

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 (“the Act”) and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber Ref: FTS/HPC/PF/22/1654 and FTS/HPC/PF/22/1655

Property: 61 Kelvin Court, Great Western Road, Glasgow G12 0AG (“the Property”)

The Parties:-

Mrs Lesley MacKiggan, 61 Kelvin Court, Great Western Road, Glasgow G12 0AG (“the homeowner”)

Newton Property Management Limited, registered in Scotland under the Companies’ Acts (SC224378) and having their registered office at 87 Port Dundas Road, Glasgow G4 0HF (“the property factors”)

Tribunal Members:

George Clark (Legal Member/Chairman) and Mike Links (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) decided that the property factors had failed to comply with Section 2.7 of the Property Factors Code of Conduct effective from 16 August 2021 and had failed to comply with the Property Factor’s duties. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. The homeowner submitted two applications to the Tribunal, both received on 31 May 2022. They relate to the same set of facts and circumstances, but one refers to conduct prior to 16 August 2021, so is covered by the Property Factors Code of Conduct effective from 1 October 2012 (“the 2012 Code of Conduct”), whilst the other is covered by the Property Factors Code of Conduct effective from 16 August 2021 (“the 2021 Code of Conduct”).
2. The complaints made under the 2012 Code of Conduct referred to Sections 1.1, 1.2, B4, 2.2, 2.3, 2.7, 3 (Introduction), 5.6, 6.1, 6.4, 6.5, 6.6 and 6.7 and 7.
3. The complaints under the 2021 Code of Conduct referred to OSP2, OSP3, OSP4, OSP6, OSP10, OSP11, Sections 1.1, 1.2, B4, 2.2, 2.3, 2.7, 3 (Introduction), 5.6, 6.1, 6.4, 6.5, 6.6, 6.7 and 7.
4. The homeowner also complained that the property factors had failed to comply with the Property factor’s duties.
5. The applications were accompanied by a very large number of documents, the application and documents amounting to more than 100 pages. On 5 September 2022, the Tribunal received further written representations from the homeowner, again extending to over 100 pages, more written representations on 6 October 2022, and further extensive written submissions on 3 December 2022, following the Hearing.
6. On 5 September 2022, the property factors provided 30 pages of written representations to the Tribunal and indicated that they did not wish to take part in an oral Hearing.
7. In her applications, the homeowner summarised the main issues as:-
 - A perceived unhealthy relationship between the property factors and a small group of residents, which has led to a deep division between the majority of proprietors, most of whom are unaware of the atmosphere, and a probably similar few, who just want Kelvin Court to be run effectively and in the best interests of all.
 - There had been innumerable instances of negligence on the part of the property factors. They did not respond to a leak from common pipes, refusing to acknowledge that they were, in fact, common. They took weeks and weeks to investigate, refused to attend to see for themselves, giving COVID as the excuse, and gave false information to vulnerable proprietors, telling them that it was their

responsibility to approve contractors and pay any excess charges, despite the repairs being to common property.

- Communication was, in very many instances, extremely poor, especially with one particular Property Manager, who complained that he had thousands of emails. This was due to the fact that he had not replied to repeated/multiple requests or complaints from proprietors. Many emails were very slow to be acknowledged and many were simply ignored.
 - Criticisms of the property factors' "Preferred Contractors", some of whom have proved to be unsatisfactory.
 - Contradictory statements made by the property factors. At the 2019 AGM, the tendering for the East and West roofs was voted upon. The contract was awarded to one of the property factors' preferred contractors, who had no expertise in flat roofs. One owner had suggested that one of the other contractors, with 200 years background in roofing, be asked to re-tender, but the property factors stated that it would be "inappropriate and unprofessional". The contract for cleaning had, however, been awarded to a company, following a tender process. The property factors said they had not asked that company to re-tender, but in various emails said they had negotiated a lower price, bringing the quote to below that of another company.
 - The property factors' tendering processes have been far from transparent. The homeowner's belief is that frequently no tenders were sought, and contractors appointed on a "preferred contractor" basis.
 - The treatment of one particular contract was shameful. Slanderous allegations had been made about a principal in the company by the small group of residents who had the unhealthy relationship with the property factors, who had acquiesced in that treatment.
 - Failure to adhere to the results of the EGM of February 2022 regarding an issue of the removal of defective masonry. The Meeting had endorsed a Motion to appoint a conservation architect, but the property factors had failed to carry this through and had simply appointed contractors.
 - The culture of behaviour of the property factors. The homeowner's distinct impression was that whilst they make a pretence of compliance, in fact they do what they want.
8. The homeowner wished the property factors to be heavily reprimanded and ordered to pay a large compensatory sum to Proprietors for the financial losses they had incurred in mismanaged projects, and in the hugely increased insurance premium (£89,000 in 2021 and £112,000 in

2022) caused by their many repeated delays in addressing repairs and leaks. The homeowner's opinion was that £100,000 would be equitable.

9. The property factors provided the Tribunal with detailed written representations on 7 September 2022. They contended that several of the complaints related to services provided to proprietors other than the homeowner, so should not be considered by the Tribunal. They also said that the complaint under Section B4 of the 2021 Code of Conduct was the subject of consideration by the Tribunal in connection with two concurrent cases, namely PF/21/3219 and PF/22/2246. One particular complaint was an alleged breach relating to the homeowner's personal data. Such a complaint as this, they said, should be directed to the Information Commissioner's Office.
10. The property factors stated that their office staff receive an average of 20 emails per working day, as well as numerous additional telephone calls and letters, from residents at Kelvin Court. In the last year, they had received more than 4,000 emails from the homeowner and her neighbours. Kelvin Court is a development of 101 flats and their position was that this level of email traffic is quite disproportionate to the size of the development and it is inevitable that that they will sometimes take longer to respond than the indicative timescales set out in their Written Statement of Services, which says they will "try to respond within these timescales". In relation to the awarding of the cleaning contract, the property factors said that more than 25% of residents had emailed them to say they approved of the contractor to whom the contract would have been given, with a smaller number indicating their opposition. As a result of the objections, the company concerned had withdrawn. A number of residents had complained that they had repeatedly previously had issues with the company next in line following the tender process, so the property factors had used their delegated authority to appoint a company which had not worked on the development in the past. It was only after having appointed them, that the property factors made enquiries of them as to a possible reduction in their price. The issues regarding the West and East roofs were due to be discussed at a meeting with the residents on 20 September 2022.

Hearing

11. A Hearing was held by means of a telephone conference call on the morning of 6 October 2022. The homeowner was present. The property factors were not present or represented.
12. The Tribunal advised the homeowner that, if it was established that some of her complaints related to services provided by the property factors to

other owners, rather than to herself, the Tribunal would not consider them. The Tribunal could not consider any complaints which were, in effect, being brought on behalf of others. For clarification, the homeowner told the Tribunal that the costs of all common repairs are split amongst the 101 proprietors, so she was, for example, liable for a proportion of the cost of repairs to both the West and the East roof.

13. The homeowner advised the Tribunal of the outcome of the meeting of the residents with the property factors on 20 September 2022. In their written representations, the property factors had indicated that this meeting was due to take place to discuss the roof repairs. The homeowner told the Tribunal that no decisions had been taken at the meeting, but that it had emerged that the property factors had not entered into formal contracts for either the West or East roof.
14. The view of the Tribunal was that it was practically impossible to consider the many documents provided by the homeowner and the detail of complaints under the various Sections of the Codes of Conduct over a telephone conference call and that a face-to-face Hearing would be necessary. The homeowner agreed and asked if this could be arranged before Christmas as she was to be abroad from 28 December until 16 April 2023. The Tribunal agreed to try to facilitate that request. The homeowner agreed to provide the Tribunal with a copy of the Minutes of the meeting of 20 September 2022 and the Tribunal decided to issue a Direction to the property factors to confirm whether they had entered into formal contracts for the works to the West and East roofs of the block of which the Property forms part and to provide the Tribunal with copies of any documents in relation to other applications before the Tribunal, which they wished the Tribunal to consider as part of their written representations. The property factors did not comply with the Direction.

Continued Hearing

15. The continued Hearing was held at Glasgow Tribunals Centre, 20 York Street, Glasgow, on the morning of 20 December 2022. The homeowner attended and was accompanied by a supporter, Mrs Ena Jess. The property factors were not present or represented.
16. At the request of the Tribunal, the homeowner explained the difference between the cost of the work to the West roof and the work to the East roof. The estimated cost for the West roof had been £570,000, including a contingency of £37,000. After the work was completed, £30,000 was repaid to the owners, so the final cost was £540,000. The cheapest estimate for the East roof had been £34,000 less than the £528,000 estimate that was accepted on the recommendation of the consultants,

Wiseman Associates, who said that the contractors who had worked on the West roof had the experience of having done that work and would be using the same team, so there would probably be a saving in the long term. In the event, however, the company selected to carry out the work had not used the same team but had employed 5 different sets of sub-contractors. This had resulted in an overspend of £48,000 and a total cost of £576,000. It was her share of this overspend that the homeowner was refusing to pay. In addition, the contractors had used the caretaker's facility for 2 years and the homeowner was not prepared to pay until it is deep cleaned and redecorated. The meeting of 20 September 2022 of Proprietors with the property factors and a representative from Wiseman Associates had been poorly attended and no decisions had been taken.

17. The homeowner told the Tribunal that the issues regarding the canopies had still not been resolved. The property factors had awarded the contract at an estimated cost of £13,000 to a company whose work had been poor. The company had agreed to come back but had failed to resolve the problem. They had replaced cast iron downpipes with plastic ones. The property factors had said many times that they would be re-done at no cost to the proprietors and that the work would be done at the end of the east roof work. The work on the canopies was now going to cost £29,000 and would be carried out by Glasgow Property Maintenance (one of the property factors' preferred contractors). Many of the owners had written to the property factors to say that they would prefer to use a contractor recommended by Fiona Sinclair, a conservation architect and the property factors had failed to obtemper a Decision taken at an EGM on 23 February 2022 to appoint her. It was, the homeowner said, necessary that the appointed contractor was suitably qualified to remove or fix spalling concrete. The matter is ongoing.
18. In relation to the process by which the cleaning contract was awarded, the property factors had said that they had not gone back to the chosen contractors until after the contract had been awarded. A small number of owners (probably about 25) were, the Respondent said, the ones who had been criticising the previous contractors. The homeowner stated at it was that group that was responsible for the bulk of the emails. The property factors had had 4 property managers for Kelvin Court in 4 years, the latest one having left on 7 December 2022.
19. In her concluding remarks, the homeowner told the Tribunal that she was very disappointed by the property factors' delay in dealing with problems. She felt they should be "shamed" for their lack of adherence to taking care of the building, which had resulted in problems escalating and costs increasing significantly. They had been very remiss in attending to reports

of leaks in the building, resulting in the amounts claimed on insurance being much higher than they would have been if the property factors had acted promptly, and very large consequential increases in the block insurance premiums.

Reasons for Decision

20. The Tribunal considered firstly the three main heads of complaint. The first was the issue of the East and West roof. The essence of the complaint was that the final bill for the West roof had come in under budget at £540,000, but that for the East roof had come in £48,000 over the estimate, at £576,000. The breakdown of costs had been given to owners in a letter from the property factors of 20 July 2022. It showed a residual balance of £48,109.33, but the property factors indicated in that letter that they were not proposing to pay the balance until they had a meeting with their consultants Wiseman Associates and with the committee or the owners to discuss the additional costs and a full breakdown of where these costs had arisen. They enclosed with that letter a copy of a document from Wiseman Associates in which the consultants confirmed that monies had been ingathered from the owners on the basis of the final account for the West roof, which had been £514,645.04. This had been on the assumption that the works would be identical to both blocks. There had, however, been constant increases in material and labour costs, the use of cast iron had increased the cost, and there had been significantly more joinery undertaken on the East roof due to its configuration and from defects that emerged as the work progressed.
21. The Tribunal noted that the work on the East roof was carried out after the COVID-19 lockdown of 2020 and was aware that one of the consequences of the lockdown had been an acute shortage of labour and materials, which had led to significant increases in the cost of both. The homeowner had expressed concern that it appeared there was no contract for the work on the East roof, the property factors having stated at the meeting on 20 September 2022 that there had been an exchange of letters appointing the contractors. They had explained at that meeting that it was not a fixed-price contract. Funds had been ingathered from proprietors on the basis of the actual cost of the work on the West roof. They accepted that there had been a lower tender but stated that, with a new contractor, work items would have been repriced and that the additional items which resulted in the £48,000 shortfall would also have had to be priced by the other contractor, had the contract been awarded to them instead.
22. The view of the Tribunal was that the property factors had not acted unreasonably in recommending the awarding of the contract for the East

roof. The work on the West roof had been carried out to a standard with which the proprietors appeared to be content. Property factors are not engaged as building experts. They are appointed to administer the process of common repairs. In the present case, they used suitably qualified consultants, who had recommended the contractors who had carried out the work on the West roof, because their knowledge of the roof, based on their experience on that contract would be helpful. The Tribunal noted the homeowner's disappointment that the team that worked on the West roof was not employed on the East roof, but the effects of Brexit and the global pandemic have led to worker shortages and greater movement of workers within the building industry and it was not the fault of the property factors that sub-contractors were used, so long as the consultants were content that the work was being carried out to an acceptable standard.

23. The homeowner contended that there was a contingency of £33,000 built into the estimate of costs for the East roof. There had been a contingency element in the costing for the West roof and the final cost had come in higher than the estimate, but lower than the funds ingathered, which included the contingency provision. This had resulted in a refund to the owners. The costing for the East roof had been based on the actual outturn for the West roof, not on an estimate with an added contingency, and funds totalling £528,000 had been ingathered from the proprietors. The homeowner had stated that there was a shortfall of £33,000 (namely the contingency) built in to that figure, so the overspend was £81,000, not £48,000. The Tribunal did not agree with this interpretation. The estimated cost and funds ingathered had been based on the actual cost of the West roof works. The additional cost was, therefore, £48,000. The Tribunal decided that the property factors could not be held responsible for that overspend, which had been explained by rising costs of labour and materials for reasons that were well-understood and a certain amount of work resulting from the two roofs not being identical. In addition, the property factors had taken appropriate professional advice during the tendering and execution of work process.
24. The Tribunal noted the comment by the homeowner following the meeting of 20 September 2022 that there did not appear to be any contract for the work on the east roof, Wiseman Associates having stated that there had been an exchange of letters appointing the contractors. The Tribunal had not seen these letters, and, in any event, this complaint related to a matter that had arisen after the date of the application, so the Tribunal could make no finding as to whether the letters constituted a contract.

25. The Tribunal then considered the second main head of complaint, namely the issue of the canopies. The homeowner had stated that The property factors had awarded the contract at an estimated cost of £13,000 to a company, whose work had been poor, and the property factors had said many times that they would be re-done at no cost to the proprietors and that the work would be done at the end of the east roof work. The work on the canopies was, however, now going to cost £29,000 and would be carried out by Glasgow Property Maintenance (one of the property factors' preferred contractors). Many of the owners had written to the property factors to say that they would prefer to use a contractor recommended by Fiona Sinclair, a conservation architect and the property factors had failed to obtemper a Decision taken at an EGM on 23 February 2022 to appoint her.
26. The property factors wrote to the residents on 20 July 2022 with an update on the canopies and the East roof. They noted that when the original canopy works were carried out, there was a general consensus amongst the owners that these works were not sufficient. They understood that only one canopy continued to leak and this had been re-done by the contractors who were working on the roofs, at no additional cost to the owners. The property factors had hoped that, due to the size of the overall contract, the canopy roofs could be replaced by the roof contractors as an extension of goodwill from the main contract, and their surveyor had been largely supportive of this view. The intention to remediate the canopies at no cost to the owners had been discussed positively on multiple occasions with members of the Committee, with the property factors understanding that it should have been achievable, and the property factors understood that this had been communicated internally through much of the Kelvin Court community.
27. The Tribunal's view was that the property factors had genuinely believed, with the support of the consultants, that it would be possible to agree with the main roof contractors that they would carry out the works to the canopies at no cost, as a gesture of goodwill, given the size of the main contract. This outcome had not been achieved, due to rising costs within the industry. The property factors had, however, then negotiated a full refund from the contractors who carried out the original, unsatisfactory, work. There was no evidence to indicate that the property factors had given the homeowner information that they knew or believed to be false or misleading on this matter.
28. At the Hearing, the homeowner confirmed that the canopy at Entrance 4 had now been replaced. The Minutes of the Meeting of 22 November 2022 record that the property factors stated that a quote from Saltire had been

received and that Fiona Sinclair was to be consulted due to the listed status of the building. They had also referred to a meeting with her in July 2022. It appeared to the Tribunal that the question of the canopies is an ongoing matter on which it could make no finding and that, whilst the Tribunal could not determine when the property factors had first consulted Ms Sinclair, it had been, at latest, in July 2022. Accordingly, the Tribunal could not make a finding that the property factors had failed to obtemper an instruction given to them at the EGM in February 2022.

29. The final main head of complaint related to the re-tendering for the contract for the provision of grounds maintenance and cleaning services. The property factors, in a letter to the Committee of 9 May 2022, said that the decision to re-tender had been based on negative feedback received from multiple owners on the performance of the incumbent. As the tender exercise concluded, the successful tenderers found themselves the recipients of voluminous negative feedback from certain parties within the Development, leading them to ultimately withdraw their bid. This in turn had led to the property factors using their best judgement and delegated authority to appoint another contractor, after negotiating a discount on their services. The property factors accepted that their decision could have been explained better, but that they had formed the view that, as the successful tenderers had withdrawn and as there had been negative feedback from residents about the incumbents, the best solution was to appoint contractors who had no previous connection with the development. It was only after having appointed them that the property factors had sought and been successful in obtaining a discount on the contract price that that firm had quoted.
30. The Tribunal was unwilling to consider the homeowner's complaint of a perceived unhealthy relationship between the property factors and a small group of residents, which, she said, had led to a deep division between the majority of proprietors, most of whom were unaware of the atmosphere, and a probably similar few, who just wanted Kelvin Court to be run effectively and in the best interests of all. The homeowner referred to the group as a "dissident group" comprising a number of former Committee members who had resigned but remained in close contact with the property factors. The property factors had alluded to internal disagreements amongst the homeowners. No evidence was provided to the Tribunal sufficient to establish that the property factors were acting on the instructions of any such group and insinuations to that effect by the homeowner, however sincerely felt and expressed, must be regarded as conjecture. Accordingly, the Tribunal did not consider the homeowner's complaint that the property factors' decision to put out the cleaning

contract to re-tender had been precipitated by complaints from the so-called “dissident group” about the incumbents.

31. It was apparent to the Tribunal that the process of the re-tender had been very contentious, with extremely strong views having been expressed against both the incumbents and the firm which provided the lowest tender for the cleaning contract. The property factors wrote to residents on 30 March 2022, giving details of the tenders received, both for cleaning and for grounds maintenance. They said that they were proposing to appoint the companies that had provided the lowest figures, but on 5 April 2022, they wrote again to say that a number of owners had emailed them to say they did not want these companies to be awarded the contracts, although the numbers of objectors was fewer than the number who had complained about the incumbents, leading to the re-tendering exercise. They felt that having a new contractor altogether was best for the development and that they would be appointing such a firm, the firm originally successful in the tendering for the cleaning contract having withdrawn their tender. The Tribunal did not consider that to have been an unreasonable stance to take, given the apparent level of dissatisfaction with the other two companies. The Tribunal did consider that the property factors had erred in advising the residents on 5 April 2022 that a different company had been appointed, when they had, in their letter of 30 March 2022, told residents that any objections to either of the contractors being awarded the contract had to be intimated to the property factors in writing by 5pm on 6 April. There was, however, no evidence to suggest that the outcome would have been different had the property factors waited another day.
32. The homeowner, in her application, referred to a failure of the property factors to respond to a leak from common pipes, refusing to acknowledge that they were, in fact, common. The view of the property factors was that this matter related to other residents and not to the homeowner. The Tribunal agreed with this view and noted that the homeowner had said in her written representations that she had been involved in many of the disputes with the property factors, helping other proprietors to argue the case that water ingresses were caused by a common pipe or leak and therefore should be an insurance claim or a common charge.

The 2012 Code of Conduct

33. The Tribunal then considered the complaints made under the 2012 Code of Conduct.

34. **Section 1 of the 2012 Code of Conduct** provides that property factors “must provide each homeowner with a written statement of services setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement” and that, if a homeowner applies to the Tribunal for a determination in terms of Section 17 of the Act, the Tribunal will expect property factors to be able to show how their actions compare with the written statement of as part of their compliance with the requirements of the Code. The Tribunal did not uphold the complaint under Section 1.1 of the 2012 Code of Conduct, as the homeowner did not offer any evidence that this particular Section had not been complied with. It appeared that the homeowner was referring to Section 1.1 of the 2021 Code of Conduct and the complaint is dealt with by the Tribunal under that heading.
35. The homeowner’s complaints referred to as being under Sections 1.2, B4 and 2.7 of the 2012 Code of Conduct were not considered by the Tribunal as there are no such Sections in that Code. The homeowner appears to have referred mistakenly to the numbering and lettering of the 2021 Code. In addition, the complaints under Sections 2.2, 2.3, 3, 5.6, 6.1, 6.5, 6.6 and 6.7 of the 2012 Code of Conduct were not considered by the Tribunal as they did not appear to be relevant to the application, the view of the Tribunal being that, again, the homeowner was incorrectly using the numbering of the 2021 Code of Conduct. It was likely that the same error applied to the remaining Sections of the 2012 Code of Conduct which had been included in the complaint, namely Sections 1.1, 3 (Introduction), 6.4 and 7, but the Tribunal gave these consideration, as there were such Sections in the 2012 Code, so might be relevant, and the substance of the complaints, if upheld, could constitute a failure to comply with one or more of these Sections.
36. **The Introduction to Section 3 of the 2012 Code of Conduct** refers to Financial Obligations and states “*Homeowners should know what they are paying for, how the charges were calculated and that no improper payment requests are involved.*” The homeowner’s complaint under this Section is included in its findings in relation to the equivalent Section of the 2021 Code, namely Section 3.
37. **Section 6.4 of the 2012 Code of Conduct** provides “*If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of Works.*” The Tribunal did not uphold the complaint under Section 6.4 of the 2012 Code of Conduct for the reasons set out in its determination under Section 6.7 of the 2021 Code of Conduct.

38. **Section 7 of the 2012 Code of Conduct** deals with Complaints Resolution. The homeowner stated in her written submissions that the Complaints Procedure had been adhered to by the property factors, but that certain questions had been evaded or ignored on the spurious excuse that the current property manager (at the date of the application) had not been involved at the time and that the then property manager had departed, supposedly having deleted relevant emails. The response of the property factors was that the property manager was facing upwards of 4,000 emails a year, many of which were intemperate, relating to Kelvin Court. They had found it challenging to retain staff for the Kelvin Court contract regardless of their internal support mechanisms. The view of the Tribunal was that the homeowner's complaint related not to the complaints resolution procedure, but to the fact that she was not satisfied with the responses to her complaints. Accordingly, the Tribunal did not uphold the complaint under Section 7 of the 2012 Code of Conduct.

The 2021 Code of Conduct

39. The Tribunal then considered the homeowner's complaints under the 2021 Code of Conduct.
40. **OSP2** provides "*You must be honest, open, transparent and fair in your dealings with homeowners.*" The homeowner's complaint related to the tendering and awarding of contracts processes, her particular emphasis being on the retendering of the cleaning and garden maintenance contracts. The Tribunal has already noted the fact that the property factors did not wait until the deadline for objections before telling residents that they had appointed contractors for the cleaning and garden maintenance contracts, but that the opinion of the Tribunal was that there was no evidence that the outcome would have been different had they waited another day. The homeowner also referred to her contention that, when she was on the Committee, requests for sight of tenders and invoices were rarely complied with. Her belief was that frequently no tenders were sought, but she also said that the Committee had not, apparently, pursued the matter. The Tribunal did not uphold this complaint, as the failing, if any, on the part of the property factors was a failing in a duty to the Committee, not the homeowner personally.
41. **OSP3** provides "*You must provide information in a clear and easily accessible way.*" The homeowner referred here to the Quarterly Accounts. This element is dealt with under the Tribunal's determination in relation to Section 3 of the 2021 Code. The homeowner also referred to examples of poor communication and non-communication, but the instances she gave

related to the property factors' dealings with the owners of Flats 50 and 55, not with the homeowner, so were not considered by the Tribunal.

42. **OSP4** provides "*You must not provide information that is deliberately or negligently misleading or false.*" The homeowner's complaint under this heading was that the property factors had permitted, without challenge, accusations, which she contended were vicious and false, against the then incumbent cleaning and gardens maintenance company. This had not helped that company when the retendering process was undertaken.
43. The Tribunal did not uphold the complaint under OSP4. The property factors would be required to listen to all views expressed by residents and were not obliged under the 2021 Code to challenge the residents on allegations the subject of which would not necessarily have been within their knowledge. Their passive stance could not be interpreted as providing information that was negligently misleading or false.
44. **OSP6** provides "*You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.*" The homeowner's complaint related primarily to poor communication and the failures on the part of one property manager in particular to respond to queries or to action matters. The homeowner was of the view that the property factors had failed this individual by not giving him sufficient training and that he had been promoted beyond his capability.
45. The Tribunal did not uphold the complaint under OSP6. The issue of communication would be more appropriately dealt with under Section 2.7 of the 2021 Code and any opinion that the property factors had failed an individual could only be regarded as speculation.
46. **OSP10** provides "*You must ensure you handle all personal information sensitively and in line with legal requirements on data protection.*" The Tribunal agreed with the view of the property factors that an alleged breach relating to the homeowner's personal data should be directed to the Information Commissioner's Office, so did not uphold the complaint under OSP10. Alleged data protection breaches by the property factors involving two Committee members were not considered by the Tribunal as they related to persons other than the homeowner.
47. **OSP11** provides "*You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling*

procedure.” This complaint was upheld by the Tribunal, its findings being addressed in relation to Section 2.7 of the 2021 Code.

48. **Section 1.1 of the 2021 Code** provides “*A property factor must provide each homeowner with a comprehensible WSS (written statement of services) setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner.*”
49. **Section 1.2 of the 2021 Code** provides, *inter alia*, that a property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners at the earliest opportunity (in a period not exceeding 3 months) where substantial change is required to the terms of the WSS. The homeowner contended that the WSS changed almost annually without distribution to owners. The property factors, in their written representations, stated that copies of their Written Statement of Services were issued to all owners on 7 March 2019, 6 March 2020, 3 March 2021 and 8 March 2022. They were either attached to an email accompanying a common charge account or were sent by hard copy to owners who did not have access to email. The Applicant, in her written representations of 3 December 2022, acknowledged that the property factors did publish on the reverse of their Quarterly Accounts details of how to apply for their Written Statement of Services, but that she had never noticed these pages as they are so faint as to be virtually blank. She said that they did not alert changes to their Written Statement of Services either by email or hard copy and that there were quite a number of changes to its various editions. The property factors stated that the Written Statement of Services issued on 8 March 2022 contained no substantial changes.
50. The Tribunal did not uphold the complaints under Sections 1.1 and 1.2 of the 2021 Code. There was no evidence provided to the Tribunal that the property factors had failed to provide a copy of the Written Statement of Services to homeowners or that they had failed do so where substantial change to it was required. The homeowner had clearly seen or at least had access to the various versions, as she referred to the fact that the Written Statement of Services was changed almost annually, and she did not challenge the statement by the property factors that copies had been issued to homeowners in March of each year from 2019 to 2022.
51. **Section 1.B.(4) of the 2021 Code** provides that the WSS must set out “*the core services that the property factor will provide to homeowners. This must include the target times for taking action in response to requests from homeowners for both routine and emergency repairs and the frequency of*

property visits (if part of the core service.)" The homeowner's complaint was that target times were not met. This is addressed by the Tribunal in its findings in relation to Section 2.7 of the 2021 Code.

52. **Section 2.2 of the 2021 Code** provides that "*Factors are required to comply with current data protection legislation when handling their client's personal data, and to ensure that this information is held and used safely and appropriately.*" The homeowner's complaint was that the property factors had held a meeting with a group of Kelvin Court proprietors on 21 September 2021, at which allegations were made by the group that the then Committee, including the homeowner, were intent on removing the property factors and replacing them. On 18 October 2021, the homeowner made a subject access request to know the content of the discussion. The property factors' response on 27 October 2021 was that they had no record of processing any data relating to the homeowner and that, unless there was a requirement to do so, they did not as a rule keep records of meetings or conversations with customers. They added that they had no recollection of the homeowner having been personally mentioned. The homeowner stated on 3 November 2021 her intention to report her concerns to the Information Commissioner's Office.
53. The view of the Tribunal was that the property factors had responded to the homeowner's subject access request and that, if she was not satisfied with the response, her remedy was to report the matter to the Information Commissioner's Office. There was no evidence before the Tribunal to support the complaint under Section 2.2 of the 2021 Code, and the complaint was not upheld.
54. The homeowner also alleged data protection breaches by the property factors involving two Committee members. This matter was not considered by the Tribunal as it related to persons other than the homeowner.
55. **Section 2.3 of the 2021 Code** provides that "*The WSS must set out how homeowners can access information, documents and policies/procedures*". The homeowner's complaint under this Section was that the Committee had asked for sight of all invoices prior to publication of Quarterly Accounts, but that this had occurred only on a very infrequent basis. The property factors stated in their written representations that information on how homeowners can access information, documents and policies and procedure was contained in their Written Statement of Services (Revised July 2021), a copy of which they provided. Section D b) provides that the procedure was for a homeowner to write to the property factors' local office. The Tribunal's view was that the issue of the Committee requesting sight of all invoices did not relate to a breach of any

obligation of the property factors to the homeowner. The Tribunal held that the property factors had complied with the requirements of Section 2.3 of the 2021 and did not uphold the complaint.

56. **Section 2.7 of the 2021 Code** provides that “*A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in the WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.*” The homeowner contended that the response timescales set out in the Written Statement of Services had not been observed and that enquiries and complaints were frequently only answered after repeated requests and were sometimes ignored altogether. The property factors pointed out that the wording of the Written Statement of Services was that they would “try to respond” within these timescales. They said that their office received on average 20 emails per working day and numerous additional telephone calls and letters from Kelvin Court. In the last 12 months they had received in excess of 4,000 emails from the homeowner and her neighbours. This was completely disproportionate to any other property under their management, and it was inevitable that sometimes they would take longer than the indicative timescales set out in their Written Statement of Services. The view of the homeowner was that it was the fact that the property factors’ Property Managers (and one in particular) were either very slow to respond or did not respond at all that encouraged several “repeat” emails.
57. The Tribunal accepted that the level of email correspondence was extremely high for a development of 101 flats, but that did not excuse the property factors’ failure to deal with enquiries and complaints in the manner set out in Section 2.7 of the 2021 Code. It was incumbent on them to provide the resources required to deal with the volume of correspondence that they were receiving. The property factors did not appear to have kept the homeowner informed when they were not able to respond within the agreed timescale, and the wording of the Written Statement of Services that they would “try to respond” did not justify failures to respond within reasonable timescales or, in some instances, failure to respond at all. Their admitted failure resulted in significant inconvenience to the homeowner, who had to send many repeat requests for information and explanations. This had been a significant contributing factor to her decision to apply to the Tribunal.
58. The Tribunal upheld the complaint under Section 2.7 of the 2021 Code.

59. **Section 3 of the 2021 Code** covers Financial Obligations. The Tribunal identified the relevant portions as being - “*Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment request are included on any financial statements/bills.*” and “*A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise) a detailed financial statement showing a breakdown of charges made and a detailed description of the activities and works carried out which are charged for.*”
60. The Tribunal noted that the provisions of Section 3 of the 2012 Code were substantially the same as those on the 2021 Code, so dealt with both together, as the matters complained of occurred during the currency of both Codes. The homeowner’s primary complaint was lack of detail in the Quarterly Accounts. There had been no information referencing contractors used, flats concerned, or detail of repairs or works carried out. This had been the subject of repeated complaints. She provided partial copies of previous Quarterly Accounts and copies of her emails to the property factors seeking clarification and explanations.
61. The property factors provided the Tribunal with a copy of their Quarterly Account sent to the homeowner, covering the period from 29 May 2022 to 28 August 2022. The homeowner acknowledged in her written response to the property factors’ written representations, that these latest accounts showed “a very slight improvement”. The view of the Tribunal was that, whilst it had not seen complete versions of previous Quarterly Accounts, the Account to 28 August 2022 was clear and sufficiently detailed, so it appeared that the property factors had acted on the homeowner’s complaints. Accordingly, the Tribunal did not uphold the homeowner’s complaints under Section 3 of the 2012 Code or Section 3 of the 2021 Code.
62. **Section 5.6 of the 2021 Code** states: “*If applicable, a property factor must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. This information must be made available if requested by a homeowner. If homeowners are responsible for submitting claims on their own behalf (for example, for work that is not on common parts), a property factor must take reasonable steps to supply to homeowners all information that they reasonably require in order for homeowners to be able to do so.*” The homeowner stated that the property factors had repeatedly claimed that common faults, such as leaks, were the responsibility of owners. This had caused delays, as a result of which the damage escalated hugely. As a consequence, the buildings insurance

premium had almost doubled. In her written representations, however, she referred to various issues relating to Flats 55, 62, 67, 68 and 72. None of these properties belong to the homeowner, so any alleged breaches related to owners other than her and could not be considered by the Tribunal. Any impact that such issues might have had on the level of insurance premium was speculation. Accordingly, the Tribunal did not uphold the complaint under Section 5.6 of the 2021 Code.

63. **Section 6.1 of the 2021 Code** provides “*While it is homeowners’ responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.*”
64. **Section 6.4 of the 2021 Code** provides “*Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*”
65. The Tribunal dealt with Sections 6.1 and 6.4 together. The examples given by the homeowner in support of her complaints under these Sections related to six Flats, none of which she owns, so any failings were not in relation to duties owed to the homeowner and could not be considered by the Tribunal.
66. **Section 6.5 of the 2021 Code** provides “*If emergency arrangements are part of the service provided to homeowners, a property factor must have procedures in place for dealing with emergencies (including out-of-hours procedures where that is part of the service.*”
67. The Tribunal did not uphold the complaint. The Written Statement of Services provides a reference to the property factors’ website for a list of emergency trade contact details and states that homeowners can contact their local branch phone number for details of how to contact out-of-hours contractors.
68. **Section 6.6 of the 2021 Code** provides “*A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a*

competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.”

69. The Tribunal did not uphold this head of complaint. The Written Statement of Services states – “*You can nominate contractors to carry out repairs, or we will appoint contractors who have the relevant insurance...If necessary, and if you instruct us to, we will arrange for a professional consultation on...projects that include significant repairs or improvements.*” There was no evidence that the property factors were not able to demonstrate how and why they appointed contractors, including cases where they had decided not to carry out a competitive tendering exercise. They had provided a summary of the tenders for the cleaning and garden maintenance contracts and an explanation for their decision to appoint the contractors.
70. **Section 6.7 of the 2021 Code** provides “*It is good practice for periodic property visits to be undertaken by suitable qualified/trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure that a property is maintained appropriately. If this service is agreed with homeowners, a property factor must ensure that people with appropriate professional expertise are involved in the development of the programme of works.*”
71. As with the complaint under Section 6.4 of the 2012 Code of Conduct, the Tribunal did not uphold the complaint under Section 6.7 of the 2021 Code. The evidence before the Tribunal did not indicate that there was any planned programme of cyclical maintenance for Kelvin Court and that repairs issues were dealt with as and when they arose. The repairs to the West and East roofs were very substantial, but were not part of a pre-agreed programme of cyclical maintenance.
72. **Section 7 of the 2021 Code** relates to Complaints Resolution. As with the complaint under the equivalent Section of the 2012 Code, the view of the Tribunal was that the homeowner’s complaint related not to the complaints resolution procedure, but to the fact that she was not satisfied with the responses to her complaints. Accordingly, the Tribunal did not uphold the complaint under Section 7 of the 2021 Code of Conduct.
73. The homeowner also complained that the property factors had failed to comply with the Property factor’s duties. Her issues related primarily to matters which had also been included as complaints under specific Sections of the Codes of Conduct and have been dealt with as such in this Decision. The failure to comply with Section 2.7 of the 2021 Code was, however, also upheld by the Tribunal as a failure to comply with the

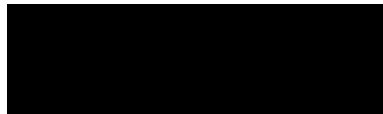
Written Statement of Services section headed “Communication Arrangements”. In that section, the property factors state that they “will try to respond to phone calls by the next working day, emails within five working days, and written correspondence within 21 days.” They also advise that homeowners who would like information, documents and policies or procedures that may help them understand the property factors’ work should write to their local office and sets out the position as regards data protection. The property factors accepted that they did sometimes take longer than the indicative timescales set out in the Written Statement of Services, but the Tribunal held, in its Decision relating to Section 2.7 of the 2021 Code, that this was not a valid excuse for failure to respond at all or within a reasonable timescale.

74. In arriving at its Decision on the applications, the Tribunal has had to consider an enormous amount of detailed written representations and documentation from the homeowner. Although not every minuscule of evidence has been referred to in the Decision, the Tribunal members, in arriving at their conclusions, gave careful consideration to all the evidence, both written and oral, before them. The Tribunal noted that the homeowner has given assistance to a number of residents in relation to issues that they have had with the property factors, but any complaints about the service provided to other residents would have to be raised by them and could not be considered by the Tribunal in the present applications.
75. Having decided that the property factors had failed to comply with Section 2.7 of the 2021 Code, the Tribunal then considered whether to make a Property Factor Enforcement Order. The Tribunal’s view was that the failure on the part of the property factors had been serious and extended over a protracted period. It had caused the homeowner very considerable inconvenience as she repeatedly sought responses to her queries and requests for information and the Tribunal decided that it would be appropriate to make a Property Factor Enforcement Order.
76. The Tribunal proposes, therefore, to make a Property Factor Enforcement Order requiring the property factors to pay the homeowners the sum of £500 as reasonable compensation for the inconvenience and distress caused by the property factors’ failures to comply with the Code of Conduct.
77. The Tribunal’s Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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.



George Clark
Legal Member/Chair
06 March 2023