwork in the car park, as mentioned in the roof report, was inadequate. This was highlighted to the Property Factor in 2018.

Paragraph 6.9

The Homeowner said the Property Factor should have pursued the contractor that had been instructed to clean the gutters, as it was clear from the report that the gutter contractor had caused damage to the gutter and soffit. The contractor responsible for using inappropriate materials for painting the structural steelwork should also have been pursued.

48. Response on behalf of the Property Factor

Paragraph 2.1

Ms Cameron denied that any information provided was misleading or false. The written representations state that the Property Factor informed the Homeowner that the second quote was by email.

Paragraph 2.5

Ms Cameron reiterated the previous submissions that it was accepted that there had been delays in responding to requests for information.

Paragraph 6.4

Ms Cameron referred the Tribunal to page 149/166 which was the list of cyclical maintenance. The roof was not included within cyclical maintenance. The Property Factor is not qualified to inspect the roof, and there are no formal regular inspections of the roof. Any work done is reactive.

Paragraph 6.9

Ms Cameron said the roof report was quite specific regarding poor workmanship at the time of construction that had led to movement, which caused the issues now being seen, rather than the gutter cleaning. The written representations of the Property Factor stated that no evidence had been provided to support the assertion that any of the roof issues were due to a lack of maintenance.

49. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There was insufficient evidence that any false or misleading information had been provided.

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor had not responded to the Homeowner's enquiries within a reasonable timescale.

Paragraph 6.4

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There is a programme of works, albeit it is contained within several documents.

Paragraph 6.9

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. There was insufficient evidence to link the state of the roof to the guttering contractors. In relation to the fire protection to steelwork, there was also insufficient evidence to determine failure to comply with the Code.

Item 5

Chamber Ref: FTS/HPC/PF/17/0274 – alleged failure to comply with paragraph 2.1 of the Code

50. Representations by the Homeowner

The Homeowner lodged a copy of a decision of a previous Tribunal between the same parties. Evidence given on behalf of the Property Factor at that hearing had been accepted by the Tribunal. The Homeowner submitted that the evidence was false, and later obtained evidence to that effect. The Property Factor had accepted the evidence and agreed to amend the minutes of a meeting held on 12th April 2018 to reflect the correct position. The amended minutes had not been circulated to the homeowners. It was the Homeowner's position that the Property Factor had provided false and misleading information to the previous Tribunal. Responding to questions from the Tribunal, the Homeowner said he did not have the evidence within the required timescale to take this matter back to the original Tribunal.

51. Response on behalf of the Property Factor

Ms Cameron said this was not a relevant complaint. She explained that minutes are issued in draft for comments. When their content is agreed, the final minutes are issued. She was uncertain whether the minutes were still in draft.

52. Decision of the Tribunal

The Tribunal decided this was not an appropriate matter to bring before the Tribunal, as it involved alleged false and misleading information given to a Tribunal, rather than to the Homeowner by the Property Factor as covered by the Code. The Tribunal observed that it would have been open to the Homeowner to take forward a complaint about the Property Factor's failure to issue the amended minutes.

Item 6

Vent Fault on the Smoke Vent System – alleged failure to comply with paragraphs 2.1, 2.4, 2.5, 3.3, 5.2 and 6.4

53. Representations by the Homeowner

Paragraph 2.1

A letter was sent to homeowners on 1st April 2019 (Production 23), regarding smoke vent system repairs, and including a ballot form. The Homeowner's complaint was that it was not a ballot on whether or not to proceed with the proposed works, but, rather, a ballot on using or offsetting the cost of the works against the sinking fund balance. Furthermore, the letter purported to enclose a quote from a contractor, when the document enclosed was actually an estimate. It was his position that this letter was misleading. Responding to questions from the Tribunal, the Homeowner explained that the costs contained in an estimate could change, whereas a quote was fixed. Asked why there was any question over whether or not to fix the vents, the Homeowner said there was no doubt in his mind that the work had to be done. He had reported a fault, and nothing had been done.

Paragraph 2.4

The Homeowner said there was no discussion with homeowners regarding this work and no meeting was held. No approval was sought for the works. The Property Factor had given the go ahead for the work before all the funds were ingathered, yet this was not an emergency repair.

Paragraph 2.5

The Homeowner said he had made the Property Factor aware of a fault on the fire panel at the front door of his block at the 2018 AGM. It then transpired that the Property Factor had been aware of this issue earlier and had obtained a report from Realm dated 8th March 2018, yet this was never brought to the attention of the homeowners, or mentioned at the AGM. The first communication about the issue with homeowners was by letter dated 7th November 2019. The Homeowner made a request for documentation and information on maintenance carried out and charged for to date. This has not been provided.

Paragraph 3.3

Following discussion, the Homeowner withdrew this complaint.

Paragraph 5.2

The Homeowner said he had asked the Property Factor on 13th June 2019 to confirm if the system required to be operational for any appropriate fire safety or building regulations, and for the building insurance. The Property Factor could not give a definitive answer, and was not able to provide anything in writing. They advised the Homeowner to contact the insurer directly. According to the Homeowner, this constituted a breach of this paragraph as the Property Factor should be able to provide clear information and could not. On 20th July 2020, the Property Factor advised the Homeowner that they had spoken to the insurer and been told they would pay out on an insurable peril but the equipment should be maintained and repaired whenever the Property Factor becomes aware of an issue.

Paragraph 6.4

The Homeowner said this paragraph was breached as the Property Factor has no development maintenance plan for the smoke vent system. This was admitted by a property manager. It was the Homeowner's position that, if the system had been inspected and maintained properly, it would have been operational and would not have required a large costly repair. It was his position that annual testing had not taken place. He referred to section 6 of the development schedule (p149/166) which stated that routine property inspections would be carried out.

54. Response on behalf of the Property Factor

Paragraph 2.1

It was Ms Cameron's position that the ballot letter was clear. Ms Cameron referred to an email from the Property Factor dated 12th June 2019 (Production 25 p7/9) where the Property Factor stated that they had checked with the contractor and, although the document stated it was an estimate, it was a quote.

Paragraph 2.4

Ms Cameron said that the homeowners' responses indicated that they were in favour of the work being carried out. Although she could see the Homeowner's point, the positive ballot indicated the works could go ahead. If the homeowners had not been in favour, the work would not have been carried out. The letter was, arguably, a form of consultation.

Paragraph 2.5

Ms Cameron reiterated the previous submissions that it was accepted that there had been delays in responding to requests for information.

Paragraph 5.2

Ms Cameron referred to the written representations which stated that the insurance policy documents are available on the client portal and accessible for all clients. The quarterly invoice issued to homeowners details the apportionment split for all charges including insurance. There is no impact on insurance cover as a result of any fire maintenance equipment being non-operational. Ms Cameron said that a block insurance policy is different to a home insurance policy. She accepted the Property Factor could have given a more comprehensive response at the time.

Paragraph 6.4

Ms Cameron said the smoke vent systems had been inspected and maintained on a regular basis. She directed the Tribunal to invoices in this regard for 2013, 2014, 2018 and 2020. The invoices for the missing years could not be found. The programme of works document was not drawn up until 18 months ago, but works were carried out. The Property Factor now has a cyclical maintenance function and work orders are issued automatically for these works.

55. Decision of the Tribunal

Paragraph 2.1

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The letter of 1st April 2019 makes clear that the proposal that is being referred to is whether or not to use the sinking fund for the works. There was some carelessness regarding terminology by the contractor and the Property Factor in relation to the estimate/quote, but the contractor confirmed eventually that the document was a quote, and not an estimate. The cost of work at the time of invoicing had not changed from the cost quoted. There was no misleading or false information provided.

Paragraph 2.4

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Tribunal observed that the letter of 1st April 2019 should have been clearer in indicating that it was a consultation that required the approval of the homeowners rather than emergency work that did not require approval.

Paragraph 2.5

The Tribunal found there had been a failure to comply with this paragraph of the Code in that the Property Factor had not responded to the Homeowner's queries within prompt timescales.

Paragraph 5.2

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. Each homeowner is provided with the necessary documentation and information on the terms of the policy. The Tribunal observed that the insurer or the Property Factor should have referred the Homeowner at an earlier stage to the policy documents and provided a more definitive answer.

Paragraph 6.4

The Tribunal did not find there had been a failure to comply with this paragraph of the Code. The Tribunal accepted the evidence of the Property Factor that the system had been regularly maintained as part of a programme of cyclical maintenance.

Failure to carry out property factor duties

56. The Tribunal noted that many of the Homeowner's allegations of failures to carry out property factor duties were actually duties that arose from the Code. The Tribunal explained that it would not consider the same matter as an alleged failure under the Code and property factor duties. The issues that appeared to relate to property factor duties are as follows:

57. The development is not being maintained appropriately (PF/20/2432 & PF/21/0476)

The Homeowner said there had been a failure to maintain the roof, the gates and the smoke vent system appropriately, as previously referred to.

The Factor has instructed works that are not appropriate (PF/21/0476)

The Homeowner said the Property Factor had instructed a contractor to paint steelwork at the underground carpark with zinc phosphate metal primer and metal shield satin finish (Production 35). This was inappropriate. The roof report showed that intumescent paint was required.

58. Response on behalf of the Property Factor

Ms Cameron referred to previous submissions in relation to maintenance of the development.

With regard to the paint work, she said the Property Factor puts confidence in its contractors and project manager.

59. Decision of the Tribunal

The development is not being maintained appropriately (PF/20/2432 & PF/21/0476)

The Tribunal found the Property Factor to have failed in carrying out their property factor duties by not maintaining the development appropriately in respect of the failure to progress works to the gates, and in failing to carry out works promptly to the smoke vent system upon being notified of issues. No reasonable explanation was provided for the delays in attending to faults in both systems. The Property Factor also failed in their duties by failing to include paint damage to the lift following flooding in an insurance claim. The Property Factor has a duty to the Homeowner and all other residents in the development to ensure that the safety equipment and automated gates and barriers are working properly and safely.

The Factor has instructed works that are not appropriate (PF/21/0476)

The Tribunal did not find this to be a failure to carry out property factor duties. The Tribunal observed that the Property Factor should rectify the issue in relation to the painting of the steelwork, but there was insufficient evidence to determine that they instructed inappropriate works.

Observation

60. The Tribunal observed that the Property Factor appeared to be reluctant to share documents. This reluctance lessens transparency. There appeared to be a lack of leadership and a reluctance to take action and initiative in dealing with safety and maintenance matters. There was a lack of clarity about the responsibilities of the Property Factor. The Property Factor's methods of portfolio-wide management lead to issues surrounding transparency and openness.

Proposed Property Factor Enforcement Order (PFEO)

61. Having determined that the Property 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.
62. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Property Factor's failures.
63. 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.
64. 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

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

9th February 2022