Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the of the First-tier Tribunal for Scotland Housing and Property Chamber
In an Application under section 17 of the Property Factors (Scotland) Act 2011

by

David Watson, 1/16, 145 Albion Street, Glasgow G1 1QS ("the Applicant")

Charles White Limited, 65 Haymarket Terrace, Edinburgh EH12 5HD ("the Respondent")

Chamber Ref: HOHP/PF/16/0119

Re: 1/16, 145 Albion Street, Glasgow G1 1QS ("the Property")

Tribunal Members:

John McHugh (Chairman) and Susan Napier (Surveyor Member).

DECISION

The Respondent has failed to carry out its property factor's duties.

The Respondent has failed to comply with its duties under section 14 of the 2011 Act.

The decision is unanimous.

We make the following findings in fact:

1 The Applicant is the owner and occupier of a flat at1/16, 145 Albion Street, Glasgow.
2 The flat is located within a development known as "The Herald Building" (hereinafter "the Development").
3 The Development was built around 2005 and consists of a conversion of a former newspaper building into residential units and associated parking and common areas.
4 The Development has roof sections at various levels.
5 The Development has passenger and disabled lifts as well as a car park lift.
6 The Respondent commenced as factor of the Development in October 2007.
7 The Respondent was replaced as factor on 29 August 2016.
8 A Deed of Community Burdens by FM Herald Building Limited registered 26 July 2005 ("the Deed of Conditions") governs the arrangements which apply among the Respondent and homeowners within the Development including the Applicant.
9 The Applicant bought his flat on or around December 2013 and remains its owner.
10 The Respondent employs sub-contractors to perform maintenance works at the Development.
11 There is an owners' association relating to the Development known as the Herald Building Owners' Association.
12 The property factor's duties which apply to the Respondent arise from the Respondent's Written Statement of Services and the Deed of Conditions. The duties arose with effect from 1 October 2012.
13 The Respondent was under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of its registration as a Property Factor (7 December 2012).
14 The Applicant has, by his correspondence, including that of 5 and 24 August 2016 notified the Respondent of the reasons as to why he considers the Respondent has failed to carry out its property factor's duties and its obligations to comply with its duties under section 14 of the 2011 Act.
15 The Respondent has failed or unreasonably delayed in attempting to resolve the concerns raised by the Applicant.

Hearing

A hearing took place at Wellington House, Glasgow on 16 January 2017.

The Applicant was present at the hearing and was assisted by Ron McAulay, Chairman of the Herald Building Owners' Association.

The Respondent was represented at the hearing by Sarah Wilson, Associate Director and Karen Jenkins, Team Leader.

Introduction

In this decision we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "the 2016 Regulations".

The Respondent became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

During the course of the Application, the Tribunal issued two Directions ordering the production of documents by the Respondent.

The Tribunal had available to it, and gave consideration to, the documents lodged on behalf of the Applicant and the Respondent including those lodged in response to the Committee's Directions.

The Respondent had been ordered by the Direction of 9 December 2016 to produce certain documentation by 30 December 2016 although its response was only received on or around 11 January 2016. The second Direction required documents to be produced at the hearing, which they were. The Tribunal provided the parties with the option of requesting that the substantive hearing be delayed until a later date to enable the documents received in respect of the two Directions to be considered further. The parties indicated a preference to proceed with the hearing on the basis that if it became apparent during the course of the hearing that the latest documents were going to cause any prejudice or difficulty, a further request for additional time could be made during the course of the hearing. In the event, the recently lodged documents proved to present no challenge to the smooth running of the hearing and no further representations regarding the matter required to be made.

The Applicant had some concern that the response to the Directions by the Respondent was less than full given that certain classes of document were absent. Mrs Wilson offered assurances (which we accepted) that all of the relevant documents in existence had been produced. It became apparent that certain records which the Applicant had thought would exist did not, in fact, exist.

It was agreed that the parties would be granted a further seven days from the date of the hearing to produce, in the case of the Respondent, any newsletters in the period 2013-2016 (which were produced by it on 17 January 2017) and in the case of the Applicant, Minutes of the AGMs for 2014-2016 (which were partially produced by Mr McAulay on 16 January 2017).

The documents before us included a Deed of Community Burdens by FM Herald Building Limited registered 26 July 2005, which we refer to as "the Deed of

Conditions" and the Respondent's "Written Statement of Services for The Herald Development – Effective from January 2014" which we refer to as the Written Statement of Services.

REASONS FOR DECISION

The Legal Basis of the Complaints

Property Factor's Duties

The Applicant complains of failure to carry out the property factor's duties.

The Deed of Conditions and the Written Statement of Services are relied upon in the Application as sources of the property factor's duties.

The Code

The Applicant complains of failure to comply with Sections 1, 2.1, 2.5, 5.3, 5.4, 5.5, 5.7, 6.3, 6.4, 6.7 and 6.9 of the Code.

The elements of the Code relied upon in the application provide:

*"...**SECTION 1: WRITTEN STATEMENT OF SERVICES***

You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code.

You must provide the written statement:

- *to any new homeowners within four weeks of agreeing to provide services to them;*
- *to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage;*
- *to existing homeowners within one year of initial registration as a property factor.*
- *However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by thehomeowner housing panel (within the timescale the homeowner housing panel specifies);*
- *to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement....*

1.1a For situations where the land is owned by the group of homeowners
The written statement should set out:

A. Authority to Act
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;

B. Services Provided
c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified;

C. Financial and Charging Arrangements
e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee;
f. what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated;
g. confirmation that you have a debt recovery procedure which is available on request, and may also be available online (see Section 4: Debt recovery);
h. any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service);
i. any arrangements for collecting payment from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service);
j. how often you will bill homeowners and by what method they will receive their bills;
k. how you will collect payments, including timescales and methods (stating any choices available). Any charges relating to late payment, stating the period of time after which these would be applicable (see Section 4: Debt recovery);

D. Communication Arrangements
l. your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your inhouse

complaints handling procedure (see Section 7: Complaints resolution);
m. the timescales within which you will respond to enquiries and complaints received by letter or e-mail;
n. your procedures and timescales for response when dealing with telephone enquiries;

E. Declaration of Interest
o. a declaration of any financial or other interests (for example, as a homeowner or lettings agent) in the land to be managed or maintained;

F. How to End the Arrangement
p. clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination....
...

SECTION 2: COMMUNICATION AND CONSULTATION

2.1 You must not provide information which is misleading or false...

...2.5 You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)...

...SECTION 5: INSURANCE...

...5.3 You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.

5.4 If applicable, you 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. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so.

5.5 You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves...

...5.7 If applicable, documentation relating to any tendering or selection process

(excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance…

SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE

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

6.4 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…

…6.7 You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you…

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

The Matters in Dispute

The factual matters complained of relate to:

(1) Failure to issue a written statement of services.

(2) Information provided by the Respondent at the 2016 AGM.

(3) Insurance Arrangements.

(4) The status and making of insurance claims.

(5) Repairs and Maintenance.

We deal with these issues below.

(1) Failure to issue a written statement of services

The Applicant complains that the Respondent failed to provide him with a Written Statement of Services contrary to its obligation to do so in terms of Section 1 of the Code. Mrs Wilson explains that a check of the Respondent's system has revealed that a first copy of the Written Statement of Services was issued to the Applicant in January 2014 as part of a welcome pack of documentation in accordance with the Respondent's normal practice. The Applicant's position was that he could not remember whether he had received this. The Respondent's records show that a further copy was sent by post on 18 January 2016 in response to a request by the Applicant. He confirms that he did not receive that and made a further request by email on 25 February 2016. Mrs Wilson acknowledges that, through oversight, she failed to respond to the email of 25 February 2016. The Applicant reports that he only received the Written Statement of Services after writing his formal complaint letters of 5 and 24 August 2016.

Regardless of the history of the sending and receipt (or otherwise) of the Written Statement of Services after January 2014, we can identify no breach of the Code (or of property factor's duties) in this respect. We find that the Respondent did provide a copy of the Written Statement of Services to the Applicant in January 2014. The wording of the obligation contained in the Code does not require a further copy to be issued in the circumstances which apply in this case.

(2) Information provided by the Respondent at the 2016 AGM

The Applicant complained that the Respondent had provided information which was misleading or false in respect of various representations which were made by Mrs Wilson at the Owners' AGM on 14 January 2016. The alleged misrepresentations were as follows:

(a) That roof leaks were coming from roof terraces/patios which were private and not to be dealt with as common repairs.

(b) That the ventilation system was not common but was private to each flat

(c) That the door entry system was similarly not common but was private to each flat.

Mrs Wilson's evidence on matters (b) and (c) was that she had not stated that the ventilation system was private. She had stated that she was unaware whether or not it was common and had said she would have to check and confirm. In relation to the door entry system, she had not stated that it was private but had stated that the parts within the individual flats may be private but she had known that other parts were common. We accept Mrs Wilson's evidence on these points as credible and reliable. The Applicant's recollection differed to that of Mrs Wilson in relation to the exact nature of her comments. Although he believed his recollection to be correct we found him less insistent upon the points than Mrs Wilson and ultimately we prefer Mrs Wilson's evidence on these points. In any event, we would have been unable to identify any intention upon Mrs Wilson's part to mislead or to deliberately supply false information at the AGM and so would be unable to identify a breach of section 2.1 of the Code or of any of the property factor's duties.

The Applicant had originally complained by reference to Code section 2.5 about a failure by the Respondent to continue with debt recovery post its ceasing to be involved with the Development but he confirmed that this had since been dealt with by agreement with the Respondent and, accordingly, withdrew this from his application.

On issue (a) Mrs Wilson's position was that the comments attributed to her were had not been made. She advised that she was aware that the

terraces/patios were partly private and that other aspects of their maintenance were common.

The Applicant felt that what was said about roofs was particularly misleading as the Respondent had obtained a report on the condition of the roof from Savills in June 2015 but Mrs Wilson had made no mention of this clearly relevant issue when discussing roof repairs at the meeting. Mrs Wilson explained that she had taken over responsibility from the property manager Chris Vallance, who had left the Respondent in September 2015. She advised that Mr Vallance had failed to log the report on the Respondent's system or to progress action in respect of it. As a result, when speaking at the meeting, she had had no knowledge of the report's existence and her discussion had been focused upon leaks to terraces and patios which had recently been reported.

Mrs Wilson acknowledged that the Respondent should have been able to offer continuity after Mr Vallance's departure and had failed to do so. She, however, had not known the history and had no way of doing so. As a result, nothing she had said or done in relation to this matter at the AGM was done with any element of malintent. We accept Mrs Wilson's evidence in this regard and find that while the information she provided may have been wrong, there was no evidence of any intention to mislead or to provide information which was false. We consider that section 2.1 of the Code requires at least some evidence of such an intention as opposed to simply the making of a mistake, as was the case here.

The Applicant also complained of a failure to respond to his email of 25 February 2016. Mrs Wilson, as noted above, accepted this to be the case. Accordingly, we find there to have been a breach of Code section 2.5 and of property factor's duties in respect of the failure to respond within the timescales contained within the Communication provisions contained within paragraph 4 of the Written Statement of Services.

The Applicant also complained in respect of an incident in December 2015 when the fire brigade had forced entry to his flat. He understood that the

Respondent had been contacted with a request to be provided with access. He was working close by and had the Respondent called him, he would have attended. This would have avoided the need to break down the door and the cost of replacing it. Mrs Wilson explained that although the Applicant's telephone number had been provided to the Respondent previously, it did not appear to have been saved into their records and so had not been able to be provided. There was some discussion around exactly when the call had been made and by whom ie whether the purpose of the call had been to ask for access or had been to advise that access had already been taken by force and whether the call had come from a representative of the fire brigade or of the Council. We can identify no positive duty upon the Respondent to keep and to provide emergency contact details and, in the circumstances, we have been unable to identify a breach of the Code or of the property factor's duties in this respect.

(3) Insurance Arrangements.

The Applicant complained that it was unclear as to the commission which the Respondent received for placing insurance. Mrs Wilson advised that the Written Statement of Services had been correct when issued in 2014 in that it stated that the commission received by the Respondent was 20%. This later fell to 17.5%, a fact that had been intimated to homeowners by letter.

These were the standard arrangements applying to all properties where the Respondent arranged insurance. Insurance cover is sought for the whole portfolio of such properties together.

Mrs Wilson understood that the broker, Deacon Insurance Services Ltd, received 12% of premiums.

The Applicant presented a letter by Arthur J Gallagher Insurance Brokers of 4 January 2017 which referred to Deacon receiving 14% and the Respondent 17.5%. Mrs Wilson had no knowledge of the arrangements between the insurers and Deacon and had no explanation for the discrepancy as regards Deacon's commission percentage.

The Applicant was concerned that reference had been made by the Respondent to "Deacon Insurance Services Ltd" but that that company did not appear to be the one which provided broking services here. The letter of 4

January offers an explanation that the Deacon name is now used as a trading name of Arthur J Gallagher. Again, Mrs Wilson had been unaware of the details of this and believed that the Respondent had simply passed on an explanation of the insurance arrangements as they had been outlined to it.

The Applicant wanted an explanation of the tendering arrangements for insurance and Mrs Wilson provided this, advising that a letter is sent to homeowners annually setting out the insurance arrangements which will apply.

We can identify no breach of the Code nor of property factor's duties in this respect. The Respondent has provided accurate information regarding the insurance commission arrangements which apply to it. The commission arrangements which apply between the brokers and the insurers remain somewhat unclear but there is no obligation upon the Respondent in this respect. The issue of the broker's name/identity seems to have caused confusion although the apparent mistake does not constitute a breach of the Code or property factor's duties. The Respondent would however be well advised to review its future correspondence to homeowners to ensure that the correct broker's name is provided.

(4) The status and making of insurance claims.

There had been a claim made to insurers in respect of storm damage to the Level 9 roof. This related to damage which had occurred during the 2015 festive period. The complaint was that Mrs Wilson had met the Owners' Association Committee and the loss adjuster in February 2016. The Applicant does not know what has happened since and no updates have been provided. The applicant learned from the letter of 4 January 2017 that the claim had apparently been repudiated by the insurers but this had not been advised to him previously.

Mrs Wilson advised that the loss adjusters had not kept her up to date with the progress of the claim and she knew no more than was in the letter of 4 January 2017 as regards the repudiation by the insurers. She has been making enquiries recently of the brokers but, so far, had no answer. She recalled that the issue had been reported on by her at the 2016 AGM. She also believed that the Committee had been updated in March or May of 2016. It was thought that there may be correspondence to support this and that this

would be provided as part of the further documents agreed to be produced. In that correspondence (provided by the Respondent on 17 January 2017) we note that the February 2016 newsletter advises that the Respondent is working with the loss adjusters and contractors to have the storm damage rectified. The same phrase is repeated in the August newsletter (which was the Respondent's final newsletter before relinquishing factoring of the Development). The 2016 AGM notes (received from Mr McAulay on 16 January) make reference in general terms to insurance claims progressing but no specific reference to the roof claim.

It appears to us that there have been no substantial updates regarding this claim and the fact that it has apparently been repudiated by insurers. There was no evidence from the Respondent about what steps it had been taking (apart from post the letter of 4 January 2017)in order to obtain information about the status of the claim in order to keep homeowners informed of progress and little evidence of meaningful updates to the homeowners. In the circumstances, we consider there to have been a breach of sections 5.4 and 5.5 of the Code. There is no breach of property factor's duties.

The Applicant has also complained of a failure to make an insurance claim regarding roof damage recorded on the Savills report. In this regard there is no information available as to whether a claim was contemplated or should have been in contemplation. It may have been that a positive decision had been taken that the matter would not be appropriate to be the subject of an insurance claim and was a maintenance issue. The position is unclear and we are aware that the then property manager appears not to have taken any other action in relation to the Savills report leaving open the inference that he failed to contemplate or advise upon the possibility of the making of an insurance claim. Nonetheless, there is insufficient evidence before us on this question to enable us to identify that there has been a breach of the Code or of property factor's duties.

The Applicant further complains that the Respondent failed to disclose material facts to insurers (being the faults with the fire detection system and the carbon monoxide and smoke extraction systems) with the effect that the insurers might have declined to meet any fire related claim. There has, in fact, been no such claim or avoidance of liability by insurers. We can well understand why the Applicant might have real concerns about this matter. However, we do not consider that there is sufficient evidence before us as to

what declarations the Respondent had made to insurers compared to the information which was reasonably within its knowledge at the time. Accordingly, we do not find there to have been a breach either of the Code or of property factor's duties.

(5) Repairs and Maintenance.

Within this category, the Applicant has complained by reference to a number of matters, detailed below. The Applicant perceives there to have been a general lack of maintenance of the common parts of the Development. Many of the matters raised were the subject of only short discussion or evidence and were not themselves necessarily being pursued as matters of substance in their own right but as evidence of a general failure on the part of the Respondent to perform its duties. The Applicant complained, in particular, that building maintenance problems were not adequately brought to owners' attention, particularly in respect of owners who were not members of the Owners' Association Committee. Mrs Wilson referred to the Respondent's newsletters which she said provided updates to all owners on relevant matters.

(a) The absence of a programme of maintenance. The Applicant complained that the Respondent had no programme of planned maintenance. The Respondent acknowledged that this was true as maintenance was dealt with only on a reactive basis following upon six weekly walk around inspections of the Development by the Respondent's property manager or in response to complaints. Mrs Wilson explained that the position is now different and that, as an organisation, the Respondent is now putting in place programmes of planned maintenance in respect of the various developments which it manages. We find the absence of a programme to constitute a breach of Section 6.4 of the Code.

(b) Roof Maintenance The Applicant is concerned that roof maintenance was not carried out, he is concerned that adequate inspections did not take place or, if inspections were carried out, problems noted were not acted upon. Mrs Wilson acknowledged that the regular six weekly inspections never included the inspection of the ninth floor roof as it was not possible for lone employees of the Respondent to inspect it because of health and safety reasons. We find there to have been a breach of property factor's duties in respect that the

Respondent has undertaken in the Written Statement of Services (Clause 2) to carry out its functions "with reasonable skill and diligence in accordance with the principles of good estate management." We do not find there to have been a breach of the Code.

(c) Water Tanks There are two water tanks serving the Development. Only one was operational initially and there had been issues relating to its capacity. It had been agreed to bring into service the second tank. The Owners Committee had instructed the Respondent to instruct a contractor to carry out the necessary works. It was agreed that in fact the second tank had never been re-commissioned. Mr McAulay, who has a background in water engineering, noticed this during a visit to the basement car park. By this time, the Respondent had paid the contractor in full, not realising that the work had not been completed by the contractor. The Respondent had successfully pursued the contractor to refund its charges for the works which had not been performed. The Applicant is unhappy that the Respondent has failed to supervise the contractor and make sure that the works had been completed before paying the contractor. Mr McAulay advised that although he has expertise in the matter, it would have been readily evident to any unqualified person that the re-commissioning work had not been performed. We accept his evidence on this matter. Mrs Wilson had no explanation as to the failure to realise that works had not been completed by the contractor and the approval of payment. We find there to have been a breach of Code Section 6.9 in that the Respondent failed to identify the failure of the contractor to complete these substantial works or to pursue the contractor for its failures until the matter was brought to its attention by owners well after the work had been approved for payment by the Respondent. We consider the same conduct to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services.

(d) Legionella Testing The Applicant complains that legionella testing has not been performed. Mrs Wilson explained that this had been contracted to an independent contractor but neither the contractor nor the Respondent is able produce any evidence that this has been done. Mrs Wilson said that it is normal policy for the Respondent to ensure that legionalla testing is done annually at Developments of this kind. She cannot explain why this seems not to have happened here. We find there to have been a breach of Code Section 6.9 in that the Respondent failed to identify the failure of the

contractor to complete these works or to pursue the contractor for its failure to do so. We consider the same conduct to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services.

(e) Fire detection systems Mrs Wilson accepts that there was a long standing faulty with the fire detection system. She observed this herself on visits to the Development. She instructed the contractor, ADT, to provide a quotation to rectify the fault. There then followed a period of months during which ADT claimed to have sent quotations to the Respondent and the Respondent did not receive them. The Applicant is concerned that the fire alarm system was working ineffectively at times and disabled at other times because of the lack of progress. He complains of the Respondent's failure to monitor the performance of ADT and to ensure that quotations were received and dealt with or an alternative arrangement made. He complains that no fire safety log has been handed over to the new factor. He advises that the new factor reported serious problems with the fire alarm system and instructed the replacement of two thirds of the smoke sensors. We do not find the explanation that repairs to the system had to await the production of a quotation from ADT to be reasonable given that that position was admitted to have persisted for months. There was no evidence as to why the Respondent could not have taken steps to advance what was an important matter. We consider the Respondent's conduct to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services. We identify no breach of the Code in this respect.

(f) Smoke extraction system The Development has a system which automatically opens doors to allow smoke to be extracted from the building in the event of a fire. The Applicant complains that doors have for a very considerable time been stuck in the open position. Mrs Wilson advises that ADT were responsible for maintaining the system. Her evidence was that ADT had carried out repairs that she had asked for. She referred to one particular smoke door where a replacement of the whole part had been necessary. In response, the Applicant indicated that the doors had been stuck in the open position for some time in many locations in the building – this was not a case of just one door needing to be replaced. We accept the Applicant's evidence in this regard. We find there to have been a breach of Code Section 6.9 in that the Respondent failed to identify the failure of the contractor to maintain/repair the system or to pursue the contractor for its

failure to do so. We consider the same conduct to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services.

(g) CO extraction system There is a system in the basement car park to expel car exhaust fumes from the basement. It transpired (and appears to be agreed) that this had never been in working order. Self-evidently this had never been maintained and it appears that the Respondent completely overlooked the need to deal with this. No explanation could be offered by the Respondent. This is an important building system and so the Respondent, as part of its regular inspection regime, should have noted the position and either advised owners that the system did not work or made arrangements for its connection and maintenance as appropriate. Instead it did nothing. We consider this to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services. We do not consider there to be a breach of the Code.

(h) Lifts The Development is served by two passenger lifts, two disabled lifts and a basement car park lift. The Applicant did not complain about the latter. The Applicant indicated that he was not strongly insisting upon this aspect of his application but he did feel that the lift maintenance contracts had not been properly supervised by the Respondent. The Applicant advised that the lifts had been unreliable. The disabled lifts, in particular, had been a problem between summer 2015 and summer 2016 with one not working at all during that period. The Respondent accepted that the lifts had not been working for extended periods which Mrs Wilson put down to inaction on the part of Mr Vallance, although we note that he is said to have left the Respondent's employment in September 2015. We consider the failure to take steps to ensure that the lifts were appropriately maintained to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services. We do not consider there to be a breach of the Code.

(i) Electricity Supply It was agreed that the Applicant's concerns regarding this matter had been dealt with directly between the parties and so we do not address this issue here.

(j) Basement supports Supports within the basement area are said by the Applicant to be rusty and in need of sand blasting and painting. The Applicant regards this as a maintenance failure by the Respondent. Mrs Wilson

explained that there is a problem with water ingress in the basement and it had not been thought sensible to deal with the beams until the water ingress had been resolved. The water ingress is the subject of a claim to the NHBC. The Applicant accepted that there was an issue with water ingress. We consider that the evidence available on this topic was not sufficient to allow us to infer that there had been a breach of either property factor's duties or of the Code.

(k) Cleaning The cleaning contract was held by a company called Oak. The Applicant found their performance in cleaning the common areas to be very poor. There had been a number of complaints from owners. There was a concern that the Respondent was not properly supervising the contractor and had not replaced the contractor with a more able alternative contractor. Mrs Wilson indicated that the Respondent had inherited Oak as the cleaning contractor. The Respondent had dealt with complaints by contacting the contractor and that had led to some improvement. Mrs Wilson advised that the Development's common areas received high use and that many student occupiers were not as respectful of the need to keep the common areas clean as they might be. The Applicant was particularly concerned that the windows had not been cleaned since 2012. Mrs Wilson explained that window cleaning had been halted during the period of building works nearby (2013-2014). She advised that specialist abseiling contractors were required and that quotes had been provided to and rejected by the Owners' Committee in 2015 and 2016. The Applicant was concerned that refusal by the Owners' Committee was not equivalent to obtaining the views of all proprietors. He felt that the window cleaning quotes were unrealistically expensive compared to those which had been obtained more recently. We do not consider that the evidence available on this point is sufficient to enable us to conclude that the Respondent's actions constitute a breach of the Code or of property factor's duties.

(l) Lightning Conductor Mrs Wilson acknowledged that the Respondent had never put into place any arrangements to maintain the lightning conductor at the Development. She accepted that such an arrangement should have been put into place by the Respondent. It is the Respondent's normal practice for developments which it factors to employ a specialist contractor to carry out an annual maintenance inspection. That had never happened in this Development and she could not explain why.

The Respondent, as part of its regular inspection regime, should have noted the position and arranged appropriate maintenance. Instead it did nothing. We consider this to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services. We do not consider there to be a breach of the Code.

(m) Door Entry System This was said to have worked initially but always to have had problems. The Applicant felt that there had been a failure to have a contract for regular maintenance of the system. Mrs Wilson confirmed that contractors employed by the Respondent have advised that the system is obsolete and cannot be maintained adequately such that replacement is required. Mrs Wilson considers that repairs had been performed when needed and possible, but that the issues experienced related to the obsolete nature of the system. We accept her evidence in this regard. We have not identified any breach of the Code or of property factor's duties in relation to this matter.

(n) Commission The Respondent confirmed that there was no commission received by it in relation to maintenance contracts and we accept this and find no breach of the Code or of property factor's duties.

(o) Tendering arrangements The Applicant was concerned that proper tendering arrangements may not have been followed for cleaning and maintenance contracts. Mrs Wilson confirmed that the Respondent's standard arrangements were followed which included obtaining competitive quotations from multiple contractors where appropriate.

(p) Missing cladding It was agreed that there was an area of cladding which had been missing from the building's façade for some time. Mrs Wilson explained that an attempt to address this had been unsuccessful because an owner had failed to provide access to the affected area. We found no evidence of a failure by the Respondent in this respect and find there to have been no breach of property factor's duties or of the Code.

(q) Ventilation system There is a ventilation system serving all of the bathrooms and kitchens of flats within the Development. It is not working properly. The Respondent had contracted with a contractor, Emtec, to perform maintenance but the contract depended upon there first having been an inspection and survey of the system, which survey appears not to have been completed. The Respondent's evidence was that a survey had been

instructed by Mr Vallance in June 2014 but that nothing seemed to have happened thereafter. No explanation could be provided for that by the Respondent. We consider this to constitute a breach of property factor's duties by reference to Clause 2 of the Written Statement of Services. We do not consider there to be a breach of the Code.

PROPERTY FACTOR ENFORCEMENT ORDER

We propose to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached document.

Having regard to the significant failures of the Respondent which we have identified, we have decided that the Respondent should be ordered to pay to the Applicant the total sum of £300 which approximately reflects the management fees charged by the Respondent to him during the period of his ownership.

Section 20 of the 2011 Act provides the Committee with a wide discretion as to the terms of any PFEO. In particular, section 20(2) allows us to award such sum as we consider to be reasonable. In all the circumstances of this case, we consider payment of the sum of £300 to be reasonable.

APPEALS

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

JOHN M MCHUGH

CHAIRMAN

DATE: 13 February 2017