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

Decision on Homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/22/4324
FTS/HPC/PF/22/4325

Parties:

Mr William McGibbon, Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP ("the Applicant")

Hacking & Paterson Residential Management Services, 103 East London Street, Edinburgh EH7 5BF ("the Respondents")

Tribunal Member:

Graham Harding (Legal Member)
Andrew Murray (Ordinary Member)

DECISION

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with the preamble of Section 3, 3.3 and 6.1 of the 2012 Code and OSP2, OSP4, 2.1, 3.1 and 6.4 of the 2021 Code

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 2012 is referred to as "the 2012 Code"; the Code of Conduct for Property Factors 2021 is referred to as "the 2021 Code" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 1 November 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that

date.

Background

1. By application dated 2 December 2022 the Applicant complained to the Tribunal that the Respondent was in breach of Sections 2.1, 2.5, 3 (opening paragraphs), 3.3, 4.1, 4.7, and 6 of the 2012 Code and Sections OSP 1,2,3,4 and 6, 2.1, 2.6, 3.1, 3.2, 4.1, 4.10, 5.6, 5.7 and 6.4 of the 2021 Code. The Applicant also complained in both applications that the Respondent had failed to carry out its property factors duties. The Applicant submitted copies of correspondence with the Respondent together with additional documents in support of the application.

2. By Notice of Acceptance dated 14 December 2022 a legal member of the Tribunal accepted the application and a Case Management Discussion ("CMD") was assigned to take place by teleconference on 17 January 2023.

3. By email dated 6 January 2023 the Respondents advised the Tribunal that they wished further time to address the Applicant's complaints through its formal complaints procedure and was unable to attend the CMD.

4. By email dated 12 January 2023 the Applicant submitted additional documents to the Tribunal.

5. The CMD on 17 January did proceed but was adjourned to allow the Respondent to investigate the Applicant's complaints and to submit written representations.

6. By email dated 11 April 2023 the Applicant submitted further written representations to the Tribunal.

7. A further CMD was held by teleconference on 2 May 2023. The Applicant attended in person and the Respondent was represented by its Associate Regional Director Mrs Emma Blair. The Tribunal continued the applications to a hearing and directed the Respondent to submit written representations within two weeks.

8. By email dated 16 May 2023 the Respondent submitted written representations to the Tribunal.

9. By correspondence dated 7, 12 and 17 September 2023 the Applicant submitted further written representations, documents and witness and supporter details.

10. By correspondence dated 4 September 2023 the Respondent submitted an Inventory of Productions.

Hearing

11. A hearing was held at George House Edinburgh on 19 September 2023. The Applicant appeared in person supported by his wife Mrs Marjorie McGibbon. The Respondents were represented by Mrs Emma Blair and another Director, Mr Gordon Buchanan.

12. The Applicant commenced by submitting that the Respondent had suggested in its representations that the issues raised were complicated but had failed to explain why. He said that the Respondent had authorised work to be carried out in respect of private property but had charged it to all homeowners as though it were common property.

13. For the Respondent Mr Buchanan explained that the owners had been charged appropriately for investigations into water ingress at certain owners' properties. He went on to say that the Respondent was not a gatekeeper and that it was necessary to eliminate the possible source of any water ingress and that may require intrusive investigations into privately owned property on some occasions.

14. The Applicant said that he had requested the Respondent provide evidence as to who had given the Respondent that authority but had not been provided with this. For the Respondent Mr Buchanan said that the Respondent had in terms of its Written Statement of Services been given unlimited delegated authority to instruct such investigations and repairs as the Respondent considered appropriate. He referred the Tribunal to the Respondent's Productions of 4 September 2023 and in particular Productions 2 and 3.

15. In response the Applicant referred the Tribunal to his written representations of 11 April 2023. He submitted that as the development was made up of three sections consisting of 12, 13 and 14 Ravelston Terrace it was not appropriate to charge the owners of 12 Ravelston Terrace for works carried out to one of the other sections.

16. Mr Buchanan referred the Tribunal to the Deed of Conditions burdening the property and in particular to the definitions of "section scheme property" and "scheme property". Mr McGibbon referred the Tribunal to Rule 2.5.4 of the Deed of Conditions which stated that if there was a conflict between the terms of the Scheme and the other provisions of the Deed the other provisions would prevail.

17. Mr Buchanan referred the Tribunal to the terms of invoices 1, 9, 10, 11, 13, 14, 21, 28 and 34 on Production 2 and explained that not all of the charges had been treated as common and some had been charged to individual owners. The Applicant submitted that the apportionment was inconsistent. This was disputed by Mr Buchanan who said that the Respondent had to know who was being charged at the time of instructing a contractor. He went

on to say that unless owners have restricted its authority the Respondent would always ask contractors to investigate and repair if minor. Mr Buchanan gave an example of an owner reporting a fault in the door entry system. He said the Respondent would instruct an engineer to attend and all the owners would be charged for a share of the cost of investigating the fault but if the fault was with the handset in the owner's property the owner would be charged for the cost of the repair.

18. The Applicant queried who had a detailed knowledge of a property at the development and suggested this would be an owner. He went on to say that the vast majority of the development consisted of private property and that the common property was largely restricted to the garage, garden and roof.

19. The Applicant went on to explain that by their letter of 15 March 2023 all avenues of complaint to the Respondent had been exhausted. The Applicant went on to refer the Tribunal to the schematic diagram of the development attached as an appendix to his written representations of 11 April 2023. He explained that from the west view it could be seen that there was no communal property other than the roof above the penthouse. He said all the balconies were privately owned. The Applicant also referred the Tribunal to his title plan which showed that his title included the balcony. He said that as an owner he had instructed and paid Nu Cairn for repairs to his balcony. He went on to say that any communal balconies were small and agreed that some work to communal balconies had been done and would be a common repair but the vast majority of the work had been on private balconies. The Applicant referred the Tribunal to Part 2 of the Schedule to the Deed of Conditions and in particular Rules 1.1 and 1.2(c) and the definition of a "flat" as contained in the Interpretation in Part 1 at 1.2. The Applicant said that in his letter to the Respondent of 22 February 2023 he had put forward 31 questions none of which had been answered other than in general terms.

20. There then followed some discussion by both the Applicant and Mr Buchanan as to what were spandrel panels and whether they formed part of the Applicant's and other owners' properties. The applicant's position was that they were within his property and contained various services solely for his property and were behind a glass partition and were therefore private and not communal property. Mr Buchanan's position was that the spandrels were not defined within the Deed of Conditions and therefore were arguably common property.

21. Mr Buchanan went on to say that it was standard practice to instruct a contractor to trace and locate the source of any water ingress and that the title deeds provided for an owner being required to give reasonable access to their property for that purpose.

22. The Applicant referred the Tribunal to the property owned by Owner 1. He explained that this was a duplex property comprising a penthouse on the upper two floors of 12 Ravelston Terrace. According to the Applicant the water ingress was appearing in the ceiling of Owner1's property on the 6th floor beneath the 7th floor balcony and therefore the cost of repair should

entirely have been met by that owner. The Applicant referred the Tribunal to his written representations in that regard.

23. The Applicant led evidence from Mr Nick Reid and referred the Tribunal to Mr Reid's report of 6 September 2023. Mr Reid provided the Tribunal with a description of the development and its communal areas. He said he had reviewed the title deeds and that everyone owned their balconies, windows and doors. He said that spandrels were part of the window system and hid the services within the apartment behind a décor panel. He said that it was his understanding having spoken to a chartered building surveyor that each owner owned to the midpoint of the property above and below and to the side of the neighbouring properties. He said that the roof was communal For the Respondent Mr Buchanan put it to Mr Reid that whilst an owner owned the walls ceiling and floor within a property the structure of the building was communal.

24. In response to a question from the Applicant, Mr Reid confirmed that the balconies at the development were intended to be waterproof and had a guarantee of 20 years but only if properly installed and maintained. He said that there had been no maintenance by some owners and shoddy workmanship during the installation. He explained that the decking on the balconies ought to be removed annually and the drainage channels beneath cleaned otherwise the guarantee would be null and void. Mr Reid went on to say that the contractors, Nu-Cairn had originally been aluminium specialists and were good at that but had to get approval to do repairs to the type of balconies at the development from the manufacturer. He went on to say that if his company had been involved it would have stripped off the decking and any cuts in the membrane would have been identified. He said these should have been maintained by the owners of the balconies. He went on to say that looking at the costs involved over the years the balconies could have been replaced three times. He said it would have been better to strip off and start again than to repair. He said the original installation by Sundial had been poor and the owners had worked with them between 2012 and 2019 to have issues remedied. He said the Respondents became involved after there had been problems for 6 years at the end of the defects period covered by the Architects certificate.

25. Mr Reid went on to explain that he had been a member of the owners' committee for 12 years but had never known that the work on the balconies was being carried out as communal property. He explained that he had not attended meetings from 2019 as his son had been terminally ill.

26. In response to a question from Mr Buchanan regarding water ingress at Flat 10/12, Mr Reid disputed that the building was complicated and that he had said it had a complicated boiler room.

27. The Applicant led evidence from Mr Shaun Burnett and referred the Tribunal to Mr Burnett's report of 11 September 2023. Mr Burnett explained he was Head of Communications at Edinburgh University.in response to a query from the Applicant as to how he felt about the Respondents had communicated

spending £30000.00 on repairs at the Development Mr Burnett said that in Phase 1 there had been silence as there had only been activity between the Respondent and a single owner at that point. He went on to say the next phase was being sent an erroneous bill which he considered he needed to be convinced was due. He said there were years of history with lots of detail some of which was relatively cryptic without any narrative. He said he found the Respondent's communication horrendous. He went on to say that for phase 3 it was necessary to go into the portal and look at it there and given that many of the residents at the development are elderly and are trusting it was too much.

28. For the Respondent Mr Buchanan submitted that the information provided detailed the common charges. Mr Burnett responded that other residents would not know what they were about and Mr Buchanan pointed out that the Tribunal was only dealing with the Applicant's complaint and not any wider issues.

29. Mr Burnett went on to refer to the Respondents rating on Trustpilot the relevance of which was disputed by Mr Buchanan.

30. Mr Burnett referred to the owners' association and whether any discussion about water ingress had taken place at meetings. The Tribunal noted the minutes of the meetings made reference to water ingress.

31. Mr Buchanan suggested that the Tribunal had not heard evidence with regards to the alleged breaches of the various sections of the Codes however the Tribunal noted that both parties had submitted extensive written representations in this regard.

32. The Tribunal asked Mr Buchanan to clarify the Respondent's position in its written representations where it said it did not need to comply with the Homeowner's title deeds. Mr Buchanan went on to say that it was open to the homeowners to restrict the Respondent's authority in respect of authorising repairs but they had not done so. In the absence of any such restriction the Respondent was acting within the terms of its Written Statement of Services.

33. In response to questions from the Applicant Mr Buchanan explained that the Respondent had not made any additional charges for services. He explained that it was appropriate for the Respondent to instruct a contractor to investigate owners' complaints of water ingress and carry out minor repairs. He disputed the Applicant's suggestion that the Respondent had to comply with the terms of the title deeds and said that it was not for the Respondent to police the title deeds.

34. The Tribunal sought clarification from the Respondent as to why it had previously determined in its letter to the Applicant of 15 September 2020 that the charges for repairs to the penthouse balconies had been wrongly apportioned as communal were once again being deemed to be communal. Mr Buchanan said that following the matter being reconsidered the Respondent now took the view that the charges should be reinstated.

35. The Applicant in summing up spoke of the need for transparency, fairness and clarity. He referred the Tribunal of the extensive investigations that had been carried out and the subsequent invoicing. He said the central issue was that the balconies in question were private and the responsibility of individual owners. He said the actions of the Respondent had a negative impact on him and also on other owners. He suggested the Respondent should not only reimburse the £655.00 charged to his account but also all the other owners that had been similarly charged.

36. For the Respondent Mr Buchanan said that the development consisted of a complex building with complex problems and complex dynamics and differing opinions. He said that a factor cannot plan for everything and cannot please everyone and it is not its role to gatekeep but to try to investigate and to apportion costs appropriately.

The Tribunal make the following findings in fact:

37. The Homeowner is the owner of Flat 10, 12 Ravelston Terrace, Edinburgh EH4 3TP ("the Property")

38. The Property is a flat within the development at Ravelston Terrace, Edinburgh (hereinafter "the development").

39. The Factor performed the role of the property factor of the Development.

40. There have been long standing issues of water ingress to some properties at the development since 2012.

41. In a letter dated 15 September 2020 following a complaint by the Applicant, the Respondent advised the Applicant that the cause of water ingress from more than one of the penthouse balconies had been attributed to a drain on the balcony and as such was not common and therefore any charges would be credited back.

42. The minutes of the Owners Committee Meeting of 2 September 2020 confirm: three leaks are under investigation; where appropriate an insurance claim has been made; owners are due a refund for some previous work wrongly charged to all owners; where any owners find a leak in a common area, they should advise H&P immediately; and leaks in individual flats are the responsibility of the owner unless the leak is due to a problem with the roof.

43. The Respondent’s representative Mr Mike Grehan attended the Owners’ Association meeting of 2 September 2020.

44. The minutes of the Owners Association Committee meeting of 27 January 2021 confirmed investigations were ongoing for water leaks in some apartments. Mr Grehan also attended this meeting.

45. The Minutes of the Owners Association Committee meeting of 14 April 2021 records that contractors are currently working on flat 12/17. Mr Grehan and Ms Amy Turk attended the meeting on behalf of the Respondents.

46. The Minutes of the Owners Association Committee Meeting of 18 September 2021 refer to water ingress on the East and West balconies on level 7 and on the communal west balcony above the communal stairwells and entrance doors. A discussion took place about the balconies and the responsibility of individual owners as well as their collective responsibility for the payment for repairs required to be undertaken and it was agreed that the Respondent required to pursue this through a legal interpretation of the title deeds. Mr Grehan attended on behalf of the Respondent.

47. The Minutes of the Owners Association Committee meeting of 25 November 2021 noted inter alia that further discussions were required on the aspect of title deed interpretation and responsibilities. Mr Grehan and Ms Caroline Richmond attended on behalf of the Respondent.

48. The Minutes of the Owners Association Committee meeting of 9 February 2022 concluded that the title deeds were unclear and that further investigations were required. Mr Grehan, Ms Richmond and Mr Rafiq attended on behalf of the Respondent.

49. The Minutes of the Owners Association Committee meeting of 14 June 2022 recorded that water ingress to the common stairwell appeared to be coming from the I-beams. No mention is made of the interpretation of the title deeds. Mr Grehan and Ms Richmond attended on behalf of the Respondent.

50. Between October 2019 and August 2021, the Respondent instructed Nu-Cairn Ltd to undertake investigations into water ingress at a number of properties in the development and on occasions to carry out repairs.

51. Some repairs were charged to individual owners but all investigations were apportioned amongst all the owners at the development.

52. A Deed of Conditions registered 20 August 2008 by Yor Limited burdens the development.

53. The definition of a “flat” is contained within Part 1.2 of the Deed of Conditions.

54. The Deed of Conditions differentiates between Section Scheme property and Scheme property.

55. Clause 3.5.1 of the Deed of Conditions states that “All parts of the Main Building for which costs of maintenance have not been otherwise allocated in

this deed shall be scheme property and the cost of maintenance shall be allocated in accordance with Part 9 hereof."

56. Clause 9.6.1 of the Deed of Conditions provides that "Any costs for maintenance of the Site or properly incurred by the Manager in furtherance of his duties which are not allocated elsewhere in this Deed shall be allocated amongst the Owners on the same basis as the Scheme Costs."

57. By letter dated 23 November 2022 the Respondent wrote to the Homeowner advising of the actions it had taken to trace water ingress at the development over the previous three years.

58. The Respondent subsequently reversed its decision contained in its letter of 15 September 2020 and recharged the Applicant for a share of the Nu-Cairn Ltd invoice 3721 of 1 November 2019 and charged the Applicant a total of £655.00 for his share of the cost of this and subsequent investigations and repairs.

59. The Respondent intimated a claim under the development block insurance in respect of the water ingress that was not covered by the policy.

60. Flat 12/17 Ravelston Terrace occupies both the 6th and 7th floor of the building.

61. The spandrels of each flat at the development are located within the curtilage of each flat.

62. In terms of Rule 1,2 of Part 2 of the Deed of Conditions the cost of maintaining certain scheme property can be shared by two or more owners.

63. Scheme property includes external walls, the roof, and any wall, beam or column that is load bearing but excludes those parts of the building that are stated to form part of a flat as defined in Part 1 of the Deed.

Reasons for Decision

64. The Respondent's Terms of Service and Delivery Standards (the "TOSADS") sets out the agreement in place between the parties. Clause 2.5 of the TOSADS provides that the Respondents will consult with homeowners prior to instructing common works and services where it considers it necessary to do so. The terms of reference are therefore quite broad and leave it very much to the Respondent to determine when it is appropriate to consult with homeowners before obtaining approval for common works. Furthermore, it was not disputed by the Applicant that the Respondent had unlimited delegated authority to incur expenditure in respect of investigations and repairs as it considered appropriate. Therefore, the Tribunal was satisfied that the Respondent had wide ranging delegated authority in this regard. However, the Tribunal also was in no doubt that the title deeds govern the

management of the development and that the Respondents must take account of the rules set out in the schedule annexed to the Deed of Conditions contained in Burden 12 of title deeds. The Tribunal acknowledged that interpreting the Deed of Conditions was complicated and that it was necessary to separate the rights of owners to make scheme decisions from the role of the Respondent appointed as manager to manage the development. Nevertheless, the Tribunal was satisfied that the Respondent had to only charge the Applicant for his share of work properly instructed in respect of common property.

65. The Tribunal did not accept the Applicant's argument that if work was carried out to a section of the development that was separate from the section in which his flat was located, he should not be liable to contribute towards the cost. Although certain costs would only be allocated to owners in a particular section under designated "Section Scheme Property" this only applied to costs connected to the lift with its plant and machinery, the decoration of the staircase, stair walls, ceilings and landings and the floor coverings. The Tribunal was satisfied that other costs would fall into the category of repairs to "Scheme Property".

66. The Tribunal was satisfied from the terms of the title deeds and in particular from the definition of a "flat" that the balconies at the development were wholly owned by the owners of each flat. Only balconies fronting a common landing or stairwell would be common. It therefore follows that the cost of maintenance repair and renewal of a flat balcony is the sole responsibility of each owner at the development.

67. The Applicant pointed out in both his written representations and oral submissions that the penthouse flat owned by Owner 1 is located on the 6th and 7th floors of the development. The Tribunal was satisfied from the evidence of the Applicant that even a cursory appraisal by the Respondent of Owner 1's complaint of water ingress at his property would have disclosed that it could not be connected to water ingress from anywhere other than owner 1's own property and therefore liability for the cost of repair lay with him. The Tribunal was not provided with definitive information as to whether or not the Respondent was aware of the previous long standing issues Owner 1 had experienced with Sundial prior to the Respondent becoming involved. If the Respondent was aware then it certainly ought to have been extremely cautious about instructing contractors to attend at Owner 1's property without obtaining at least some information to be satisfied the water ingress was probably coming from a source outwith Owner 1's property. The Tribunal was prepared to accept that under certain circumstances the Respondent was not a gatekeeper. For example, if the Respondent had no prior knowledge of the issues Owner 1 had experienced with water ingress between 2012 and 2019 then on being advised in October 2019 of water ingress and the owner making reference to a "common landing" it would be reasonable to instruct contractors to "investigate and repair if minor". However, the Tribunal does not accept that once a contractor has been instructed an owner has no liability for the cost of investigations if it transpires that the cause of the water ingress is wholly due to issues within that owner's

own property and for which he is wholly liable. The Tribunal considers that Mr Buchanan's reference to the investigation of door entry issues is not analogous to the issues of water ingress at the property as it was known that these were emanating from the balconies that were privately owned. This was apparent from the brief entries in the minutes of the Owners Committee Meetings.

68. The Tribunal does not accept that it was reasonable for the Respondent to continue to instruct contractors in December 2019 or on any subsequent occasion to investigate the source of water ingress at Owner 1's property subsequent to the contractor's report of 23 October 2019 without making reasonable enquiries as to the likely source of the water ingress given that it was apparent from the report that the water ingress emanated from Owner 1's balcony and not from any common property. The Respondent in deciding to instruct contractors in terms of its delegated authority failed to give proper consideration to the terms of the title deeds. Furthermore, having told the Applicant in a letter of 15 September 2020 that he had been improperly charged for the cost of repairs the Respondent did not act in a way that was honest, open transparent and fair in its dealings with the Applicant when some 26 months later it reversed its decision without discussion and throughout that time did not keep the Applicant appraised of its intentions. The Tribunal also considered that the Respondent was bound by its decision to uphold the Applicant's complaint in its letter of 15 September 2020. Having reached a decision on that complaint it had no right to change its decision and reimpose a charge upon the Applicant. The Respondent incurred over a period of three years charges amounting to some £20852.00 that it charged to the collective homeowners of which the Applicant's share amounted to £655.00. During that three-year period the Respondent gave no indication to the Applicant that he was going to be charged for any of the investigations or work instructed until he received the letter of 23 November 2022. This demonstrates a woeful lack of communication on the part of the Respondent as spoken to by the Applicant's witness Mr Burnett and also by the Applicant and to some extent Mr Reid. It cannot be said however that the Respondent provided information to the Applicant that was misleading or false in breach of Section 2.1 of the 2012 Code. However, the Tribunal is satisfied that by going back on its decision to uphold the Applicant's complaint in September 2020 and by failing to communicate openly and transparently and fairly with the Applicant over a period of over two years the Respondent was in breach of OSP2 and by reinstating the charge from September 2020 the Respondent was either deliberately or negligently providing misleading information to the Applicant in breach of OSP4. The Tribunal also found that by failing to consult appropriately with the Applicant over a prolonged period the Respondent was in breach of Section 2.1 of the 2021 Code. The Tribunal did not consider that there was sufficient evidence to support a finding that the Respondent was in breach of Section 2.5 of the 2012 Code or OSP1 or OSP 4 or 2.6 of the 2021 Code.

69. With regards to Section 3 of the 2012 Code the Tribunal has no reason to doubt that the Respondent has properly produced invoices to show what has been charged to the Applicant's account. The Tribunal is also satisfied that

the Respondent is able to distinguish between its own funds and homeowners' funds. What the Respondent failed to do was provide the Applicant each year with a detailed financial breakdown of charges made and a description of the activities and works carried out which were charged for until in 2022, three years' work was charged at once. The issue for the Tribunal to determine is whether this is a breach of either Code. The Tribunal noted that the Respondent had submitted insurance claims in respect of the investigative work. It was not told exactly when these claims were refused however a prudent method of dealing with the charges would have been to allocate them to homeowners' accounts as they arose and credit the accounts if the insurance claim had been successful. Such procedure would have had the effect of letting the Applicant know in 2020 that the Respondent was once again intending to charge him for investigations into water ingress and thus provide transparency and allow any charges to be challenged if inappropriate. By delaying producing annual charges and accumulating them over a three-year period the Respondent was in breach of the first paragraph of Section 3 and Section 3.3 of the 2012 Code and 3.1 of the 2021 Code.

70. The Tribunal was satisfied that there was no evidence to suggest that the Respondent had breached either Sections 4.1 or 4.7 of the 2012 Code or 4.1 or 4.10 of the 2021 Code.

71. The Respondent relied upon the wide-ranging level of authority delegated to it by virtue of its TOSADS. There was no upper limit of cost above which the Respondent had to obtain homeowners' approval before instructing investigations or repairs. It was left to the Respondent's discretion as to when homeowners should be consulted. The Respondent in its written representations stated that they did not accept that the homeowners had not been kept advised of the progress of works and the Tribunal was referred to the minutes of the Owners Association Committee meetings at the hearing. The minutes may not reflect everything that was discussed at the meetings but are the only written reference to ongoing water ingress issues at the development. The Tribunal was advised that up until recently the minutes were not prepared by the Respondent. The Tribunal did not consider that the minutes provided the Applicant with sufficient information as to the progress of the work to allow him to even conclude that he might be charged for work on private balconies. The tribunal is therefore satisfied that the Respondent is in breach of Section 6.1 of the 2012 Code and Section 6.4 of the 2021 Code.

72. The Applicant's complaint as regards the Respondent's failure to carry out its property factor's duties was based on the Applicant's submission that the Respondent failed to comply with the terms of the title deeds and acknowledge that as the balconies were private any water ingress into flats below from the balconies would not be a common repair but be an issue for the owner of the balcony in question. It was also the Applicant's submission that the spandrels formed part of the window installation and this was supported by Mr Reid. The title deeds provided that scheme property consisted of all parts of the development owned by two or more owners with the exception of each owner's flat and the cost of repair to scheme property fell to be shared amongst the owners in the proportions provided within the

deeds. The Tribunal was therefore satisfied that if the Respondent properly incurred expenditure in respect of scheme property the Applicant would be obliged to meet a share of the cost. The issue however is whether by instructing contractors over a prolonged period to carry out investigations and repairs at the private balconies the Respondent was complying with the terms of the title deeds. Mr Buchanan's position was that the Respondent was not a gatekeeper and therefore if water ingress was reported the Respondent was obliged to instruct contractors to investigate and report and potentially carry out minor repairs. For the reasons given above the Tribunal considers this argument to be flawed. The Respondent has a duty to understand the development and the buildings on it. It also has to consider the terms of the title deeds and to take account of them when instructing contractors. It was clear from the Minutes of the Owners Committee Meetings that the issue of ownership of the balconies and the legal interpretation of the title deeds had been raised at an early stage. The Respondent therefore ought to have grasped the issue and made its position clear or if it thought it lacked authority then it should have proposed that owners instruct it to obtain legal advice. By letting the issue drift over a number of years the Respondent clearly failed in its property factors duties.

73. The Applicant's account has been charged with a share of the cost of the investigations and in some cases repair of water ingress to some owners' properties emanating from private property and the charges ought not to have been treated as common repairs but charged to the individual owners whose balconies required repair. The Tribunal has insufficient evidence to determine whether as Mr Reid suggested the costs incurred as a result of numerous patch repairs to the balconies was excessive compared to the cost of stripping out and replacing the membranes. In any event this was not an issue the Tribunal was required to determine. The Tribunal was however satisfied that given the Respondent's breaches of the Codes and its failure to carry out its property factors duties and given the inconvenience and distress this has caused the Applicant it is appropriate that in addition to crediting back to the Applicant from its own funds the £655.00 charged to his account the Respondent make a further payment to the Applicant of £345.00.

Proposed Property Factor Enforcement Order

74. The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) (a) Notice.

Appeals

An Applicant or Respondent 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.

Graham Harding	Legal Member and Chair
10 October 2023	Date