

Housing and Property Chamber First-tier Tribunal for Scotland



**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”)
Property Factors (Scotland) Act 2011 (“the Act”)**

Statement of reasons for decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber (“the Tribunal”) (Rules of Procedure) Amendment Regulations 2017 (“the regulations”)

Chamber Ref: FTS/HPC/PF/21/0147

Re.: 29 Rattray Grove, Edinburgh, EH10 5TL (“the property”)

The Parties: -

Mr William M Smith, 29 Rattray Grove, Edinburgh, EH10 5TL (**“the homeowner”**)

Trinity Factoring Services Ltd., 209 Bruntsfield Place, Edinburgh, EH10 4DH (**“the property factor”**)

Tribunal Members: - Simone Sweeney (Legal Member) Angus Anderson (Ordinary Member)

Decision of the Tribunal

The Tribunal unanimously determined that there is no evidence that the property factor has failed to comply with sections 6.1, 6.3, 6.6 or 6.9 of the Code of Conduct for Property Factors (“the Code”) as required by section 14 (5) of the Act.

The Tribunal unanimously determined that there is no evidence that the property factor has failed to comply with the Property Factor’s duties as required by section 17 (1) (a) of the Act.

Background

1. By application dated 25th March 2021, the homeowner applied to the Tribunal for a determination on whether the property factor had complied with sections 6.1, 6.3, 6.6 and 6.9 of the Code and with the Property Factor's duties in terms of section 17 (1) of the Act.
2. Documentation in support of the application was produced by the homeowner (including copy emails, photographs, floor plan). By email dated 15th July 2021, the homeowner provided the Tribunal with his observations to documentation produced by the property factor.
3. A Notice of Acceptance of the application was issued on 7th April 2021 by a legal member of the Tribunal under Rule 9 of the regulations. The application was referred to a telephone hearing before the Tribunal on 7th June 2021. That hearing was discharged and the application continued to a hearing on 23rd July 2021. Reference is made to the terms of the Tribunal's direction dated, 9th May 2021.
4. A note of response to the application together with an inventory of productions was received from the property factor under cover of email dated 4th May 2021. Further documents were received from the property factor by email dated 16th July 2021. Included in the documentation was copy deed of conditions, insurance documentation, photographs, copy letters, complaints procedure and copy invoices.
5. In advance of the hearing on 23rd July 2021 the homeowner indicated that he wished to withdraw the part of his complaint of 25th March 2021 about factor's charges.
6. At the telephone hearing on 23rd July 2021 the homeowner was present. The property factor was represented by Ms Nikki Dunlop, property manager and George McGuire, Director of Operations. Mrs Bonner, legal member of the Tribunal was present to observe proceedings, only, and played no part in the hearing. No issues were raised by parties in advance of the hearing.

Formal complaint

Evidence of the homeowner

7. The homeowner alleged that the property factor had failed to follow its own complaints procedure and, in so doing, had not complied with the Property Factor's duties.

8. Specifically, the homeowner alleged,

"In accordance with Section 17 of the Act and the Tribunals requirements to consider an Application, the Applicant submitted a Formal Complaint to the Factor on 14.01.21. The Factors procedure is to acknowledge the complaint within 5 working days and provide a full written response within 20 working days from receiving the complaint. WMS 3/1

The full written response was received by the Applicant on 25.02.21 – 30 working days from 14.01.21 (10 days late!)

The third and final stage of the Factors Complaint procedure is to issue a decision within a further 15 working days. WMS 3/1

40 working days from the Applicants Formal Complaint expired on 11.03.21.

The Factor has failed to provide his Stage 3 response to the Applicants Formal Complaint and the Applicants Stage 2 response which was submitted on 01.03.21.

The Applicant requested the Factor on 01.03.21 and 04.03.21 to confirm safe receipt of the Applicants Stage 3 submission. WMS 3/6

The Factors failed to provide confirmation of receipt of the Applicants Stage 3 submission.

The Factor has failed to comply with his Formal Complaints Procedure."

9. The homeowner referred the Tribunal to a copy of the property factor's complaints procedure which was within the inventory of productions before the Tribunal. This provided a three stage process. Stage 1 required the complainer to register a complaint in writing. The property factor would "aim" to acknowledge the complaint in five working days. Stage 2 involved an investigation of the complaint and the property factor would "endeavour" to provide a written response within twenty working days of receiving the complaint. Stage 3 allowed the complaint to be

referred to a Director of Operations for a final written decision should the complainer remain dissatisfied with the response from Stage 2.

10. The homeowner submitted that he received a final response to his complaints of 14th and 15th January 2021 on 19th March 2021. This, he claimed, was 40 days from the date of his complaint. This was out with the timescales of the property factor's complaints procedure. By his calculation, the homeowner submitted that the final response ought to have reached him 35 days from 14th January and 15th January to comply with the procedure.
11. Copies of emails between the parties in respect of a formal complaint from 14th January to 19th March 2021 were produced within the property factor's inventory of productions. The email of 14th January 2021 from the homeowner highlighted repairs required to address issues of pigeon damage, BT damage, fire safety, switch room access and requests for, "*outstanding*" information and documentation.
12. A further email from the homeowner, dated 15th January 2021, set out further repairs and requested further information.
13. Two separate acknowledgement emails were sent from the property factor on 22nd January 2021 at 17:44 and 17:57. Each email confirmed that the property factor would "*endeavour*" to send a written response to the homeowner in four weeks of receipt of the complaint.
14. An email dated 5th February 2021 at 09:39 from the property factor was sent to the homeowner addressing the issues in the emails of 14th and 15th January 2021.
15. An email dated 8th February 2021 by the homeowner challenging the property factor's response of 5th February 2021 and requesting further information.
16. A response dated 25th February 2021 from the property factor's officer, Nick Jarvie, was produced.
17. The homeowner sent an email dated 1st March 2021 directed to the property factor's officer, George McGuire, expressing his dissatisfaction with the content of Mr Jarvie's email of 25th February 2021. There were 14 issues raised by the homeowner.

18. An email dated 19th March 2021 from the property factor's Director of Operations, George McGuire responded to each of the 14 issues. The email intimated that the content was the final response of the property factor to the homeowner's complaint and directing the homeowner to the Tribunal should he remain dissatisfied.

Property factor's response

19. On behalf of the property factor, Ms Dunlop denied any failure to comply with the property factor's duties. Referring to the dates of the emails above, Ms Dunlop submitted that these show compliance with the dates set out in the complaints procedure.
20. The original complaints of 14th and 15th January 2021 were responded to on 22nd January which satisfies the five working day commitment of stage 1 of the procedure. The email of 5th February 2021 from the property factor was within twenty working days of the 14th and 15th January 2021 which satisfies the commitment of stage 2 of the procedure. On 25th February 2021 the property factor replied to the homeowner's email of 8th February 2021. Again, this was within twenty working days which satisfied stage 2. The homeowner escalated his complaint on 1st March and a final response was issued on 19th March, which Ms Dunlop advised was 15 working days from receipt of the escalation email.

Failure to address issues to building arising from pigeon damage

Evidence of the homeowner

Section 6.1 of the Code

"You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."

Section 6.9 of the Code

"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."

21. The homeowner alleged that, having failed to address issues arising from pigeon damage on the exterior of the building, the property factor had failed to comply with sections 6.1 and 6.9 of the Code. The homeowner conceded that this exact complaint had been dealt with by another Tribunal in a separate application under reference FTS/HPC/PF/20/1445. In that application, that Tribunal had found no failure on the part of the property factor to comply with sections 6.1, 6.9 (and also, section 6.3) of the Code in relation to the pigeon damage. The homeowner had attempted to challenge the decision of that Tribunal in relation to this complaint but had been advised that he was out of time. The homeowner considered the other Tribunal to have, “*erred in their PFEO judgement*” and wished the matter to be considered in this application. The Tribunal chair explained to the homeowner that having been unable to successfully appeal a previous decision, it was not appropriate to bring the same complaint before another Tribunal in the hope that a different decision was reached on a matter determined already. The homeowner submitted that he did not agree with the advice of the chair. It was explained that the Tribunal was not providing legal advice to the homeowner. Rather the homeowner was being advised that the Tribunal would not consider this part of the application as this complaint had been determined, previously, under reference, FTS/HPC/PF/20/1445.

Response of the property factor

22. In relation to the allegations of a failure to comply with sections 6.1 and 6.9 in relation to pigeon damage, the property factor relied on the decision of the Tribunal under reference, FTS/HPC/PF/20/1445.

BT Damage

Evidence of the homeowner

Section 6.6 of the Code

“If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.”

23. The homeowner alleged that the property factor had failed to comply with sections 6.1, 6.6 and 6.9 of the Code in relation to damage caused to the common parts of the building by an engineer from BT.
24. The homeowner submitted that in the application with reference, FTS/HPC/PF/20/1445 the Tribunal had determined that the property factor had entered into a wayleave with BT, *“illegally...without consulting or obtaining the unanimous approval of the proprietors in accordance with the Deed of Conditions.”*
25. It was a matter of agreement that in the course of fibre optic improvement works, an engineer from BT Open Reach had caused damage to the duct panels in the common hallway.
26. In the determination of application, reference, FTS/HPC/PF/20/1445 the Tribunal referred to, above, considered this same complaint under sections 6.1, 6.6, 6.7, 6.8 and 6.9 of the Code. That Tribunal found no failure by the property factor to comply with sections 6.1, 6.6, 6.7, 6.8 or 6.9 of the Code.
27. Reference is made to the comments of the Tribunal at paragraph 20, above.

Response of the property factor

28. By way of response the property factor relied upon the findings of the Tribunal in consideration of this complaint under application, FTS/HPC/PF/20/1445. The property factor denied any failure to comply with sections 6.1, 6.6 or 6.9 of the Code in relation to this complaint.

Insurance claim arising from BT damage

Evidence of the homeowner

29. The homeowner submitted that the property factor had made an insurance claim for the damage to the duct panels. He claimed that the claim had been settled by the insurers but the money had not been returned to owners which, he believed, ought to have occurred. The homeowner prayed in aid the decision of the Tribunal in FTS/HPC/PF/20/1445 that the property factor should not have submitted an insurance claim without approval of owners. The homeowner claimed that the property factor had failed in its property factor's duties by failing to return money paid by the insurers in settlement of the claim to owners.

30. The homeowner referred the Tribunal to an email dated 16th March 2021 which, insofar as is relevant, provided, *“Trinity should refund all Insurance monies received by Trinity in relation to the BT December 2019 damage to the Insurers.”*

Response of the property factor

31. The property factor denied any failure to comply with the property factor’s duties. It was admitted that an insurance claim was made, successfully. The money was paid by the insurers and offset against the costs to be paid to the contractors who had undertaken the necessary remedial work in the common areas. The owners had requested that the entire staircase was re-decorated when the area around the duct panels were being decorated. Ms Dunlop submitted that the property factor had notified all owners in writing that an insurance claim was submitted.
32. Ms Dunlop explained that the insurance policy is in the name of the property factor and claims can be made and payments received without the property factor seeking any authority from the owners.
33. The deed of conditions was within the property factor’s inventory of productions. Insofar as is relevant, it provided, *“...The insurance shall be in the name of the Factor for behoof of all the Proprietors...”*

Fire safety

Evidence of the homeowner

34. The homeowner alleged that the property factor had failed to protect owners from a risk of fire. It was explained that individual flats within the building are designed as units to self-contain fire. There are six smoke detectors are positioned within the common hallways and staircase. Also there is a single external hallway window opening mechanism on each floor. In the event of a fire, the smoke alarms in the common hallways and the window opening mechanism should activate. The mechanism is intended to provide ventilation to the hallway and staircase. The homeowner described the mechanism as, *“a crucial and essential part of the Fire Safety provisions in the hallway.”*
35. A fire safety certificate from contractors, Total Concept Services Limited, dated, 14th April 2020 was produced within the homeowner’s inventory. The document was produced following a bi-annual fire inspection at the property by Total Concept

Services Limited. The homeowner submitted that he recovered this document from the property factor in August 2020 at his request. The certificate was not shared with owners by the property factor in April 2020.

36. The homeowner drew to the Tribunal's attention the section of the certificate which provided, "*Ground floor window actuator faulty- failed to open. (Smoke detection >10 years old).*"
37. The certificate also noted that the six smoke detectors were, "*due replacement.*"
38. The homeowner submitted that the smoke detectors were replaced by the property factor almost immediately in April 2020.
39. In August 2020, the homeowner was concerned to learn that, not only had the window opening mechanism on the ground floor of the building not been in full working order at the time of the inspection in April 2020 but no repairs had been carried out and the mechanism remained inoperable in August 2020. Given the consequences which arose in the event of fire, the homeowner submitted that the property factor had left the owners at risk by failing to address this issue sooner.
40. The homeowner was of the view that the property factor ought to have made owners aware of the fact that the mechanism was inoperable when it was identified in April 2020 but the property factor failed to do so. The homeowner submitted that the property factor ought to have addressed the faulty mechanism in April 2020.
41. The property factor did not instruct contractors to undertake works to address the faulty mechanism until 5th August 2020, approximately 15 weeks from receiving the certificate which highlighted the issue.
42. In the course of their works on 5th August 2020, the contractor identified that similar mechanisms on the windows on the first floor of the building required replacement, also.
43. The homeowner raised his concerns with the property factor in August 2020. An email to the property factor dated 19th August 2020 was produced. Insofar as is relevant, it provided,

"Why did all three windows fail to open under test? All three did not fail on the inspection on 14th April, only the ground floor failed...When did all three last open

under test?...If the window opening mechanism is faulty and/or out of date, please immediately replace it-for all three windows..."

44. It was alleged that the property factor had failed to comply with section 6.1 of the Code, specifically, the homeowner submitted in his complaint that,

"The Factor has failed to pay professional attention to this important repair and maintenance issue. Code 6.1...The Factor failed to recommend to the Proprietors to obtain a Fire Risk Report Code 6.1."

45. The homeowner accepted the terms of section 6.1 of the Code (that the property factor requires to have in place procedures to allow homeowners to notify matters requiring repair, maintenance or attention and to inform homeowners of the progress of this work, including timescales). Notwithstanding this, the homeowner confirmed that he was able to bring to the attention of the property factor, through email, that there was an issue with the window mechanism which required repair.

Response of the property factor

46. The property factor denied the allegations that there had been any failure to comply with section 6.1 of the Code or the property factor's duties.
47. Ms Dunlop confirmed that the fire certificate from Total Concepts Limited of 14th April 2020 was not shared with owners. It was submitted that the certificate was received by the property factor on 30th April 2020. On 1st May 2020, the property factor instructed contractors to replace the six smoke detectors. This work was completed on 14th May 2020.
48. Also, on 1st May 2020, the property factor requested a quote for replacement of the faulty window mechanism. The request was made by telephone. There is no record of the call. Ms Dunlop explained that it is the property factor's practice to recover quotes before works are instructed. The information received from the contractors was that there was a delay recovering the relevant parts from suppliers. This was impacted by lockdown which was in place at the time.

49. A quote for the window mechanism repair was received from the contractors on 4th August 2020. The property factor instructed the works on 5th August 2020, having sourced the relevant parts. The repairs were carried out on 25th August 2020. It was admitted that in the course of these works, it was identified that there were issues with the mechanisms on the first of the building. These, too, were addressed. The contractor made use of spare parts which he had in his possession to complete the repairs.
50. The Tribunal enquired what efforts the property factor made to press the contractors between the initial contact on 1st May and the quote being received on 4th August 2020. Ms Dunlop's evidence was that the property factor chased the contractors by phone during this period. There is no record of any of the phone calls as the property factor's practice is not to keep a record of calls to contractors. The response from the contractor, on each occasion, was that there was a delay with suppliers.
51. Ms Dunlop denied any suggestion that the smoke detectors were replaced without obtaining quotes in advance. Rather, her evidence was that a quote for the replacing the smoke detectors was requested at the same time the quote for the window mechanism work was requested. Total Concepts Services Limited provided a quotation for replacing the smoke detectors quickly. On receipt of the quotation, the property factor instructed the works in May 2020.

Fire safety insurance

Evidence of the homeowner

52. The homeowner had concerns that the property factor had not made insurers aware of the faulty window mechanism and the increased risk of fire which arose from that. Therefore he requested that the property factor provide him with evidence that the insurers had been informed. The homeowner referred the Tribunal to an email exchange between himself and the property factor on 8th September 2020.
53. An email from the property factor on 8th September 2020, insofar as is relevant, provided,

"Dear Mr Smith, I have now heard back from the insurers. Insurers comments as follows: "Thank you for your email...I agree that given our Insured's comments I am

satisfied that they are aware of their obligations and am happy for them to respond to the property owner." Cover is still being provided in full with no restrictions..."

A response from the homeowner at 11:38am on the same date provided,
" Can you forward a copy of the email referred to in the insurer's response? Are there any obligations and standard terms, conditions, exclusions per policy wording that we at 29RG should be specifically aware of in relation to my disclosures to Trinity as brokers? Are there any deficiencies that we should rectify to maintain adequate insurance cover for fire?"

54. The homeowner submitted that he had received no response from the property factor to his email on 8th September 2020 at 11:38am.

55. The homeowner was unable to show evidence that the property factor had failed to notify the insurers of the issues with fire safety at the building. In terms of any failure by the property factor, the homeowner submitted that,

"the Code of Conduct and definition of duty make no specific provision for the Applicants important and pertinent request. The Applicant is concerned that the Insurers may have relevant observations that the Factor has unreasonably failed to share, attend and apply."

56. Having received no reply to his email of 8th September 2020 at 11:38am, the homeowner requested that the Tribunal order the property factor to provide a copy of the insurer's response and to pay each of the eleven proprietors in the building the sum of £300 for failing to, *"comply with the Code and their duty."*

Response of the property factor

57. In response, Mr McGuire for the property factor, directed the Tribunal to an email within the property factor's inventory of productions. The email was dated 8th September 2020 and sent from the property factor to the homeowner at 17:22. The email read,

" 'Cover is still being provided in full with no restrictions (obviously subject to standard terms, conditions, exclusions per policy wording).' I attach the policy wording."

58. A 64 page document from Arch Insurance with the title, *"Policy wording Property Owners"* was provided within the inventory. Mr McGuire submitted that this

document was attached to the email which was sent to the homeowner at 17:22 on 8th September 2020. The property factor denied any allegation that there was any failure to comply with the Code or any duties.

Access to the switch room

Evidence of the homeowner

59. A cupboard within the common area contains the electrical wiring for the building. In his application, the homeowner referred to the cupboard as the, *“switch room.”* The property factor had fixed a lock to the cupboard door preventing the homeowner access. The homeowner alleged that the property factor had no legal basis to do this, *“without the unanimous approval of all the proprietors.”* He relied upon the deed of conditions.
60. The homeowner referred to condition thirteenth which provides that, *“There shall be appointed a Factor who will be responsible for instructing and administering the common repairs and maintenance of the Block Common property.”*
61. The homeowner alleged that the lock attached to the switch room door was not, common repairs or maintenance. Rather this was an addition, intended to restrict access to the room which was out-with the powers afforded to the factor by the deed of conditions.
62. The homeowner submitted that it is imperative that a key was never intended for this room. Rather, access should be easy. Should fire services attend the building, they cannot spend time searching for a key to access the electrical wiring.
63. The homeowner alleged that this was a failure to comply with sections 6.1, 6.3 and 6.6 of the code.
64. In respect of section 6.1 of the Code, the homeowner alleged that a failure arose because there was no information provided to the homeowner that the property factor intended to do this work.

Section 6.3 of the Code

“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.”

65. No detail or specification was provided by the homeowner as to why the property factor had failed to comply with sections 6.3 or 6.6 of the Code in relation to this complaint.
66. It was alleged that the property factor had acted illegally, incompetently and had, *“exposed the Proprietors to risk to life and property”* by attaching a lock and restricting access to this room.

Response of the property factor

67. Ms Dunlop explained that a letter was issued to owners on 17th December 2020 intimating that a lock had been attached. The letter was before the Tribunal. Insofar as is relevant, the letter provided,

“It was reported that the door to the electrical cupboard...has been kept ajar on several occasions...It is unusual that no lock was fitted when built by Cala, however to ensure the door remain closed and restricts unauthorised access, a budget lock has been fitted...”

68. Ms Dunlop explained, further, that a T Bar locking mechanism was applied to the entry door. The locking mechanism is standard in the building industry. The key which owners have to gain access to the bin enclosure provides access to the room. It was denied therefore that the owners were unable to access the room. Most contractors and the fire service carry keys which provide access to this standard locking mechanism.
69. The property factor denied any allegation that they had failed to comply with sections 6.1, 6.3, 6.9 of the Code or the property factor’s duties by failing to act in accordance with the powers afforded to them within the deed of conditions. Rather Ms Dunlop referred to the provisions of the deed of conditions which allows the property factor to preserve the property.
70. The homeowner did not deny receipt of the letter of 17th December 2020. Rather he submitted that this letter simply advised owners of the property factor’s actions after the locking mechanism was fitted. The homeowner was of the opinion that the property factor ought to have provided notice to the owners in advance of the mechanism being fitted.

Car park

Evidence of the homeowner

71. It was alleged that the property factor failed to effect necessary repairs at the common car park and by this failure had not complied with sections 6.1, 6.6 of the Code and the property factor's duties.
72. By way of background, the homeowner explained that, around October 2020, he noticed that the monobloc was unstable in the car park area. The homeowner explained that monobloc is positioned on top of substrata which is made from sand. Depressions had appeared in the monobloc surface of the car park. Poor drainage was causing the substrata to wash across the car park whenever it rained. Photographs were provided to illustrate the issue.
73. The homeowner considered it an essential repair and raised this with the property factor on 19th October 2020 setting out the works he regarded as necessary to address the issue. The email, insofar as is relevant provided,
- “Please arrange for the loose and de bedded paviments at the entrance to the rear car parking area-and those within 1m- to be lifted, re-laid on a sound base, levelled to the existing falls and grouted to match the existing...Please obtain 2 or 3 competing estimates for the same specification... ”*
74. The property factor acknowledged the issue by email of 29th October 2020 and the homeowner was advised that the matter would be attended to.
75. Having received no update nor the specification requested, the homeowner required to contact the property factor again on 2nd December 2020 and 15th January 2021 but no response was forthcoming.
76. By failing to remedy the monobloc prior to the winter, the homeowner argued that the damage would increase and cause owners unnecessary costs in the future.
77. The Tribunal requested how the homeowner alleged that the failure to remedy the issues in the car park was a failure to comply with section 6.1 of the Code. Reference was made to the terms of section 6.1. The homeowner submitted that there was no works undertaken, no progress and in the absence of any better part of the Code, he was insisting the Tribunal consider this complaint under section 6.1.

78. With regards to section 6.6 of the Code, the homeowner insisted that the property factor's failure to provide the works specification he had requested on 19th October, showed a failure to comply with section 6.6 of the Code.
79. In respect of a failure to comply with the property factor's duties, the homeowner submitted that the property factor has a duty to be professional in all property matters but that has not been the case, here.

Response of the property factor

80. The property factor admitted no repairs had been carried out to the car park in response to the email from the homeowner of 19th October 2020.
81. Ms Dunlop submitted that the property factor had taken the decision that urgent repairs to the car park were unnecessary based on the views of other owners.
82. The property factor had written to owners seeking their views. A copy of the letter of 20th April 2021 was before the Tribunal. The letter was in the following terms,

"We have been contacted by the owner at No. 4 who is of the opinion that the monobloc/paviments at the rear of Block 26 & 29 Rattray Grove require urgent attention, please see picture below. Whilst we are of the opinion that it does not require attention, we will take instructions from owners if they would wish for us to proceed with any work. Should we get a majority agreement, we will look to appoint a surveyor/engineer to draw up a specification of works for tendering. Please note that the area in question is the mutual responsibility of all owners in both block 26 & 29...I would therefore be obliged if you would advise by Friday, 30th April if you are in favour or against instruction a surveyor/engineer to draw up a specification of works for tendering."

83. The property factor confirmed that no technical advice about the state of the car park was recovered from a suitably qualified expert prior to the letter being issued on 20th April. The phrase, "*Whilst we are of the opinion that it does not require attention,*" was based on the opinion of the property factor, only.
84. In response to the letter of 20th April 2021, the property factor received replies from five owners at block 26. Of those five, all were against a surveyor/engineer being

instructed. Nine owners from block 29 replied. All nine confirmed they were against the instruction of a surveyor/engineer to draw up a specification of the works required.

85. In light of the responses, the property factor determined that the decision of the majority of owners meant that a surveyor/engineer should not be instructed to draw up a specification of works.

Request to forward messages to Blocks 26 and 29

Evidence of the homeowner

86. The homeowner wished to invite all owners in blocks 26 and 29 at the development to a meeting and to share with them various pieces of information relevant to the management of the development. The homeowner was aware that not all owners are resident at their properties. To ensure that all owners received an invitation to his meeting, the homeowner had sought the assistance of the property factor. The purpose of the meeting was for the homeowner to share issues he held about the management of the development with other owners.
87. By email dated 17th February 2021 the homeowner requested that the property factor circulate a message to the owners of blocks 26 and 29. A copy of this email was within the homeowner's inventory.
88. By email dated 25th February 2021 the homeowner requested that the property factor circulate to all owners certain pieces of information, on his behalf. A copy of this email was within the property factor's inventory. The homeowner, requested that the property factor, *inter alia*,

“forward a copy of the replies to Trinity’s message referred to in Trinity’s letter dated 24.02.21. Confirm the senders are Proprietors, delete their email address and identify the flat number. Confirm that George has circulated my message of 17.02.21 to the Proprietors of 26 & 29 RG, as requested.”

89. A copy of the property factor's response to the homeowner of 3rd March 2021 was also before the Tribunal. That response, insofar as is relevant, provided,

“...We are not obliged to provide you with copies of correspondence that we receive from other clients...Having had no sight of your message of 17.02.21 please forward a copy to allow me to respond.”

90. The homeowner was not satisfied with the response he received from the property factor. He felt that more could have been done by the property factor assist him to communicate with other owners. Failure to share documents on his behalf to other owners showed a failure to comply with the property factor’s duties. Only the property factor had the relevant contact details to enable communication with all owners. The homeowner conceded that there was no obligation within the Code for the property factor to share information on his behalf. He withdrew an allegation of a failure to comply with section 6.6 of the Code.

91. The homeowner denied that he could communicate his meeting without the assistance of the property factor. He was fearful of placing letters through individual letter boxes as he didn’t know who lived in each flat. A notice could not be placed in the common areas as owners would complain. A meeting of owners is held annually, an owners’ committee exists but the homeowner did not wish to seek the assistance of the committee to promote a meeting on his behalf.

Response of the property factor

92. Ms Dunlop submitted that the property factor has intimated information and communication on behalf of the owner in the past. However the property factor has received a request from the majority of owners that no further communications are sent to them on behalf of the homeowner.

93. Ms Dunlop referred the Tribunal to the property factor’s final response email to the homeowner’s complaint of 19th March 2021. The relevant part of the email provided,

“Your message of 10 February 2021 was circulated to the owners. Nikki Dunlop’s email dated 16 February 2021 confirmed this. We will not be forwarding any further messages on your behalf if you wish to correspond with the other owners you can either use the email address you already have or put something through their letter box...”

Cleaners

Evidence of the homeowner

94. The final part of the homeowner's complaint concerned an issue which had arisen during lockdown. The homeowner alleged that cleaners attending the property to clean the common areas failed to wear facemasks.
95. The homeowner agreed that cleaning services are provided by an external cleaning contractor and not the property factor.
96. Notwithstanding that, the homeowner alleged that this was a failing on the part of the property factor to comply with sections 6.1 and 6.9 of the Code and the property factor's duties.
97. The homeowner specified that the, *"factor failed to pay attention and failed to pursue the contractors to provide adequate work and service."*

Response of the property factor

98. Ms Dunlop denied any failure on the part of the property factor to comply with sections 6.1 or 6.9 of the Code or the property factor's duties.
99. Ms Dunlop submitted that the property factor had no responsibility for the actions of employees of the external cleaning company. All contractors were required to follow the guidance issued by the Scottish Government and it was for each contractor to carry out the appropriate risk assessments to ensure that staff and others were kept safe.
100. Having received the homeowner's complaint, the property factor had spoken to the cleaning contractors to remind them of their responsibilities. This was confirmed to the homeowner by email of 19th March 2021, referred to previously. The homeowner was advised to contact the relevant authorities if he continued to have concerns about the actions of the cleaners and directed to the Scottish Government website.

Further information provided by parties post hearing

Property Factor's position on authority to apply lock to electrical cupboard

101. After the hearing, in the course of its deliberations, the Tribunal identified that further information was required from the parties to enable the Tribunal to determine the application. In particular, the Tribunal sought clarification from the

property factor upon which section of the deed of conditions it was relying when it was submitted that the property factor had authority to apply a lock to the door of the electrical cupboard. The homeowner was copied into the request of the Tribunal.

102. By email dated 26th August 2021, Ms Dunlop replied in the following terms, *“...if you can refer to clause 25 of the deed of conditions.”*

103. Clause twenty fifth of the deed of conditions provides that at a meeting of proprietors, provided that there is a majority of votes of those present at the meeting then it shall be competent to,

“delegate to the Factor appointed as aforesaid, full right, power and authority to take charge of all matters pertaining to the maintenance and preservation of the Common property, both internal and external, and the employment of labour thereon, as if said right, power and authority could be exercised by a majority vote at such a meeting...DECLARING THAT said Factor shall unless otherwise determined by a meeting of proprietors, be entitled during the continuance of his appointment, to exercise the whole rights and powers which may competently be exercised at or by a meeting of proprietors and others as aforesaid.”

104. The Tribunal requested evidence, if any, of owners having delegated the powers and authority within clause twenty fifth to the property factor and when. The homeowner was copied into the request.

105. By email dated, 2nd September 2021, Ms Dunlop responded to the request providing a copy of the constitution of the owners’ association, adopted at an AGM in 2013, minutes of that meeting, and a copy email dated 1st July 2016 confirming reappointment as property factor.

106. The constitution set out the role and powers of the owners’ association, including,

“To delegate to the Factor the full right, power and authority to take charge of any or all matters relating to the maintenance and preservation of the Common Property, both internal and external and the employment of labour to deal with the said issues,

as if the right, power or authority had been exercised by a majority vote at a said meeting."

107. The minutes of the 2013 AGM revealed that twenty owners were present at the meeting together with the chair and Ms Dunlop on behalf of the property factor. There were 14 proxy votes recorded and apologies from two people. The minutes indicated that voting procedures were carried out, correctly.

108. The minutes included reference to a proposal to adopt a revised constitution which had been put before owners. The revised constitution was understood to be the document referred to, above. The minutes recorded that the proposal, *"was carried subject to an amendment to item 28, the chairman's tenure."*

109. Copies of the property factor's emails and evidence were intimated to the homeowner.

Response of the homeowner

110. The homeowner reiterated his position that there was no provision within the deed of conditions which permitted the property factor to have acted in this way, without the authority of the owners. His email, dated 24th August 2021, insofar as is relevant provided,

"Unanimous approval of all 11 Proprietors (at a Proprietors Meeting?) is required to alter, improve or add to the Common Parts. The Factors decision, without consulting and obtaining of ALL 11 Proprietors, to add locking mechanisms to the Common Parts "switch room" is clearly out-with the Factors D of C responsibilities, the Code and Duty."

111. To the information produced by the property factor by email dated, 2nd September 2021, the homeowner reiterated his submission that clause thirteenth limits the property factor's powers to common repairs and maintenance of common property. Further he provided that,

“The provision of a new locking mechanism to the common switch room is not within the Factors D of C powers or duties.”

Findings in fact

The Tribunal finds the following facts to be established:-

112. That the homeowner is the owner of the property at 29/4 Rattray Grove, Edinburgh, EH10 5TL, being the subjects registered in the Lands Registers Scotland under title, MID73486.
113. That the property is within a block of flats which share common parts and common areas in and around the block.
114. That the block of flats in which the property is situated is within a wider development of similar blocks of flats.
115. That the property factor provides services to manage the common parts and common areas of the development, including the block of flats in which the property is situated.
116. That a deed of conditions governs arrangements for the appointment of and the delegation of powers and responsibilities to the property factor by the owners at the development.
117. That a statement of services provides details of the property management services provided by the property factor at the development.
118. That the deed of conditions and the statement of services provide the Property Factor’s duties upon which the property factor has a duty to comply.
119. That the Property Factor’s duties have been in place since October 2012.
120. That an owners’ association operates at the development.
121. That, in 2013, the owners’ association created a revised constitution.
122. That the constitution provides details of the association’s roles and powers to ensure proper repair and maintenance of the common property at the development.
123. That the association’s roles and powers, as set out within the constitution, are within accordance with the deed of conditions.

124. That, in the constitution, the owners' association delegated to the property factor the power and authority to take charge of any or all matters relating to the maintenance and preservation of the common property, both internal and external.
125. That the constitution was adopted by a majority of owners at the AGM of 1st October 2013.
126. That the property factor has a three stage complaints procedure.
127. That the homeowner made formal complaints by emails dated 14th and 15th January 2021.
128. In terms of stage 1 the property factor aims to acknowledge the complaint in five working days.
129. That the homeowner's emails 14th and 15th January 2021 were acknowledged by the homeowner on 22nd January 2021.
130. That in terms of stage 2 of the complaints procedure, the property factor aims to provide a written response within twenty working days of receiving the complaint.
131. That the property factor provided the homeowner with a written response to the complaints of 14th and 15th January 2021 on 5th February 2021.
132. That the response of 5th February 2021 was issued within twenty working days of the property factor receiving the homeowner's complaints of 14th and 15th January 2021.
133. That in terms of stage 3 of the complaints procedure the property factor will allow the complaint to be referred to a Director of Operations.
134. That the property factor's Director of Operations issued a final response to the complaints of 14th and 15th January 2021 on 19th March 2021.
135. That the allegations around issues with the exterior of the building from pigeon damage were determined previously under reference, FTS/HPC/PF/21/1445.
136. That the allegations around damage to the common areas by an engineer from BT Open Reach under, *inter alia*, sections 6.1, 6.6 and 6.9 of the Code, were determined previously under reference, FTS/HPC/PF/21/1445.
137. That the property factor made an insurance claim following damage to the common areas.

138. That the insurance policy is in the name of the property factor and claims can be made and payments received without the property factor requiring the authority of owners.
139. That remedial works were undertaken to the common areas and the common stairwell was re-decorated at the same time at the request of owners.
140. That the claim was successful and paid to the property factor.
141. That the property factor offset monies paid from the insurance claim against the costs of the remedial and re-decoration costs at the common areas.
142. That a fire certificate was produced by Total Concept Services Limited on 14th April 2020.
143. That the certificate identified that six smoke detectors required replacement and that the ground floor window actuator was faulty.
144. That the property factor received the certificate on 30th April 2020.
145. That the property factor requested quotes to replace the smoke detectors and to fix the faulty window actuator on 1st May 2020.
146. That the property factor received a quote for replacing the smoke detectors, instructed this to proceed and that the smoke detectors were replaced on 14th May 2020.
147. That the contractor was unable to provide a quote to the property factor for the works to the window mechanism until 4th August 2020.
148. That the window mechanism on the ground floor of the building was fixed on 25th August 2020.
149. That, in the course of these works, it was identified that the window mechanisms on the first floor was faulty.
150. That the window mechanisms on the first floor was fixed on 25th August 2020.
151. That insurance remained in place without restriction notwithstanding the issues arising from the fire certificate of 14th April 2020.
152. That an email reply was provided to the homeowner at 17:22 on 8th September 2020 providing the information requested.
153. That the property factor fitted a lock to the door of the electrical cupboard.

154. That the property factor advised owners in writing that the lock fitting had been applied on 17th December 2020.
155. That the lock to the door was fitted by the property factor because the door was being left ajar.
156. That the mechanism applied was a standard locking mechanism in the building industry.
157. That owners had been provided with keys to access the bin enclosure.
158. That the same key provided owners with access to the electrical cupboard.
159. That neither the homeowner nor the property factor recovered technical advice on the state of the car park and whether repairs were required.
160. That the homeowner contacted the property factor requesting repairs to the car park and details of the work specification.
161. That the costs of such repairs and works specification would be met by the owners.
162. That the property factor sought the opinions of the owners on whether they wished a surveyor/engineer to be instructed to prepare a specification of works.
163. That the property factor received responses from 14 of 22 owners.
164. That the majority of owners were not in favour of a surveyor/engineer being instructed to prepare a specification of works.
165. That the property factor was bound by the instructions of the majority of owners.
166. That the homeowner did not receive a specification of works from the property factor in response to his request of 19th October 2020.
167. That the homeowner had made requests of the property factor to share information and communications with all owners on his behalf.
168. That until 19th March 2021 the property factor had complied with many of the homeowner's requests.
169. That the property factor ceased complying with the homeowner's requests due to complaints from other owners.
170. That the homeowner complained of contractors attending the development and undertaking cleaning of the common areas without wearing face coverings.

171. That the cleaners were employed by external contractors.
172. That the property factor raised the issue with the cleaning contractors.
173. That the property factor is not responsible for the actions or inactions of the employees of a third party.

Reasons for decision

174. The Tribunal is satisfied that the property factor met with the timescales set out in its own complaints procedure. The evidence before the Tribunal showed that the responses from the property factor to the homeowner met with the five and twenty working day commitments of stages 1 and 2 of the procedure. Moreover, when escalated by the homeowner on 1st March, the property factor directed the complaint to George McGuire, Director of Operations, as set out at stage 3 of the procedure. Mr McGuire provided a final response and directed the homeowner to the Tribunal. The Tribunal rejects the submission by the homeowner that the final response ought to have been received by him within 35 days of 14th and 15th January 2021. The complaints procedure simply doesn't support that.
175. By his own admission, the homeowner submitted that the allegations around issues with the exterior of the building from pigeon damage were determined by another Tribunal under reference, FTS/HPC/PF/21/1445. The homeowner had the opportunity to challenge that decision but failed to do so within the timescales set out in the regulations. It is not appropriate for the Tribunal to consider a complaint which has already been determined, judicially. Therefore the Tribunal has not determined the allegations of a failure to comply with sections 6.1 and 6.9 of the Code.
176. The allegations around damage to the common areas by an engineer from BT Open Reach under, *inter alia*, sections 6.1, 6.6 and 6.9 of the Code, were determined previously under reference, FTS/HPC/PF/21/1445. For the reasons above, the Tribunal makes no determination of these matters under sections 6.1, 6.6 or 6.9 of the Code.
177. It was a matter of agreement between parties that an insurance claim was made after the common areas were damaged, that the claim was successful and that

payment from the claim was not paid to owners. The homeowner alleged that the property factor failed in its duties by failing to share the money with owners. The homeowner did not specify which duty and from where it arose. The Tribunal was not directed to any authority which indicated that there was any obligation on the property factor to pay the sums to the owners. The Tribunal was not provided with any evidence which contradicted the property factor's position that the insurance policy was in the name of the property factor and that the insurance payment was offset against the costs of further works. In the circumstances the Tribunal is not satisfied that there is evidence which shows that the property factor has failed in its duties in this regard.

178. The Tribunal finds no evidence that the issues raised in connection with fire safety indicate a failure to comply with section 6.1 of the Code. Section 6.1 requires the property factor to have in place procedures to allow homeowners to notify matters requiring repair, maintenance or attention and to inform homeowners of the progress of this work, including timescales. The homeowner's evidence was that he became aware of the issue with the faulty window mechanism in August 2020. He raised his concerns that the issue should be addressed with the property factor by email. The homeowner was able to notify the property factor of the matter requiring repair. In any event, the matter was known to the property factor in April 2020 and action taken by them to effect repairs on 5th August 2020.

179. The homeowner produced no evidence to support his allegation that the property factor had not notified insurers of a possible increased risk of fire. No specification was provided of which duty or section of the Code it was alleged that the property factor had not complied. There is no merit that the property factor failed to reply to the homeowner's email of 8th September at 11:38am. The homeowner did not dispute that he received an email from the property factor at 17:22 on the same date providing him with the information he had requested. The Tribunal find no failures by the property factor in relation to this complaint.

180. No detail, evidence or specification was provided by the homeowner as to why the property factor had failed to comply with sections 6.3 or 6.6 of the Code in relation to the complaint that a lock was attached to the door of the switch room. The

allegation that there was a failure to comply with section 6.1 is without merit. As set out above, Section 6.1 requires the property factor to have in place procedures to allow homeowners to notify matters requiring repair, maintenance or attention and to inform homeowners of the progress of this work, including timescales. There was no matter requiring repair, maintenance or attention to be brought to the attention of the property factor. The Tribunal finds no failure on the part of the property factor to comply with sections 6.1, 6.3 or 6.9 of the Code.

181. The homeowner alleged that, by attaching a lock to the electricity room door, a the property factor had not acted within the powers afforded to the property factor by the deed of conditions. The homeowner relied upon condition thirteenth which provided the property factor with responsibility to instruct and administer, "*common repairs and maintenance of the Block Common property.*" As the lock was not a repair or issue of maintenance, the property factor had acted without authority. However, the information provided by the property factor on 2nd September 2021 reveals that the powers under clause twenty fifth of the deed of conditions, ie to have full power and authority to take charge of all matters to maintain and preserve common property, internally and externally, was delegated to the property factor by owners at a meeting on 1st October 2013. Accordingly, the property factor had authority to apply the lock to the door. The Tribunal determines that there is no failure on the part of the property factor to comply with the deed of conditions.

182. The homeowner complained that the property factor had failed to respond to his request for repairs to be undertaken to the car park nor provide details of the work specification. For the repairs to be undertaken, the property factor required the authority of owners. The homeowner did not dispute this evidence. Before repairs could proceed, a specification of works from a suitably qualified engineer was required. The homeowner did not dispute the evidence of the property factor that a majority of owners were against recovering this information nor that he had received intimation of this information. The property factor was unable to provide the works specification requested on 19th October 2020 as it did not exist. The homeowner alleges this shows a failure to comply with section 6.6. Section 6.6 refers to information relating to any tendering process. There was no tendering process. The

Tribunal finds no failure on the part of the property factor to comply with section 6.6 of the Code in relation to this complaint.

- 183.** Again, reference is made to the terms of 6.1 of the Code, above. The homeowner was able to notify the property factor of matters at the car park he believed required repair. Copies of the relevant emails were within his own inventory. Timescales could not be provided on works which did not proceed. The Tribunal finds no failure to comply with section 6.1 of the Code in relation to this complaint.
- 184.** Finally, in relation to the car park complaint, the homeowner alleges that by not completing the repairs to the car park, there was a failure to act professionally which is a failure to comply with the property factor's duties. Given that the property factor was bound by the owners' instructions, it would have been unprofessional for the property factor to have gone ahead with repairs to the car park against the instructions of the majority of owners. Therefore the Tribunal finds no failure on the part of the property factor to comply with the property factor's duties in relation to this part of the homeowner's complaint.
- 185.** The homeowner failed to specify or identify any obligation on the property factor to share information and communications with other owners on his behalf. The homeowner did not dispute the evidence of the property factor that complaints had been received from other owners. The Tribunal makes no finding of any failure on the part of the property factor to comply with the property factor's duties in relation to this part of the complaint.
- 186.** The Tribunal appreciates the concern of the homeowner to identify cleaners coming onto the common areas during lockdown without face coverings. It is understandable that he might bring this to the attention of the property factor. However there is no responsibility on the property factor for the actions or inactions of employees of a third party. Sections 6.1 and 6.6 of the Code are alleged to have been breached but the homeowner provides no detail or evidence to support the allegation. Moreover the allegation of a failure to comply with the property factor's duties is without specification. The Tribunal finds the complaint to be without merit.

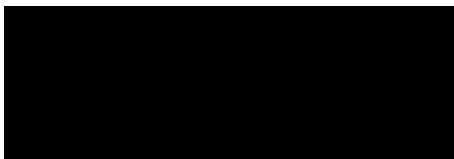
There is no finding of any failure on the part of the property factor to comply with sections 6.1 or 6.9 of the Code or the property factor's duties.

Decisions

187. In all of the circumstances narrated, the Tribunal finds no evidence that the property factor has failed to comply with sections 6.1, 6.3, 6.6 and 6.9 of the Code and no evidence that the property factor has failed to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.

Appeal

188. 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 within 30 days of the date the decision was sent to them.



Legal Chair, at Glasgow on 5th September 2021