

# Housing and Property Chamber First-tier Tribunal for Scotland

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**First-tier tribunal for Scotland (Housing and Property Chamber)  
("the tribunal")**

**Decision on homeowners' application: Property Factors (Scotland) Act 2011  
("the 2011 Act"), Section 19(1)**

**Chamber Ref: FTS/HPC/PF/18/0132**

**3B Ramsay Garden, Edinburgh, EH1 2NA  
("The Property")**

**The Parties:-**

**Mr M A Christopher Lee and Mrs Catherine Lee, 231 Sackett Street, Brooklyn,  
New York, 11231, USA  
("the Homeowners")**

**Mr R C Matthew Lee, 3B Ramsay Garden, Edinburgh, EH1 2AB  
("The Homeowners' Representative")**

**Factotum Scotland Limited, 63 Dublin Street, Edinburgh, EH3 6NS and 5  
Hillside Crescent Edinburgh EH7 5DY  
("the Property Factor")**

**Tribunal Members:**

**Susanne L M Tanner QC (Legal Member)  
Andrew Taylor (Ordinary Member)**

## **DECISION**

- 1. The Property Factor has failed to comply with the Code of Conduct for Property Factors, Sections 1, 2.1, 2.4, 3.3, 4.1, 6.1, 6.2 and 7.1.**
- 2. The Property Factor did not fail to comply with the Code of Conduct for Property Factors Section 2.3, 2.5, 5.2 and 7.2.**
- 3. The Property Factor has failed to carry out its property factor's duties.**
- 4. The decision of the tribunal is unanimous.**

## STATEMENT OF REASONS

1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as “the 2011 Act”, the Code of Conduct for Property Factors as “the Code of Conduct” and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Rules”.

### 2. Findings in fact

- 2.1. The Homeowners are siblings and became joint owners of the Property in April 2017.
- 2.2. The Homeowners reside permanently in the United States of America.
- 2.3. The Homeowners' Representative is the father of the Homeowners and he assists the Homeowners in managing the Property.
- 2.4. The Property is the lower ground apartment in a tenement at number 3 Ramsay Garden (“the Tenement”), which comprises the Property, the ground/first floor apartment known as 3/1 and the second/third floor apartment known as 3/2.
- 2.5. The apartments in the adjoining block to the Tenement are known as 4, 5 and 6 Ramsay Garden (“the adjoining block”).
- 2.6. The properties in the Tenement and the adjoining block are a mix of owner occupied properties, those rented as residential tenancies and those used for the purposes of holiday lets.
- 2.7. The Respondent became a Registered Property Factor on 9 January 2013 and renewed its registration on 9 September 2016.
- 2.8. The Property Factor was appointed as the property factor for the Tenement and the adjoining block before the Homeowners purchased the Property.
- 2.9. The Property Factor conducts a separate business as a letting agent.
- 2.10. The Property Factor acts and has previously acted as letting agent for some of the properties in the Tenement and the adjoining block, in relation to residential tenancies and holiday lets.

- 2.11. The Property Factor provided a document entitled "Terms and Conditions" to the Homeowners which was intended to be a written statement of services.
- 2.12. The Property Factor's website does not provide emergency contact details for the Property Factor on the page for factoring clients.
- 2.13. The Property Factor provided its contact details, including phone number, on correspondence and the "terms and conditions" document which was issued to the Homeowners.
- 2.14. The Property Factor does not have a procedure to consult with the group of homeowners in the Tenement and the adjoining building to seek their written approval before providing works or services which will incur charges or fees in addition to those relating to the core service.
- 2.15. The Property Factor responded to the Homeowners' Representative's enquiries and complaints by letter and email within prompt timescales.
- 2.16. The Property Factor did not provide to the Homeowners in writing at least once a year (whether as part of a billing arrangement or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for.
- 2.17. The financial information which the Property Factor provided annually to homeowners in the Tenement, including the Homeowners, was an estimate of proposed expenditure with attached spreadsheets, which was difficult to understand.
- 2.18. The Property Factor did not, in response to reasonable requests by the Homeowner, supply supporting documentation and invoices for inspection and copying.
- 2.19. The Property Factor does not have a clear written procedure for debt recovery which outlines a series of steps which the Property Factor will follow unless there is a reason not to and which sets out how the Property Factor will deal with disputed debts.
- 2.20. The Property Factor had provided the Homeowners' Representative with clear information showing the basis upon which the Homeowners' share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing the insurance cover and the terms of the policy.

- 2.21. The Property Factor provided incorrect information about the excess on the policy but when the error came to light following a discussion with the insurance broker, the Property Factor notified the owners by letter within a reasonable time.
- 2.22. The Deed of Conditions for the properties in the Tenement requires the Property Factor to arrange a policy of common building insurance.
- 2.23. The Property Factor has arranged the common building insurance policy for the Tenement and the adjoining building.
- 2.24. The Deed of Conditions for the properties in the Tenement does not require the Property Factor to arrange extra insurance cover for owners who let out their properties.
- 2.25. The insurance policy which has been arranged by the Property Factor for homeowners in the Tenement, including the Homeowners, provides over-coverage for the Homeowners as they do not let out the Property.
- 2.26. There is one owner in the adjoining building who does not pay anything towards the common insurance as a result of a condition in the Deed of Conditions for that property.
- 2.27. The Property Factor did not have in place procedures to allow homeowners in the Tenement, including the Homeowners, to notify the Property Factor of matters requiring repair, maintenance or attention.
- 2.28. No information was provided to Homeowners on the factoring page of the website or in the "terms and conditions" document in relation to procedures to allow homeowners in the Tenement, including the Homeowners, to notify the Property Factor of matters requiring repair, maintenance or attention.
- 2.29. Emergency arrangements are part of the service provided to homeowners at the Tenement.
- 2.30. The Property Factor has no procedures in place for dealing with factoring emergencies.
- 2.31. No information was provided to Homeowners about emergency procedures on the factoring page of website or in the "terms and conditions" document.

- 2.32. The Property Factor had no clear, written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which the Property Factor will follow, including how the Property Factor will handle complaints against contractors.
- 2.33. The Property Factor's complaints procedure (PF doc 7.2) does not comply with the requirements of Section 7.1 of the Code of Conduct.
- 2.34. The Property Factor's complaints procedure (PF Doc 7.2) includes outdated references to the Sheriff Court and prescribes that mandatory mediation must be entered into before a complaint is made to the tribunal.
- 2.35. The Property Factor did not provide its complaints procedure to the Homeowners until after the Application had been made to the tribunal.
- 2.36. The Property Factor did not use the in-house complaints procedure in relation to the Homeowners' Representative's complaints.
- 2.37. There is a problem with the guttering arrangement on the Tenement and the adjoining building which results in water pouring down from roof to ground level during heavy rainfall.
- 2.38. On around ten occasions since June 2017, during heavy rainfall, water has poured from the guttering on the roof of the Tenement and the adjoining building and fallen to ground level outside the Property.
- 2.39. On some occasions, the water which has fallen from the guttering at roof level has penetrated the front door of the Property.
- 2.40. In around June 2017, the Homeowners' Representative first reported a leak through the front door of the Property to the Property Factor.
- 2.41. The Property Factor first advised the Homeowners' Representative that the issue of the leak through the door at the Homeowners' property was a matter relating to common repairs with other owners in the Tenement and at a later date stated that it was not and told the Homeowners' Representative to contact his own lawyer.
- 2.42. On or about 4th January 2018, the Homeowners' Representative instructed Dialarod to clear the ground level drains outside the Property.
- 2.43. The Homeowners' Representative instructed a contractor to carry out remedial work at ground level outside the Property to prevent any water

ingress from the roof and guttering on the Tenement and the adjoining building from leaking through the front door of the Property.

- 2.44. A claim has been intimated to the insurer of the Tenement and the adjoining building in respect of construction defects at ground level.
- 2.45. In the majority of its dealings with the Homeowners' Representative, the Property Factor has focussed on the water penetration issue at ground level stating that it is the Homeowners' problem and the Property Factor has ignored the issues at roof level.
- 2.46. The Property Factor accepted at the hearing that there is an issue with the guttering in heavy rain.
- 2.47. Despite being aware that there is an issue with the guttering in heavy rain, the Property Factor has not obtained or instructed any surveys or obtained any quotes for remedial work.
- 2.48. The Property Factor has not put any proposals to or consulted with the owners in the Tenement and the adjoining building in relation to remedial works to the guttering on the properties.
- 2.49. The Property Factor has made assumptions that the liable owners will not want to pay for the required remedial work.
- 2.50. The fact that the Property Factor has ignored the problem with the roof and guttering since it was first notified could affect the cost of any repairs which are now required and over the medium to long term, it could affect property values in the Tenement, including the Property.
- 2.51. The owners in the adjoining block, for which the Property Factor is also the factor, and who share common liability for the roof and guttering with the owners in the Tenement, have not been told by the Property Factor that there is a common repairs issue with the guttering on the building.
- 2.52. The Homeowners' Representative incurred the expense of instructing a survey report from Mr McDonald, building surveyor in respect of an inspection of the Property and common areas including the roof and guttering, at a cost of £3672.00.
- 2.53. The Homeowners' Representative incurred the expense of Mr McDonald's attendance at the hearing as a skilled witness.

- 2.54. Mr McDonald has made proposals for remedial works to address the problem with the guttering and included them within a Report which is available to the Property Factor.
- 2.55. The Property Factor has not taken any steps to inform the other owners in the Tenement and the adjoining building about the proposals nor has he consulted with them, obtained any quotations or sought a mandate from them for remedial works.
- 2.56. The Property Factor has an apparent conflict of interest which arises as a result of acting in the capacity as letting agent for a number of properties in the Tenement and the adjoining building as well as acting as the property factor for both buildings without disclosing the dual role to his factoring clients.

### **3. Findings in fact and law**

- 3.1. The three proprietors in the Tenement possess a right in common to the outside walls, load bearing walls and gables thereof; the drains and soil pipes, main water supply pipes and all other pipes and rhones; the roof covering and serving the whole subjects including the roof trusses, the chimney stalks, stacks and others, the roof and external walls and others above and surrounding the common stair and all structural parts of the whole subjects supporting the roof; and all other parts and pertinents which are common to the units within the whole subjects.
- 3.2. The proprietors of the three properties in the Tenement have a burden of upholding, maintaining, cleansing and renewing and reinstating in good order and repair the whole common property in the following proportions:- House 3/1 – 39%; House 3/2 – 39%; House 3B – 22%.
- 3.3. The Homeowners are solely liable for the maintenance, repair and if necessary renewal of the entrance gate leading from Ramsay Garden, stairs leading therefrom and lower or sunk area and cellar, if any.
- 3.4. The three units in the Tenement form part of larger subjects known as Ramsay Garden and the proprietors of the three units in the Tenement are obliged to join the Ramsay Garden Proprietors' Association.
- 3.5. The Property Factor is responsible for instructing and supervising the common repairs and maintenance, cleansing, renewal and improvement of the respective common property as hereinbefore described and for apportioning the cost among the proprietors in accordance with the

provisions of the Deed of Conditions for the Tenement by the Burrell Consultancy Limited dated 3 June 1998 and a separate Deed of Conditions for the adjoining building.

- 3.6. In respect of the Property, the Property Factor in the course of that person's business, manages the common parts the Tenement, owned by the Homeowners and two other persons and used to any extent for residential purposes, in terms of Section 2(1)(a) of the 2011 Act.
- 3.7. The Property Factor did not provide the Homeowners with a written statement setting out in a simple and transparent way the terms and service delivery standards of the arrangement in place between the Property Factor and the Homeowners, within four weeks of being made aware of a change of ownership at the Property, as required by Section 1 of the Code of Conduct.
- 3.8. The document entitled "Terms and Conditions" which was provided by the Property Factor to the Homeowners fails to comply with the requirements of Section 1 of the Code of Conduct.
- 3.9. The information provided by the Property Factor to the Homeowners' Representative in relation to liability in respect of the remedial works required to address the leak into the Property was misleading and did not comply with Section 2.1 of the Code of Conduct.
- 3.10. The contact information, including telephone number, provided by the Property Factor to the Homeowners and their Representative on correspondence and the "terms and conditions" documents complies with Section 2.3 of the Code of Conduct.
- 3.11. The lack of a procedure to consult with the group of homeowners in the Tenement and the adjoining building to seek their written approval before providing works or services which will incur charges or fees in addition to those relating to the core service is a failure to comply with Section 2.4 of the Code of Conduct.
- 3.12. The Property Factor's response to enquiries and complaints received from the Homeowners was within prompt timescales and complied with Section 2.5 of the Code of Conduct.
- 3.13. The Property Factor's failure to provide to Homeowners in writing at least once a year (whether as part of a billing arrangement or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for is a failure to comply with Section 3.3 of the Code of Conduct.

- 3.14. The Property Factor's failure to respond to reasonable requests by the Homeowners' Representative, to supply supporting documentation and invoices for inspection and copying is a failure to comply with Section 3.3 of the Code of Conduct.
- 3.15. The Property Factor's lack of a clear written procedure for debt recovery which outlines a series of steps which the Property Factor will follow unless there is a reason not to and which sets out how the Property Factor will deal with disputed debts is a failure to comply with Section 4.4 of the Code of Conduct.
- 3.16. The information provided by the Property Factor to the Homeowners' Representative in respect of the common building insurance policy complies with the requirements of Section 5.2 of the Code.
- 3.17. The Property Factor's lack of procedures in place to allow homeowners in the Tenement, including the Homeowners, to notify the Property Factor of matters requiring repair, maintenance or attention is a failure to comply with Section 6.1 of the Code.
- 3.18. The Property Factor's lack of procedures in place for dealing with factoring emergencies is a failure to comply with Section 6.2 of the Code.
- 3.19. The Property Factor's lack of a clear, written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which the Property Factor will follow, including how the Property Factor will handle complaints against contractors is a failure to comply with Section 7.1 of the Code.
- 3.20. As the Property Factor did not start the in-house complaints procedure in respect of the Homeowners' Representative's complaints, the procedure could not be exhausted, therefore the other requirements of Section 7.2 of the Code of Conduct are not applicable.
- 3.21. The Property Factor had a duty to the Homeowners in terms of its appointment under the Deed of Conditions for the Tenement, to take action within a reasonable timescale once notified by the Homeowners' Representative that there was an issue with the common guttering which was causing leaks into the Property in heavy rainfall, namely consultation with the other liable owners in relation to the instruction of investigative reports, the obtaining of quotes, consultation with the liable owners in relation to works and seeking a mandate for the instruction of works; and if the requisite

number of owners voted for remedial works, instruction of the works. The Property Factor failed to carry out the said Property Factor's duties.

3.22. The Property Factor had a duty to the Homeowners in terms of its appointment under the Deed of Conditions for the Tenement not to have an apparent conflict of interest arising out of its appointment as a letting agent for some properties in the Tenement and the adjoining building which was not declared to its factoring clients. The Property Factor failed to carry out the said Property Factor's duties.

#### 4. The Application

4.1. The Homeowners' Representative lodged an application ("the Application") with the tribunal on 15 January 2018.

4.2. In Section 7 of the Application the Homeowners' Representative alleged that the Property Factor has failed to comply with the Code in the following respects:

4.2.1. *Section 1 "multiple, pervasive"*

4.2.2. *Section 2.1, 2.3, 2.4, 2.5*

4.2.3. *Section 3.3*

4.2.4. *Section 5 "multiple"*

4.2.5. *Section 6 "multiple, pervasive"*

4.2.6. *Section 7 "multiple, pervasive".*

4.3. In Section 7 of the Application the Homeowners' Representative alleged that the Property Factor has failed to comply with its Property Factor's duties for the following reasons: *"rainwater leak ongoing for several years causing property damage. Factor required to fix common issues such as leaks, but has not. In addition, factor generally not in compliance with "the Code" (Code of Conduct for Property Factors – Property Factors (Scotland) Act 2011)."*

4.4. The Homeowners' Representative completed the following four parts of Section 7 as follows:

4.4.1. *What is your complaint? "See Appendix A."*

4.4.2. *What are your reasons for considering that the Property Factor has failed to resolve the complaint? "See Appendix B"*

4.4.3. *How has this affected you? "See Appendix C"*

4.4.4. *What would help to resolve the problem(s)? "See Appendix D".*

4.5. Various documents (numbered pages 1-63) were attached to the Application and form part of the Application.

- 4.6. On 29 January 2018 the tribunal's administration returned the Application form to the Homeowners' Representative and asked him to amend Part 7A of the Application form to state upon which parts of the Code he wished to rely; and to send notification to the Property Factor specifying the alleged failures to comply with the Code and alleged breaches of property factors' duties. Template letters were provided to the Homeowners' Representative for this purpose.
- 4.7. On 5 February 2018, the Homeowners' Representative replied the tribunal's administration with a copy of his letter of notification to the Property Factor dated 5 February 2018 of its alleged failures to comply with the Code and alleged failures to comply with property factors' duties. He also enclosed a copy of an email dated 3 February 2018 which he had send to the Property Factor and two other owners in the building in which the Property is situated in relation to recent action he had taken in response to a rainwater leak into the Property.
- 4.8. On 6 February 2018 the Homeowners' Representative sent a copy of an email and letter dated 6 February 2018 with attached complaints procedure, which he had received from the Property Factor; and the Homeowners' Representative asked the tribunal's administration whether he was obliged to attend mediation in relation to the matters in the Application.
- 4.9. On 13 February 2018 the Homeowners' Representative submitted a revised Part 7A of the Application, specifying the individual subsections of the Code with which he alleged the Property Factor had failed to comply:  
"Section 1; 1.1aA; Bcd, Ce, f, g, l, h;DI, m, n,; Eo; Fp  
2.1, 2.3, 2.4, 2.5  
3.3  
4  
5.2  
6.1, 6.2  
7.1, 7.2."
- 4.10. In Section 7B of the Application (as revised) the Homeowners' Representative alleges that the Property Factor has failed to comply with its Property Factor's duties stating "see *letter dated 5 February 2018.*" A letter dated 5 February 2018 to the Property Factor was attached.
- 4.11. In the revised Application, the Homeowners' Representative completed the following four parts of Section 7 as follows:  
4.11.1. *What is your complaint? See Appendix A and letter dated February 5, 2018.*

- 4.11.2. *What are your reasons for considering that the Property Factor has failed to resolve the complaint? See Appendix B and letter dated February 5, 2018.*
- 4.11.3. *How has this affected you? See Appendix C and letter dated February 5, 2018*
- 4.11.4. *What would help to resolve the problem(s)? See Appendix D and letter dated February 5, 2018.*
- 4.12. Within the revised Application, the Homeowners' Representative listed a number of complaints under Section 1 of the Code, namely a general complaint that the Property Factor has not provided its Written Statement of Services ("WSS") in accordance with the time limits specified in Section 1; as well as a number of other subsections in 1.1a, all of which require that certain specified information is set out in the WSS. The Homeowners' Representative's complaints appeared to be internally inconsistent. If the Homeowners' Representative is alleging that the WSS has not been provided to him it is difficult to understand the factual basis for the Homeowners' Representative's argument that certain matters are not set out in the WSS. On 6 March 2018, the tribunal directed the Homeowners' Representative to confirm whether his only complaint under Section 1 was the alleged failure of the Property Factor to provide the WSS within the stipulated timescale; or whether the Homeowner was alleging that the WSS has been provided but that the information specified in Section 1.1a of the Code was not set out in it. (See Directions, below).

## **5. Referral of Application**

- 5.1. On 19 February 2018 the Application, comprising all documentation received in the period 16 January to 16 February 2018, was referred to the tribunal in terms of Sections 18 and 18A of the 2011 Act.
- 5.2. On 27 February 2018 the tribunal's administration wrote to the parties to advise that the Application had been referred to the tribunal.
- 5.3. A hearing was fixed for 18 April 2018 at 10.00am at George House, 126 George Street, Edinburgh.
- 5.4. The hearing date was intimated to parties and parties were invited to lodge any written representations by 20 March 2018 and to lodge any documents in accordance with Practice Direction number 3.

## 6. Directions

6.1. The tribunal on its own initiative issued the following Directions to parties in terms of Rule 16 of the 2017 Rules in relation to the conduct and progress of the Application:

6.1.1. First to Third Directions on 6 March 2018; and

6.1.2. Fourth to Sixth Directions on 15 May 2018.

6.2. Reference is made to the full terms of the Directions.

6.3. The First to Third Directions required the parties to do the following:

6.3.1. **The FIRST DIRECTION** required the Homeowners by 20 MARCH 2018 to submit to the tribunal's offices and the Property Factor: 1. Written confirmation of whether the Homeowners' complaint under Section 1 is the alleged failure of the Property Factor to provide the WSS within the stipulated timescale; or whether the Homeowners wish to argue that it has been provided with the WSS but that the matters specified in 1.1a of the Code are not set out in the WSS.

6.3.2. **The SECOND DIRECTION** required the Property Factor by 20 MARCH 2018 to submit to the tribunal's offices and the Homeowners: 1. Written confirmation of which parts of the Homeowners' complaint are disputed; 2 A written summary of arguments responding to each individual element of the Homeowners' complaint, with reference to the specified Sections/subsections of the Code and property factor's duties. 3. A copy of the Property Factor's Written Statement of Services. 4. Any evidence of provision of the Written Statement of Services to the Homeowners by the Property Factor.

6.3.3. **The THIRD DIRECTION** required the parties to submit to the tribunal's offices and the other party no later than seven days prior to the hearing: 1. A list of any documents and copies of the documents upon which the party wishes to rely at the hearing. 2. A list of any witnesses that the party wishes to call to give evidence at the hearing.

6.4. **The Fourth to Sixth Directions** required parties to do the following:

6.4.1. **FOURTH DIRECTION.** The Homeowners must by 22 MAY 2018 submit to the tribunal's offices and the Property Factor: 1. A supplementary List of Documents: beginning with number 11. Surveyor's invoice 6188 dated 30 April 2018 in the sum of £3,672 inc. VAT; Including number 12, surveyor's second invoice, if available; and including any other documents relevant to the matters raised in this

application, upon which the Homeowners wish to rely at the hearing, beginning at number 13 and thereafter consecutively numbered. 2. Copies of any documents referred to in the said Supplementary List of Documents, numbered on each of the documents.

6.4.2. FIFTH DIRECTION. The Property Factor must by 22 MAY 2018 submit to the tribunal's offices and the Homeowners: 1. A supplementary List of Documents: beginning with number 14. List of Contact details for owners in the block, revised to include the Homeowners' correspondence address; including as number 15 the revised list of properties for which the Property Factor acts as Letting Agent; and including any other documents relevant to the matters raised in this Application, upon which the Property Factor wishes to rely at the hearing, beginning at number 16 and thereafter consecutively numbered. 2. Copies of any documents referred to in the said Supplementary List of Documents, numbered on each of the documents.

6.4.3. SIXTH DIRECTION. 1. Parties should not lodge any documents relating to new matters or grounds of complaint which have arisen since this Application was referred to the tribunal. 2. Parties should refrain from writing directly to or addressing correspondence to either of the tribunal members. 3. Parties should refrain from including the "HPCAdmin" email as an address on correspondence being sent to homeowners in the block in which the Property is situated.

## **7. Written Representations and documents lodged in advance of hearing, at first hearing day, in between hearing days and at second hearing day**

### **7.1. Written Representations and other correspondence from parties**

7.1.1. On 6 March 2018 the Homeowners' Representative sent a letter to the tribunal returning a completed tribunal form dated 28 February 2018, stating that he wished to attend the hearing but wished further information about a possible extension to the date of 20 March 2018 before confirming whether he would submit written representations. The reason given was that he had himself instructed a Chartered Building Surveyor to inspect the Property and the roof/guttering on the tenement and provide a report, which would be produced in due course but possibly not before 20 March. He attached a copy of an email chain with Christophe Boisseau of the Property Factor dated between 24 and 26 February 2018. On 7 March 2018, the Homeowners' Representative was advised by the tribunal's administration that should he wish to request additional time to submit written representations and/or a list of

documents he could do so, he should specify when the report was expected and that any such request would be considered by the tribunal in accordance with the 2017 Rules.

7.1.2. On 7 March 2018, Christophe Boisseau of the Property Factor sent an email from himself to the surveyor instructed by the Homeowners' Representative in relation to the guttering/rainfall issue, in which he cc'd the tribunal's "HPCAdmin" email address.

7.1.3. On 12 March 2018 (letter dated 7 March 2018) the Homeowners' Representative submitted written representations in response to the tribunal's First Direction dated 6 March 2018 which directed the Homeowners' Representative to clarify the nature of his complaint in terms of Section 1 of the Code. The Homeowners' Representative also included an email dated 12 March 2018 which he had sent to the surveyor whom he had instructed, commenting on the Property Factor's email correspondence with the surveyor.

7.1.4. On 12 March 2018 the Homeowners' Representative sent an email to the tribunal stating that the surveyor should be able to complete his Report to enable it to be lodged by 20 March 2018.

7.1.5. On 16 March 2018 Christophe Boisseau of the Property Factor returned a form to the tribunal confirming that he wished to attend the hearing and to submit written representations.

7.1.6. On 20 March 2018 the Property Factor sent a proof of delivery of an item to the Homeowners' Representative. No document was attached. The tribunal's administration contacted the Property Factor and he stated that it was for the delivery of 103 pages of written representations which were received on the same date.

7.1.7. On 21 March 2018 the tribunal's administration advised parties that the last date for submission of written representations had passed.

7.1.8. On 27 March 2018 the Homeowners' Representative submitted a copy of a letter dated 21 March 2018 which he had sent to the Property Factor requesting information.

7.1.9. On 27 March 2018 the Homeowners' Representative sent a bundle of documents to the tribunal with a cover letter including written representations. Within the letter he advised that he intended to bring two witnesses to the hearing, being Douglas McDonald, Chartered Building

Surveyor and Mr Edward Stuart, the son of the proprietor of property 3A Ramsay Garden.

- 7.1.10. On 4 April 2018 the Homeowners' Representative sent an email advising that the surveyor's report had not yet been received. He sent a further email re-stating that he intended to bring two witnesses to the hearing.

## **7.2. Documents lodged in advance of the hearing on 18 April 2018**

- 7.2.1. On 20 March 2018, the Property Factor lodged a bundle of Documents with pages numbered 1 to 12.13:

- 7.2.2. There was no List of Documents with the bundle which was submitted by the Property Factor.

- 7.2.3. On 11 April 2018 the Homeowners' Representative sent to the tribunal's administration a copy of a Report from Douglas McDonald, Chartered Building Surveyor, Surveying Solutions Limited dated 10 April 2018, stating that it formed part of the Homeowners' Representative's submissions for the hearing on 18 April 2018.

- 7.2.4. On 13 April 2018 the tribunal issued a letter to parties to advise that neither had submitted a list or bundle of documents in accordance with the 2017 Rules and the tribunal's Directions and to advise parties that they required to do so.

- 7.2.5. On 15 April 2018 the Homeowners' Representative sent an email with a List of Documents 1 to 10:

7.2.5.1. Para 1 of Edinburgh Old Town Association Convener's Report 2017

7.2.5.2. Photographs numbered 1-13 (previously attached to letter of 27 March 2018)

7.2.5.3. Videos of rainwater coming from the gutters (to be displayed on Macbook Air at hearing)

7.2.5.4. Report from Douglas McDonald Dip BS MRICS, Surveying Solutions Limited, Chartered Building Surveyors, dated 11 April 2018

7.2.5.5. Factor's Terms and Conditions (included with original Application)

7.2.5.6. Homeowners' Representative's letter dated 27 March 2018 attaching documents: "Material for Discussion", "Reasons for Hiring a Chartered Surveyor" and "2018 and 2017 Factotum Bills emails"

- 7.2.5.7. Response from Dialarod in "Material for Discussion" (see 6)
  - 7.2.5.8. Timeline of events
  - 7.2.5.9. Additional information 6 February 2018 (number 4 in original application documents, 14 pages)
  - 7.2.5.10. Original application and cover letter dated 15 January 2018 and accompanying pages 1-63.
- 7.2.6. The Homeowners' Representative's List of Documents was late in terms of the 2017 Rules, Practice Direction number 3 and the tribunal's Third Direction dated 6 March 2018. However, most of the material had already been lodged with the tribunal and crossed over to the Property Factor (with the exception of document 1, a paragraph from a Report which was reproduced in full, and the video in 3 which was to be shown at the hearing). The tribunal decided to allow the late List of Documents.
- 7.2.7. However, no numbered documents were attached to the Homeowners' Representative's List of Documents. On 16 April 2018, the Homeowners' Representative was advised that he required to produce a numbered bundle of documents corresponding to his List of Documents and that the documents could be scanned if he wished. The Homeowners' Representative replied and stated that he was unable to do so. In order that the tribunal members and parties had the same documents to work with at the hearing, the tribunal's administration trawled through material already submitted by the Homeowners' Representative from the time that the Application was made and compiled a full bundle of the Homeowners' Representative's listed documents to be used at the hearing and made a copy of the List and bundle for the Property Factor.
- 7.2.8. On 16 April 2018 the Property Factor submitted a List of Documents 1-12.13 relative to the numbered bundle of documents already submitted.
- 7.2.8.1. 1-1.12 Email correspondence
  - 7.2.8.2. 1.13 Insurance Schedule
  - 7.2.8.3. 2 Trinity Factors confirmation of appointment
  - 7.2.8.4. 2.1 Letter from John Barton
  - 7.2.8.5. 3-4.3 Email correspondence
  - 7.2.8.6. 5-5.2 Extract of payment Edinburgh Sheriff Court
  - 7.2.8.7. 6-6.1 Email correspondence
  - 7.2.8.8. 7-7.1 letter plus email of 5 February 2018
  - 7.2.8.9. 8-8.1 Terms of business
  - 7.2.8.10. 9-9.1 Email correspondence
  - 7.2.8.11. 10-10.3 Statement of John Barton
  - 7.2.8.12. 11.1-11.5 Deed of Conditions 3/3a/3b
  - 7.2.8.13. 12-12.13 Deed of Conditions 4/5/6.

### **7.3. Documents lodged on first hearing day - 18 April 2018**

7.3.1. During the first hearing day on 18 April 2018, the Property Factor sought to add another item to its list of documents, namely video footage captured by a drone camera outside the Property, on 7 March 2018. The Property Factor intended to play the video during his submission. The Homeowners' Representative had seen the video before and there was no objection by the Homeowners' Representative to the late addition to the Property Factor's List of Documents. The tribunal took the view that the video was of assistance to both parties and the tribunal in relation to the matters raised in the Application. The tribunal was satisfied that the party had a reasonable excuse for late lodging in terms of Rule 22(2) of the 2017 Rules and allowed it to be lodged as Document 13 on the Property Factor's List.

7.3.2. During the first hearing day undertakings were given by both parties in relation to documents to be produced following the hearing.

7.3.2.1. The Homeowners' Representative gave an undertaking to produce the invoice from Douglas McDonald Dip BS MRICS, Surveying Solutions Limited, Chartered Building Surveyors relative to preparation of his professional report and his fees and expenses for attendance at the first day of the hearing. On 13 May 2018 the Homeowner sent a copy of the witness's invoice 6188 dated 30 April 2018 in the sum of £3,672 inc. VAT.

7.3.3. On 13 May 2018 the Homeowners' Representative sent an email indicating that he would forward once received a further invoice from the said Douglas Macdonald regarding gutter remediation costs. Said invoice was included in directions issued by the tribunal.

7.3.4. During the first hearing day, submissions were made by both parties about the contact details for the other owners in the tenement in which the Property is situated ("the Tenement"). The Homeowners' Representative indicated that all of the other owners are non-resident with some of the properties being tenanted and others used for short stay holiday guests. The Homeowners' Representative does not have correspondence addresses or email contact details for the other owners. The Property Factor indicated that he holds a full list of correspondence addresses and email addresses which he uses in his administration of the block. The tribunal asked the Property Factor if he would be willing to provide the same to the Homeowners' Representative in order that he could communicate with the other owners. The Property Factor indicated that he was willing to do so and gave an undertaking that he would

provide the list to the Homeowners' Representative prior to the adjourned hearing date. On 20 April 2018 the Property Factor sent an email to the tribunal attaching documents, including a list of Ramsay Garden owners for properties named as "3, 3a, 3b, 4, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8. and 6". A correspondence address was provided next to each property (other than the Homeowners' property at 3B). An email address was provided for each owner. The tribunal directed that the list be revised to include the Homeowners' contact and correspondence details (See FIFTH Direction).

7.3.5. During the first hearing day submissions were made by both parties about the fact that as well as factoring the block in which the Property is situated, the Property Factor acts as letting agent for one or more the owners of the said properties. One of the alleged failures to comply with the Code of Conduct for Property Factors relates to the fact that the Homeowner alleges that the Property Factor has not disclosed his interests as a Letting Agent of any properties. The Property Factor confirmed that he does act or has acted as a letting agent for a number of properties in the block. The tribunal asked the Property Factor if he would be willing to confirm which of the properties is let by him in the block in which the Property is situated. The Property Factor agreed to do so. As noted above, on 20 April 2018 the Property Factor sent an email to the tribunal attaching documents including a list of Ramsay Garden owners for properties named as "3, 3a, 3b, 4, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8. and 6". The final column identifies properties which are also let by the Property Factor as a letting agent – 3b and 5.1 are listed. Given that 3b is the Property owned by the Homeowners the tribunal formed the view that this may be an error. It would be of assistance to the tribunal if the list of properties which are also let by the Property Factor is revised, if necessary, and added to the Property Factor's List of Documents as number 15. The tribunal's FIFTH Direction was issued.

#### **7.4. Documents and correspondence submitted to the tribunal between the first hearing day (18 April 2018) and second hearing days (24 May 2018)**

7.4.1. Both parties sent correspondence and documents to the tribunal's administration in the period between the two hearing days.

7.4.2. On 20 April, the tribunal's administration received the Property Factor's email dated 19 April 2018 and letter of the same date, apparently sent to other owners in the block in which the Property is situated, enclosing the said list of contact details for the owners in the block and details of let properties. The tribunal's "HPCAdmin" email address was added by the

Property Factor to the cc. section of the email of 19 April 2018. The Property Factor was advised by the tribunal administration that the tribunal's administration should never be cc'd into such communications. Within the letter of 19 April to the owners of 3 to 6 Ramsay Garden the Property Factor makes a number of statements relative to the Homeowners' Representative and the tribunal. The tribunal notes that the Property Factor has not accurately stated the tribunal's oral directions relative to provision of a list of correspondence details and details of properties which are let by the Property Factor as an agent. The tribunal's directions on the said matters are as outlined in the said Directions.

- 7.4.3. On 2 May 2018 the Property Factor submitted a copy of another letter to owners in the block from 3-6 Ramsay Garden, dated 2 May 2018, together with its enclosure, a revised WSS with a signing page and an estimate to Y/E 31 January 2019. Within the said letter to the owners the Property Factor made various statements about the Homeowners' Representative and the tribunal.
- 7.4.4. On 3 May 2018 the Homeowners' Representative sent a letter addressed to the Chair of the tribunal. Parties were advised that they should not send any direct communications to tribunal members. The bundle attached to the email includes various submissions about new matters which are not the subject of the Application and documents which have not been lodged by either party.
- 7.4.5. On 4 May 2018 the Property Factor submitted a bundle of 18 pages of unnumbered documents without a list. It was unclear what these documents are or whether they related to the matters raised in the Application.
- 7.4.6. On 7 May 2018 the Homeowners' Representative forwarded an email he had received from the Property Factor on the same date, stating that its content might violate further sections of the Code of Conduct. The tribunal advised parties that it cannot consider new matters not raised in the Application and notified to the Property Factor. Any such complaint would require to be the subject of a new application, following notification of the alleged failures to comply to the Property Factor.
- 7.4.7. On 10 May the Property Factor sent a copy of an email thread from 8 and 9 May 2018 apparently between the Homeowners' Representative and Simon Bolam, copying in the Property Factor. The document has not been lodged by either party and its relevance to the matters in the Application was unclear.

7.4.8. On 13 May 2018 the Homeowners' Representative sent a further letter addressed to the Chair of the tribunal. As noted above, parties were advised that they should not seek to communicate directly with either of the Members of the tribunal. In addition, the correspondence apparently raises new issues which are not the subject of the Application or notification. They cannot be considered by the tribunal. A number of documents were attached to the Homeowners' Representative's email which had not previously been lodged by either party and their relevance to the matters in the Application was unclear.

7.4.9. In summary, much of the correspondence submitted between hearing days was not the subject of undertakings or in response to Directions. They appeared to be irrelevant to the tribunal's determination of the matters in the Application. The tribunal took the view that there may, however, be documents amongst those submitted since the first hearing date which did relate to the matters raised in the Application. The tribunal directed that any such documents should be added to the parties' respective Lists of Documents by that party preparing a Supplementary List of Documents and providing the same together with copies of the documents to the tribunal and to the other party by 22 May 2018. (See Fourth and Fifth Directions)

7.4.10. Parties were advised for the avoidance of doubt, that they should not lodge any documents relating to new matters or grounds of complaint which have arisen since this Application was referred to the tribunal. (See Sixth Direction).

7.4.11. Further, parties were advised that they should refrain from writing directly to either of the tribunal members and parties should also refrain from including the "HPCAdmin" email as a cc. address on correspondence being sent to homeowners in the block as the tribunal is a judicial body and cannot consider or reply to such submissions. See Sixth Direction, below.

7.4.12. The Property Factor added the following additional documents to his list of documents:

7.4.12.1. 14 List of contact details of owners

7.4.12.2. 15 List of contact details of owners who presently let through Factotum

7.4.12.3. 16 Itemisation of roof repairs re. £3000 / 3, 3A, 3B Ramsay Garden

7.4.12.4. 17 Roof repairs item 16 apportionment actual account to 31/1/2018

- 7.4.12.5. 18 Photo of Cherry Picker to demonstrate ongoing maintenance
- 7.4.12.6. 19 Copy of revised statement of service sign request.

## **8. Hearing**

- 8.1. A hearing took place over two days on 18 April 2018 and 24 May 2018 at George House, 126 George Street, Edinburgh. Thereafter the members of the tribunal sat on 20 June 2018 to determine the Application.
- 8.2. The Homeowners' Representative attended the hearing on both days.
- 8.3. Mr Christophe Boisseau, Director and Ms Fiona Exnar, Assistant, attended on behalf of the Property Factor on both days of the hearing.
- 8.4. During the hearing the Homeowners' Representative lead evidence from Douglas McDonald Dip BS MRICS, Surveying Solutions Limited, Chartered Building Surveyors (see below). His evidence was taken early on the first day and he left the hearing venue after his evidence was completed.

## **9. Summary of submissions and evidence at hearing (18 April and 24 May 2018)**

- 9.1. The tribunal heard evidence and submissions on behalf of both parties in relation to the alleged failures to comply with the Code and breaches of property factor's duties.

### **9.2. Homeowners' Representative – Opening submissions**

- 9.2.1. By way of introduction, the Homeowners' Representative advised that the Property was purchased in April 2017 by his children who both live and work in the USA. The purpose of the purchase was for renovation.
- 9.2.2. There are three owners in the Tenement in which the Property is situated.
- 9.2.3. In 2017, a University friend of the Homeowners' Representative was in a position that she needed somewhere to stay. The Homeowners' Representative is in the middle of a four-year documentary travelling around the world so as nobody was going to live in the Property, his friend moved in.

- 9.2.4. In June 2017 the Homeowners' Representative's friend who was at that time living in the Property emailed him to say that there was water coming in the front door of the Property.
- 9.2.5. The Homeowners' Representative contacted the Residents' Association. The Homeowners' Representative was told that the Property Factor would deal with this sort of matter.
- 9.2.6. The Homeowners' Representative has never had to deal with the Property Factor before. That was his first introduction to the Property Factor.
- 9.2.7. The Homeowners' Representative did not arrive in Edinburgh until December 2017. The Homeowners' Representative was not party to anything that took place between the Property Factor and the proprietors from the time that he notified the first leaks in June and his arrival in December 2017, other than receiving emails.
- 9.2.8. The Homeowners' Representative felt that nothing was happening. He wrote to the Property Factor to ask whether the Property Factor was contractually responsible for dealing with this issue or not. The Homeowners' Representative assumed from the subsequent events that he was.
- 9.2.9. When the Homeowners' Representative arrived back in December 2017 there was no leak coming through the door. However, it began leaking again at Christmas 2017. He and his friend went out on Christmas Day. When they came back the leak came down the stairs and in the door.
- 9.2.10. On 4<sup>th</sup> January 2018, the Homeowners' Representative brought in Dialarod to clear the drains and they suggested a solution.
- 9.2.11. He advised the Property Factor and he was told that the other owners did not want to be involved in the solution that was suggested.
- 9.2.12. The Homeowners' Representative has now instructed a Chartered Surveyor and he has issued his Report (now **HO doc 4**). The Homeowners' Representative told him to be independent. The Homeowners' Representative was out of the country for two weeks when the surveyor was preparing the report. The surveyor brought in a contractor, 'Sinclair' who dug a hole under the front door. No leaks could penetrate into the Property at that time because any water would go into the hole.

- 9.2.13. There appears to be a defect in workmanship by 'Burrell' (the property developer). The problem arose because water was coming off the roof and through the hole, which was defectively made. The surveyor says this is an insurance claim because no reasonable person could tell that this was a problem. The surveyor is initiating a claim to the insurer. The building insurance is arranged by the Property Factor and billed to a group of owners. A loss adjuster from 'Giant' has been to the Property. The loss adjuster said that there is a problem with repair and maintenance of the gutters.
- 9.2.14. The overriding problem is the gutters. The leak only occurs in heavy rainfall.
- 9.2.15. The Homeowners' Representative referred to a still photograph from **HO Doc 2, photo 3**, which shows the confluence of gutters and the downpipe on the Tenement in which the Property is situated and the adjoining building.
- 9.2.16. The Homeowners' Representative showed a **video taken 4 and 5 March 2018** which was stored on his iphone.
- 9.2.17. The Homeowners' Representative mentioned the gutters to the Property Factor in February 2018.
- 9.2.18. The leak through the door has happened around ten times. Just because it is raining it does not mean it comes in. It is only in heavy rain. Christmas Day 2017 was the first time the Homeowners' Representative viewed it.
- 9.2.19. There is a Ramsay Garden Proprietors' Association. Simon Bolam is the secretary. The Homeowners' Representative pays dues to that organisation. There is a firm of landscape gardeners who come in once a month. Owners pay £8000ish/37 per year for garden maintenance. There is a front garden as well that goes down to the railway line.
- 9.2.20. From the gate and steps downwards is the property of the Homeowners, as the owner of 3B. It is unclear whether the drains at lower level are the responsibility of the Property Factor.
- 9.2.21. In his opinion the actual drain is not causing the issue. The drain is fine. There is no crack. It is an issue that when it is blocked it stops the

drain from working properly. The Homeowners' Representative is unsure whether the Homeowners have full liability for the drain.

### **9.3. The Property Factor's opening submissions**

- 9.3.1. Mr Boisseau advised that in the last month before the hearing he has used a drone to film at roof level on the tenement on 7 March 2018. The video was added as **PF doc 13**. The Property Factor showed **PF Doc 13**, to the tribunal and Homeowners' Representative. It shows the guttering arrangements in the Tenement with 3B, 3/1 and 3/2 and the neighbouring block with 4, 5 and 6.
- 9.3.2. Mr Boisseau advised that the Property Factor is not disputing that there is a fault with the guttering and that it needs maintenance work done now.
- 9.3.3. Mr Boisseau was asked by the tribunal about the views in the video of the overflowing gutter in the corner of the roof. He replied that sometimes the guttering leaks in the centre. He said it is an ongoing maintenance issue. The Property Factor is up there a few times a year.
- 9.3.4. The Property Factor had scaffolding up very recently. They only used a scaffold tower. In the centre part of the building between number 2 and 3 the drain is a little too high. They were going to get a cherry picker. That area is an ongoing maintenance issue. They are up there twice a year. They spent £3000 re-doing the water gates on that section [*the date was not specified*]. They have replaced the lead flashing on the roof. The work done was lead flashing as opposed to guttering. They are going back to do the guttering. They need to go back with a cherry picker. The work has not been scheduled. A majority of the owners have voted to go ahead with the work. The Property Factor does not have funds from the proprietors.
- 9.3.5. The problem arises elsewhere at Ramsay Garden because of the different types of architecture. A hopper head has been used above the Property. This guttering arrangement was not the optimal solution.
- 9.3.6. Trees and overhanging branches are outwith his remit. The tree is in the common ground owned by all 37 residents of Ramsay Garden. It is the responsibility of the Residents' Association, which is administered by Mr Bolam. It takes responsibility for the maintenance of the gardens. Branches might come off the tree and into the gutter that is another issue

regarding liability. Reference was made to **HO Doc 2, Photographs 1 and 3.**

9.4. After opening submissions, the Homeowners' Representative called a skilled witness, Mr Douglas McDonald Dip BS MRICS Surveying Solutions Limited, Chartered Building Surveyors, 34-36 Rose Street North Lane, Edinburgh, EH2 2NP.

9.4.1. The witness's qualifications are that he has a Diploma in Building Surveying and he is an RICS member.

9.4.2. Mr McDonald has 30 years' experience. His current position is Director with Surveying Solutions. He has broad building surveying experience, primarily commercial and residential. Experience includes effect analysis, professional services, also project management of construction projects. He fulfils various roles within building contracts. He has been involved in contractual disputes between tenants and landlords. He is involved in due diligence reports. He has produced a number of expert witness reports. He has appeared in the Sheriff Court. He has been involved in mediation between parties, solely in relation to dilapidations.

9.4.3. He did not know the Homeowners' Representative before receiving instructions. On first being introduced to the Homeowners' Representative he was provided with a fairly detailed briefing. He confirmed to the tribunal that he understands that he is an independent witness.

9.4.4. He carried out an initial site assessment. He wanted to understand what the issues were. He wanted to identify causation of water ingress into the Property. That process included three inspections from start to finish.

9.4.5. He was asked (and would have done so anyway) to look at all possible causations. He wanted to identify the defect and consider what contributory factors were present.

9.4.6. He produced a Report date 4 April 2018 – now **HO doc 4**. It includes a schedule of 18 photographs taken during his inspections.

9.4.7. During his site visits he put forward a proposal that they needed to expose or excavate at the point where the water was going into the property at the front entrance door. He approached a contractor, 'Sinclair', of whom he has previous experience, in not dissimilar circumstances at a property in the New Town. Sinclair was instructed and

opening up works were carried out. On the same day the witness undertook an inspection to understand construction of the door threshold and paved area immediately outside the Property.

9.4.8. He was aware there were issues with the high-level gutter arrangements. On inspection, there was also water seeping down in the front well area in front of the front door at the Property.

9.4.9. On the basis of the series of inspections and investigations Mr McDonald put forward proposals for remedial works.

9.4.10. He has identified how the water is getting into the building. There are a number of contributory factors. These are outlined in his report:

1.0 Existing gutter

2.0 Front entrance at 3B

3.0 Inherent dampness to existing building structure.

9.4.11. 1.0 Existing high level gutter arrangement. Photo 2 in Report. The gutter to the left is on number 4 Ramsay Garden. There is an open end at the far end where it extends towards number 3. Water collected from no 4 discharges and is intended to be captured by the gutter below it, which serves number 3. There is a downpipe to the right hand side which is outwith the photo. It is a single downpipe for that gutter on number 3. The pipe which is seen on photo 2 is a waste pipe that serves number 4. It might be a bathroom or kitchen waste. He has not been in the property.

9.4.12. It has been reported and he has witnessed water cascading over the lower gutter and down into the well area. It comes from the corner area seen in photograph 2 and into the well area at number 3 (outside the Property).

9.4.13. On the second occasion on which Mr McDonald inspected, there was heavy and sustained rainfall during one of his inspections.

9.4.14. Photograph 3 shows that the water discharges into front well area.

9.4.15. Photograph 5 was taken after they completed the exploratory works. The temporary protection cover is in place at the moment. That area will be reinstated. It is a slabbed area with paving slabs which extend from the bottom of the stair all the way across to where it meets number 4. The window/external wall of number 4 Ramsay Garden can be

seen in photo 5. The slabs extend from the bottom of the stair, west. In the remainder of the well area there is original concrete slab.

- 9.4.16. The single downpipe is shown in photograph 4. It goes into the slab. He would anticipate there to be a drain. There is also a gully under that stair.
- 9.4.17. Photo 6 is taken under the stair. There is a gully in that area. He recorded it. They did not water test that.
- 9.4.18. There is an access on the wastepipe shown in Photograph 3 that would have been available to Dialarod when they attended.
- 9.4.19. He put forward as part of Section 1 of his Report to alleviate the pressure on that junction of the guttering. It is his view that it does not work, is not effective and cannot deal with peak demand. That is always going to be an issue in certain weather conditions. His proposal is for sharing the capacity. A swan neck could be fitted as an outlet to the gutter for number 4 and connecting to the waste pipe in photo 2. He would put a stop end and the water from number 4 would be taken into that waste pipe. The gutter to number 3 appears to have some sort of displacement. He would adjust that but nothing radical is required. It needs lifted.
- 9.4.20. He has suggested that there are not many options because of location and sensitivity. It can only be a similar material. Mr McDonald believes that there is a slightly larger section available. He would consider that option if it was available.
- 9.4.21. The tribunal asked the witness about reservations expressed by the Property Factor about a swan neck arrangement, namely smells, as there is a window nearby, as shown in photo 2. The Property Factor was also concerned about the cost. Mr McDonald said that he would not anticipate there being any odours and that competitive quotations could be obtained for the works.
- 9.4.22. Mr McDonald said that combined waste and rainwater pipes is not unusual in rainwater areas and there are a number of examples in this development, on the west side of the building. Mr McDonald also referred to comparable arrangements elsewhere in Edinburgh and stated that it is not an issue to combine waste and rainwater pipes in traditional buildings.

- 9.4.23. Mr McDonald said that he had considered a hopper which would provide an extra reservoir but he considered the juxtaposition of each of the elements would look quite incongruous and said that the planners may have an issue with it, in particular that the size of it would make it difficult to get it close to the waste pipe. It would be closer to the window.
- 9.4.24. Instead, his proposal is to attach a swan neck to number 4 (on LHS of number 2).
- 9.4.25. In response to a question from the tribunal chair about debris blocking the junction of the guttering, Mr McDonald said that he observed it and it was also confirmed in the drone video. Photo 3 in the Homeowners' bundle is a still photo of drone footage. Some of this is twigs or small branches from adjoining trees. Behind that is some silt from the higher level. At the back there may be some foliage. The effect is that the gutter does not have the capacity to deal with the water. To keep these gutters clear they would need to be cleared at least twice a year and the time of year would have to be chosen. It may be that additional inspections are required because this guttering is vulnerable. It does not have the capacity to deal with the water coming from the number 3 and 4 roof spaces. Any partial blockage will exacerbate that situation.
- 9.4.26. Mr Boisseau interjected at this point to state that the Property Factor attends 6 times a year to clear the gutters around the whole of Ramsay Garden. A local roofer goes up there. The guttering at number 3 is a particular hot spot.
- 9.4.27. The Homeowners' Representative contested that the Property Factor comes six times a year.
- 9.4.28. The Property Factor responded by saying that they attend "as required" and it is not a definitive number of visits. He stated that since this dispute has arisen and with the animosity which has arisen the Property Factor has not been there with a cherry picker to adjust the gutter. The Property Factor has instructed a contractor to clear the gutters twice in 2018. Mr Boisseau has also personally pulled twigs out of the gutter.
- 9.4.29. Mr McDonald's evidence resumed. He stated in relation to 2.0 that the purpose of exploratory works was to expose possible breach and eliminate problems with in ground leakage locally.

- 9.4.30. The drainage looked more recent than he had anticipated. It does not look the same date as the building. There was no obvious leakage with any of joints and in the surrounding soil there was no evidence of water.
- 9.4.31. Mr McDonald focussed on door threshold detail. The arrangement is ineffective, it is the weak point. If water is there it will come in the door. The challenge was that once that has been identified, it has to be considered what else can be done to alleviate and deal with mitigating factors.
- 9.4.32. He made reference to flooding of the well area to the west and seepage. A concrete screed retains dampness, gets saturated and looks for a way out. In those circumstances the door threshold is the weak point.
- 9.4.33. He made recommendations for the door threshold, namely to put in a proprietary waterproofing detail – a DPM damp proof membrane or a cloak. This would have to be purpose made. However, if a DPM was carried out but the guttering is not attended to, water coming down in that location is adding to the pressure. Paving slabs and screed are sitting on a concrete slab so there is no natural percolation.
- 9.4.34. He has recommended using hardcore as a sub base to act as a soakaway so if any water is being held by the screed locally there is an additional means by which it can escape from the door threshold.
- 9.4.35. Mr McDonald said in response to a question from the ordinary member that the water seepage is not constant. On the occasions on which he inspected he could see a significant difference if it is raining. Mr McDonald was unable to identify what triggers it and stated that that needs further investigation. Under the raised platform access to the property above there is what appears to be some sort of casing and he is unsure what is in that casing. Water is running down the surface below that. He referred to Photo 13 to Report which shows stone steps and platt to property 3 [3 is ground floor, 3B below, 3A upstairs]. He said that it is obvious that that has been going on for a period. It is not just dampness but silt across the well area. It needs further investigation as there is clearly water going in underneath. There are two sources of water. It is running down the surface of the wall below the stone platt. The water tobies are in the lane, 650-700mm above that so it may be connected to that and that needs to be eliminated. Photo 15 to the Report shows the tobies.

- 9.4.36. Mr Boisseau interjected to state that there is a history of spring water also in that area going back to 1676 as there was a reservoir south of the building which held the equivalent of 2 Olympic swimming pools. He also said that there is mains water and there could be a leak. Mr Boisseau stated that he absolutely agrees that a leaking gutter is unacceptable but he suggested to Mr McDonald there are lots of other contributory factors to the water ingress. Mr Boisseau stated that the gutter has not always been like that. Recently it has not been attended because of this dispute. He asked Mr McDonald whether he would agree that that area is maintenance nightmare. He also stated that there has no work in the last 4, 5 or 6 months to address the slippage of the guttering, He estimated that in July last year the roofer adjusted the gutter on 4 and 3 in July last year, before Mr Lee made his complaint.
- 9.4.37. Mr Lee contested that. Mr Boisseau responded that nothing has been done since the complaint back in August / September.
- 9.4.38. Mr McDonald returned to the Report and referred to 3.0. He stated that he added that because the water had tracked down into the basement. He was aware of previous damp proof works. He wanted to see what protection the Property had immediately below the entrance. They opened up the area. It is dry lined with plasterboard. An inspection panel was created by contractors. That confirmed that there was a containment system in place. That confirmed to Mr McDonald that there is some protection to the property. It was a limited inspection for the purpose of confirming that a damp proofing measure is in place. That is why he included the inherent dampness in his report.
- 9.4.39. Mr McDonald said that he had also picked up that there is a composite terrazzo on the stair and landing at lower ground and basement, throughout the height of the stair there is hairline cracking and evidence of dampness in and around areas from entrance to basement accommodation. This is dealt with in para 3.2 of his Report. He stated that parts of this building will be inherently damp.
- 9.4.40. Mr McDonald said that he cannot be definitive as to the source the water in the Property is coming from. It is coming from basement level. The property is on the load bearing soil, the solum. The floor at basement and the construction of the stair are solid so they are in direct contact with the sub street.
- 9.4.41. Mr McDonald said that he has been asked whether is any link between here and the front well area. He stated that he cannot make that link.

- 9.4.42. Following a short adjournment, just before Mr McDonald resumed his evidence, a man named Mr Barton arrived and stated to the tribunal clerk that he wanted to observe the proceedings. However, the tribunal noted that he is not an independent member of the public but a witness in the case. His statements have been lodged by the Property Factor as number 10 in the Property Factor's bundle and there is a letter at 2.1 of the bundle which relates to him.
- 9.4.43. The tribunal considered Rules 22(1)(b), in relation to lists of witnesses, and Rule 24(5) of the 2017 Rules, in terms of which the tribunal may exclude a person who is to appear as a witness until such time as that person gives evidence if it considers that it is fair in all the circumstances to do so.
- 9.4.44. The tribunal sought the views of parties. Mr Boisseau stated that he would completely adhere to Mr Barton's wishes and stated that if Mr Barton wanted to give evidence it was up to him.
- 9.4.45. Mr Lee said that if he was to be a witness he did not mind him coming into the hearing.
- 9.4.46. Mr Barton was asked his position. He said he is a witness but does not want to give evidence. He lives in Kingussie and his property at Ramsay Garden is not his primary residence. He explained that he has travelled down from Kingussie. He objected very strongly that he would be excluded as a member of the public. He said that he would give evidence if asked. He stated that he used to be a tribunal member for many years. He had other reasons for travelling to Edinburgh and was in Edinburgh anyway. He said he is not a party in the dispute and had not been called as a witness by either party but he had provided a statement and was aware that he was on the Property Factor's List. He said that he would be observing as a member of the public. He had contacted the tribunal's administration in advance of his attendance.
- 9.4.47. The tribunal checked with administration. His email had been forwarded from Scheduling to the Clerking in box for their attention but not sent to the tribunal members. The tribunal considered the matter outwith the presence of the parties and decided to allow Mr Barton to sit in on the basis that he is not going to give oral evidence so Rule 24(5) does not apply. Rule 24(3) provides that a hearing must be held in public.

- 9.4.48. Mr Barton was advised that he could sit in as a member of the public observing the proceedings and that he would not be called as a witness.
- 9.4.49. The Homeowners' Representative stated that he objected to Mr Barton sitting in as an observer rather than a witness and that there were things in Mr Barton's statement that Mr Lee did not agree with.
- 9.4.50. The tribunal chair advised parties that the decision had been made to allow Mr Barton to sit in as a member of the public and that as he was not being called as a witness by the Property Factor, the tribunal would take into account when considering any written evidence referred to, that the statement has not been signed, the witness has not given evidence and has not been subjected to cross-examination.
- 9.4.51. Mr McDonald resumed his evidence. There were no questions by Mr Lee.
- 9.4.52. Mr Boisseau cross-examined Mr McDonald. He asked Mr McDonald if the Property Factor has been cooperative with him. Mr McDonald stated that they had had one contact and that the Property Factor had provided a copy of a drone video.
- 9.4.53. In relation to a question from Mr Boisseau about whether maintenance of the guttering is quite challenging on a long term basis, Mr McDonald stated that the proximity of trees to gutters is an issue for many developments. Mr McDonald further stated that if he was being asked about the physical arrangement of the guttering, he said that the current arrangement relies on an overflow which is part of the issue here.
- 9.4.54. Mr Boisseau asked whether it was a structural arrangement rather than a maintenance issue, in that the architecture of the two gutters and their juxtaposition is not an ideal arrangement. Mr McDonald responded that it is the overflow and that one should not run into the other. It is a foot apart and it relies on the lower one catching the discharge from another which is reliant on gravity.
- 9.4.55. In re-examination, Mr Lee asked whether If the gutter is not fixed, does that change the solution of the basement area. Mr McDonald replied that if the gutter is not fixed in the short term in 1-3 years (in terms of fabric repairs) his recommendation in terms of remedial works may take that into consideration. I have mentioned an inset channel as a further barrier, on occasions of heavy and sustained rainfall, I would be

inclined to consider a drain channel being set across the door opening. He also stated that other measures may be required.

9.4.56. The ordinary member asked Mr McDonald that as his brief was to look at the area around 3B and the effect of the rainwater on that, whether in his opinion is the gutter having an adverse effect on the rest of the building like external walls. Mr McDonald said that he had seen no evidence of that but it was certainly something he would not encourage as you would not want water running down the building.

9.4.57. Mr Lee referred to Homeowners' Representative's Bundle 2, photo 5 . Paint washed away. Mr McDonald stated that he would agree that having water flowing down will cause fabric damage and lead to redecoration.

9.4.58. Mr Lee asked whether in Mr McDonald's experience regarding building insurance claims he thought that the insurance might have any coverage of the gutter issue alone. Mr McDonald stated that it will depend whether the policy has insurance has coverage for latent and inherent defects. He has seen sight of the policy for the Tenement but has not gone through the detail. A link would be required between that issue and the passage of water into the property and the damage. He stated that the claim may be denied on the basis of latent and inherent defects.

9.4.59. The tribunal chair asked about the instructions by Mr Lee, the payment basis and the amount of the invoice for investigations, preparation of his report and giving evidence at the hearing.

9.4.60. Mr McDonald (with the authority of Mr Lee) stated that it is a time charge and that it was currently at around £3000. His Invoice to be issued will cover attendance as well as production of the report and organising exploratory works. He stated that the invoices would be issues at the end of the month.

9.4.61. The ordinary member confirmed that the figures being discussed were exclusive of VAT.

9.4.62. Mr Lee stated that he had asked the witness to start a separate tab for the insurance. He said that he was intending to pay 100% of the surveyor's fees.

9.4.63. The witness was thanked for his attendance and left the hearing.

## 10. Discussion

10.1. The parties' evidence and submissions and the tribunal's reasons are summarised as follows, with reference to each alleged failure to comply with the Code and alleged breach of property factor's duties:

## 11. Section 1 (1 preamble; 1.1aA; Bcd, Ce, f, g, l, h; Dl, m, n; Eo; Fp)

11.1. Mr Lee stated that he has never received any document from the Property Factor which he understands to be a WSS. If the Property Factor's document headed "terms and conditions" (PF Doc 1.11) is intended to be a WSS his position is that it is deficient in relation to each of the subsections listed in the revised Application.

11.2. During the discussion Mr Lee accepted that there was delegated authority up to the limit of £250 per property specified in the WSS.

11.3. Mr Boisseau accepted that the majority of the matters identified by Mr Lee were missing from the WSS and stated that he intended to revise it within days of the hearing. He said that he had not done so to date because of what he felt was the aggressive way that Mr Lee had been dealing with the matters giving rise to the Application.

11.4. In response to a question from the ordinary member, Mr Boisseau stated that his principal business was as a letting agent that the Property Factor does not factor that many properties, around 120.

11.5. At the second hearing day Mr Boisseau submitted a document which he said was a revised WSS. The tribunal stated that it was considering the document that had been provided to the Homeowners and formed the basis of the complaint in the Application under Section 1 and would issue the decision in relation to that. The tribunal also noted that the revised WSS in any event appeared to be deficient in terms of compliance with the Code of Conduct. Mr Boisseau stated that he would await the tribunal's decision before making any further changes to the WSS and would do what was required.

**11.6. Having considered the "terms and conditions" document which was provided to the Homeowners after their purchase of the Property, the tribunal determined that the Property Factor failed to comply with Section 1 of the Code of Conduct.**

- 11.7. The Property Factor did not provide the Homeowners with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between the Property Factor and the Homeowners, within four weeks of being made aware of a change of ownership at the Property, as required in terms of Section 1 of the Code of Conduct. The Property Factor's document entitled "Terms and Conditions" does not comply with the requirements of Section 1 of the Code of Conduct.
- 11.8. In relation to Section 1.1aA, the document does not set out a statement of the basis of any authority to act on behalf of all the homeowners in the group.
- 11.9. In relation to 1.1aBc, the document does not set out the core services the Property Factor will provide, including the target times for taking action in response to requests for both routine and emergency repairs.
- 11.10. In relation to 1.1aBd, the document does not specify the types of services and works ... in addition to core services, and which may therefore incur additional fees and charges and how these fees and charges are specified.
- 11.11. In relation to 1.1aCe, the document does contain the management fee charged but does not state processes for reviewing and increasing or decreasing this fee.
- 11.12. In relation to 1.1aCf, the document does not provide the 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.
- 11.13. In relation to 1.1aCg, the document does not confirm that the Property Factor has a debt recovery procedure which is available on request or online.
- 11.14. In relation to 1.1aCh, the document does not state any arrangements relating to payment towards a floating fund (if applicable to the Tenement).
- 11.15. In relation to 1.1aCi, the document does not state any arrangements for collecting payment from homeowners for cyclical maintenance (if applicable to the Tenement).
- 11.16. In relation to 1.1aDI, the document does not include reference to the Property Factor's in-house complaints handling procedure and how owners may make an application to the tribunal (formerly the homeowner housing

panel) if they remain dissatisfied following completion of the Property Factor's in-house complaints handling procedure.

- 11.17. In relation to 1.1aDm, the document does not state the timescales within which the Property Factor will respond to enquiries and complaints received by letter or email.
- 11.18. In relation to 1.1aDn the document does not include procedures and timescales for response when dealing with telephone enquiries.
- 11.19. In relation to 1.1aEo, the document does not include a declaration of any financial or other interests (for example as a ... lettings agent) in the land to be managed or maintained.
- 11.20. In relation to 1.1aFp the document did not include clear information on how to change or terminate the service arrangement with Property Factor including signposting to the applicable legislation.

## **12. Section 2.1**

12.1. Mr Lee stated that he would have expected at the first notification of the leak something concrete to be said by the Property Factor, either that it would take action or that it was not a factoring issue. Instead, the Property Factor left the matter dragging on giving the Homeowners' Representative the perception that the Property Factor would deal with the issue. Mr Lee asked in August whether or not the Property Factor was responsible for taking action and if so, why nothing was being done. Later, the Property Factor contacted him by email to state that it was not a common repairs issue and therefore not factoring issue as it related only to the Property. For that reason the Homeowners' Representative is making a complaint that the information provided is both misleading and false.

**12.2. The tribunal determined that the Property Factor failed to comply with Section 2.1 of the Code of Conduct.**

12.3. The Property Factor provided information to the Homeowners' Representative which was misleading.

12.4. It was misleading for the Property Factor to first advise the Homeowners' Representative that the issue of the leak through the door at the Homeowners' property was a common repair with other owners in the Tenement and to allow the Homeowners' Representative to rest under the

impression that the Property Factor would take action to deal with the matter; at a later date to state that it was not a common repairs issue.

### **13. Section 2.3**

13.1. Mr Lee stated that his complaint was the website stated that the contact number was for tenants only and that there was no number on the factoring page of the website.

13.2. Mr Boisseau stated that there is an out of hours emergency line for anyone including homeowners. He stated that a caller would get an answer machine if they did not get a live operator. He accepted that it was on the page relating to the tenants and that the factoring page did not provide a number to contact. By the second hearing day Mr Boisseau stated that he had updated the website to include a number on the factoring page.

13.3. Mr Boisseau stated that the contact details were on the “terms and conditions” document and on correspondence issued to the Homeowners.

13.4. **The tribunal determined that the Property Factor did not fail to comply with Section 2.3 of the Code of Conduct.**

13.5. The tribunal took the view that there was certainly a lack of clarity in the information provided by the Property Factor but it did not amount to a failure to comply with this subsection of the Code of Conduct.

13.6. At the time of notification of the complaint by the Homeowners’ Representative and the making of the Application, the Property Factor did not have a contact number on the factoring page of the website. The tribunal noted during the hearing that the Property Factor has now updated its website to include a contact number on the factoring page.

13.7. However, despite the lack of a telephone contact number on the factoring page of the website, all of the relevant contact details, including telephone number, were on the letters issued to the Homeowners and in the “terms and conditions” document which was issued by the Property Factor.

### **14. Section 2.4**

14.1. Mr Lee stated that there is no procedure to consult with homeowners.

- 14.2. Mr Boisseau stated that owners would receive an email or letter outlining why there may have been more or less expenditure but that Mr Lee may not have seen this as he came half way through a year.
- 14.3. In response to a question from the tribunal chair, Mr Boisseau accepted that there is no written procedure in relation to consultation and seeking written approval from homeowners. He stated that he usually contacts owners by email with details of quotes. He provided an example of an incident two years ago with £100,000 of dry rot. In response to a question from the ordinary member about whether that asks them to mandate the works, Mr Boisseau described it as "a statement of fact". He then said that recently (2018) the Property Factor has adopted a signed request by electronic signature. It has not been used in any factoring services at all and has not been used at this development. He referred to PF doc 1.11 – para (6) and stated that the procedure was that he would put it in the spreadsheet and look for tacit acceptance.
- 14.4. Mr Boisseau said that he accepted that Mr Lee had notified a problem last summer about the gutters overflowing. He accepted in response to a question from the tribunal chair that he had not followed any procedure to consult with the owners about the gutters. He said that he alluded to it in an email but was unable to produce any such email. He said that he had not asked the owners to proactively sign a document. He described it as a request to get some feedback. He said that they do not say it in as many words that they are seeking majority approval. With the dry rot he informed everyone what the situation was; he sent all the different quotes but he did not actually say they were looking for majority approval. A request went in the email saying we welcome any feedback.
- 14.5. In response to a question from the tribunal chair as to whether as a Factor he would be comfortable instructing works without majority approval, Mr Boisseau stated "sometimes you have to go ahead and do it."
- 14.6. In response to a question from the ordinary member about whether he obtained funds for the dry rot work, Mr Boisseau stated that he had had to fund a lot of this personally. He further stated that although this will be devastating for the owners, he was intending to hand in my resignation after putting his house in order. He said he would put in a notice and reapply for the same post at a huge amount more money and this is the ultimate thing that is happening because he did not need this and he was bankrolling huge sums.
- 14.7. In response to a question from the tribunal chair about whether the Property Factor had contacted the other owners by email in relation to the

guttering issue, he said that the owners at number 3 had been blind copied in to all the correspondence and that they had requested to be not involved.

14.8. In response to a question from the tribunal chair about the owners at 4, 5 and 6 and whether they have been notified of the issue of common guttering, Mr Boisseau stated that they have not been emailed.

14.9. In summary, Mr Boisseau confirmed that there is no written procedure for seeking approval from a group of homeowners.

**14.10. The tribunal determined that the Property Factor failed to comply with Section 2.4 of the Code of Conduct.**

14.11. The Property Factor did not have a procedure to consult with the group of homeowners in the Tenement and the adjoining building, to seek their written approval before providing works or services which will incur charges or fees in addition to those relating to the core service.

14.12. There was no agreed level of delegated authority with the group of homeowners to incur costs up to an agreed threshold to act without seeking further approval.

14.13. In evidence and submissions the Property Factor was unable to prove the existence of any procedure to consult with homeowners on the works required beyond the core service.

14.14. Evidence was lead by the Property Factor that a procedure has been introduced by the Property Factor in 2018 which requires homeowners to return an electronic mandate but the evidence in relation to the procedure was quite vague and he stated that in any event it was not used for factoring services and had not been used at this development.

**15. Section 2.5**

15.1. Mr Lee stated that it could be said that the Property Factor responded immediately in form but in substance he stated that the Property Factor has not dealt with the issue. In form he did respond but in a totally ineffective way. In substance he has been no help.

15.2. The response from Mr Boisseau was to refer to the email threads of which there are many which show that enquiries have been replied to within 24 hours in every instance, pretty much. On that basis he said that he has responded to the enquiries and complaints promptly.

**15.3. The tribunal determined that the Property Factor did not fail to comply with Section 2.5 of the Code of Conduct.**

15.4. The Property Factor responded to the Homeowners' Representative's enquiries and complaints by letter and email within prompt timescales.

15.5. There was no dispute between the parties that the Homeowners' Representative's emails were replied to by the Property Factor.

15.6. The tribunal proceeded on the basis that this subsection of the Code of Conduct is directed towards prompt communication and keeping homeowners updated where enquiries are ongoing.

15.7. The tribunal was unable to conclude on the balance of probabilities that the Property Factor breached this subsection of the Code simply because the Homeowners' Representative was not satisfied with the response he received.

### **16. Section 3.3**

16.1. Mr Lee said that he had not received at least once a year a detailed financial breakdown of charges made and a description of activities and works carried out.

16.2. He received a bill for roof work. He immediately thought he wanted to get more information from the Property Factor. He has received documentation which he does not understand. He was not supplied with supporting information and invoices despite asking for them.

16.3. Mr Boisseau said that the Property Factor sent out a detailed financial breakdown once a year in January as part of billing arrangements. PF bundle, 1.9 "Estimate to y/e 31.1.18". It is the estimated accounts for the coming year which represent a float. It is all fully rebated at the end of the year on the invoice. When the actual accounts come in the whole amount for the previous year is credited and the actual accounts debited. It is sent by hard copy and email to the homeowners. There was a spreadsheet attached. PF Doc 1.9 is the spreadsheet to 21 April 2017. 1.10 is the invoice which is related to that.

16.4. In response to a question from the tribunal chair about what was sent out in January 2018, Mr Boisseau said that a new one would have been sent out but it was not lodged.

- 16.5. Mr Lee said that he did receive a bill and it attached a spreadsheet however it was woefully inadequate so it led him to ask the Property Factor what it was and request supporting documents.
- 16.6. In relation to a discussion about relative shares of the common repairs, Mr Boisseau said that there are 13 flats and pointed out that part of the deed of conditions excludes the Tower flat from all of the obligations. PF Doc 12.7 is the Deed of conditions for 4, 5 and 6. The stairwell room is the Tower room – it is a property at the top. It is a studio apartment.
- 16.7. Mr Lee said that he asked what miscellaneous repairs meant and Mr Boisseau said it was private non-factoring repairs. PF doc 16 – mentions the £87 in the Lee column.
- 16.8. Mr Boisseau said that he had produced another document on request with a breakdown of payments for this case. It has been sent to everyone in 3, 3A and 3B. It was Mr John Barton who requested the breakdown. It was sent in 2018, before the last hearing; round about the same time as the HO's application.
- 16.9. Mr Lee confirmed that he had received something resembling this document but repeated that it was inadequate.
- 16.10. Mr Boisseau said that there are two Deeds of Conditions. The one thing they have in common is the same factor and building insurance. Otherwise they are treated separately.
- 16.11. The tribunal chair asked how there can be 13 owners with a 1/12th vote. Mr Boisseau stated that he "threw that in. It's a difficult one. I think they have a vote. That should probably read 1/13th. It is ambiguous.", presumably with reference to the Tower apartment proprietor. The factoring fees are 1/12 each (Armstrong in the Tower apartment does not pay in terms of the deeds). £50 each. Total £600.
- 16.12. The tribunal determined that the Property Factor failed to comply with Section 3.3 of the Code of Conduct.**
- 16.13. The Property Factor did not provide to the Homeowners in writing at least once a year (whether as part of a billing arrangement or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for.

- 16.14. The Property Factor did not, in response to reasonable requests by the Homeowners' Representative, supply supporting documentation and invoices for inspection and copying.
- 16.15. The tribunal considered the evidence that the Property Factor had an unusual spreadsheet / advance estimate arrangement but did not consider that this complied with the obligation in Section 3.3.
- 16.16. The tribunal accepted the Homeowners' Representative's evidence that the information in relation to expenditure which the Property Factor provided annually to homeowners in the Tenement, including to the Homeowners, in addition to lacking a detailed financial breakdown and a description of the activities and works, was difficult to follow and understand. The tribunal accepted the Homeowners' Representative's evidence that he had asked the Property Factor for supporting documents and invoices and that these were not provided.

#### **17. Section 4.1**

- 17.1. After a discussion about matters relating to disputed debt, the tribunal chair asked Mr Boisseau if the Property Factor has a written debt recovery procedure. Mr Boisseau replied that "it was not pre-emptory in our terms at that time" but that "it was alluded to in the terms". He referred to PF doc 8.1, the WSS at the time, which provided that if an owner went two months into arrears the full annual amount would become due and may be sued for. PF doc 5.1 and 5.2 relate to three different court actions for non-payment of invoices by owners in this block. He said that at that time there was no separate written document with a debt recovery procedure but that the Property Factor has had one since January 2018. It is available on request. He does not know if it is mentioned or available on the website. He said that he had mentioned it in the revised WSS which was prepared between the two hearing days.
- 17.2. The tribunal determined that the Property Factor failed to comply with Section 4.1 of the Code of Conduct.**
- 17.3. The Property Factor does not have a clear written procedure for debt recovery which outlines a series of steps which the Property Factor will follow unless there is a reason not to and which sets out how the Property Factor will deal with disputed debts.
- 17.4. The tribunal did not accept that the limited wording in the WSS about the possibility of legal action after two months of arrears could be described

as a clear written procedure which outlines a series of steps to be followed; nor did it set out how it would deal with disputed debts.

## **18. Section 5.2**

- 18.1. Mr Lee accepted that he had been provided with all of the required information about insurance.
- 18.2. He raised an issue about the excess being increased. He was not notified until January 2018. The policy had commenced on 30 October 2017.
- 18.3. Mr Boisseau stated that he had actually made a mistake as he got crossed wires with another policy. He felt it pertinent to add it to the missive that went out to everyone. He said that he was quick to act in telling the owners after he was advised by the broker.
- 18.4. The ordinary member pointed out that this is a property owner's policy rather than a buildings policy and he was interested to know how that originated.
- 18.5. Mr Boisseau stated that it is important to have a block policy that has the ability to have the properties let. He provided the information to the broker that properties are let and cover was required for that.
- 18.6. Mr Boisseau was not sure how much does the inclusion of loss of rent cover added to the overall policy. He said that the broker had been shopping around and he thought it would be difficult to get a cheaper quote in terms of the background of claims.
- 18.7. The tribunal determined that the Property Factor did not fail to comply with Section 5.2 of the Code of Conduct.**
- 18.8. The Homeowners' Representative admitted in the hearing that the Property Factor had provided him with clear information showing the basis upon which his share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing the insurance cover and the terms of the policy.
- 18.9. The tribunal did not consider that the temporary issue with overstating the excess which was rectified as soon as it became apparent amounted to a failure to comply with the subsection.

- 18.10. The Deed of Conditions for the Tenement only requires buildings insurance to be arranged by the Property Factor. The tribunal observed that the evidence lead about the common building insurance policy indicates that it is not ideal for homeowners who do not let their properties, including the Homeowners, as they are over-covered and may be paying more for the additional cover which they do not need.
- 18.11. The tribunal also observed that there is one owner who does not pay anything.
- 18.12. However, these observations do not amount to a failure to comply with Section 5.1 of the Code of Conduct.

## **19. Section 6.1**

- 19.1. Mr Lee said that there was no procedure for homeowners to notify the Property Factor of matters requiring repair, maintenance or attention.
- 19.2. Mr Boisseau said that "it is not pre-emptory in its terms". He stated that they do have procedures in place in that owners just need to call them up. He said it is just obvious. He accepted that they do not write down the procedures and said it is "probably alluded to".
- 19.3. When asked by the tribunal chair how the Homeowners would know the procedure for notifying repairs he said that he has an email address, a phone and they can come into the office. There is a website and it has a contact details section. There is an out of hours phone number on the website. Mr Boisseau accepted that the phone number was for letting clients. It has been changed now. At the time, if people phoned the landline they got a message telling them to go through to the emergency phone. At the time the contact details were on the bottom of every page of the terms and conditions.
- 19.4. The tribunal determined that the Property Factor failed to comply with Section 6.1 of the Code of Conduct.**
- 19.5. The Property Factor did not have in place procedures to allow homeowners in the Tenement, including the Homeowners, to notify the Property Factor of matters requiring repair, maintenance or attention.
- 19.6. In evidence and submissions the Property Factor accepted that there was no procedure. The Property Factor admitted that there was no information as to any procedures on the factoring page on its website. The

Property Factor accepted that there was nothing in its “terms and conditions” document for the Tenement.

19.7. The tribunal did not accept the Property Factor’s evidence that anyone could telephone or email the Property Factor as meeting this requirement of the Code. The purpose of this subsection is to ensure that the Property has procedures in place and the Property Factor accepted that it did not.

## **20. Section 6.2**

20.1. Both parties referred to the submissions already made.

**20.2. The tribunal determined that the Property Factor failed to comply with Section 6.2 of the Code of Conduct.**

20.3. The Property Factor accepted that emergency arrangements are part of the service provided to homeowners at the Tenement and that there were no procedures in place for dealing with emergencies. The Property Factor stated at the last day of the hearing that the information is now on the factoring page of website but was not at the time.

## **21. Section 6.4**

21.1. The tribunal was invited by the Homeowners’ Representative to consider whether there had been a breach of Section 6.4 of the Code of Conduct on the basis that the Property Factor did not produce a programme of works arising out of the inspections but as this was not in the Application (as amended) or notified to the Property Factor as required in terms of Section 17(3) of the 2011 Act, the tribunal was unable to make a determination in relation to the subsection.

## **22. Section 6.6**

22.1. The tribunal was invited by the Homeowners’ Representative to consider whether there had been a breach of Section 6.6 of the Code of Conduct on the basis that the Property Factor did not produce documentation relating to the tendering process but as this was not in the Application (as amended) or notified to the Property Factor as required in terms of Section 17(3) of the 2011 Act, the tribunal was unable to make a determination in relation to the subsection.

22.2. The tribunal observed that on the evidence led none of the work at the Tenement had gone out to tender in any event.

### **23. Section 6.7**

23.1. The tribunal was invited by the Homeowners' Representative to consider whether there had been a breach of Section 6.7 of the Code of Conduct on the basis that the Property Factor did not disclose to the Homeowners in writing any commission, fee or other payment or benefit received from a contractor appointed by the Property Factor but as this was not in the Application (as amended) or notified to the Property Factor as required in terms of Section 17(3) of the 2011 Act, the tribunal was unable to make a determination in relation to the subsection.

23.2. The tribunal observed that the Property Factor confirmed during the hearing that there was that there was no such commission or fee.

### **24. Section 6.8**

24.1. The tribunal was invited by the Homeowners' Representative to consider whether there had been a breach of Section 6.8 of the Code of Conduct on the basis that the Property Factor did not disclose to the Homeowners in writing any financial or other interests that it had with a contractor appointed by the Property Factor but as this was not in the Application (as amended) or notified to the Property Factor as required in terms of Section 17(3) of the 2011 Act, the tribunal was unable to make a determination in relation to the subsection.

24.2. The tribunal observed that the Property Factor confirmed during the hearing that there were no such financial or other interests with the contractors.

### **25. Section 7.1**

25.1. The Homeowners' Representative's complaint was that there was not clear written complaints resolution procedure.

25.2. Mr Boisseau had already accepted that it was not referred to in the WSS. The tribunal chair asked whether there was a written complaints resolution procedure. Mr Boisseau referred to PF doc 7, a letter on 5

February 2018. It was noted by the tribunal that this was after the Application was made to the tribunal. Mr Boisseau stated that they did not send anything to Mr Lee. There was nothing pre-emptory.

25.3. He stated that PF Doc 7.2 contains the procedure. It is the whole document. Part of the procedure is that parties should always go to mediation. It did not happen in this case. The Property Factor offered mediation but that was after the Application was made to the tribunal.

25.4. The tribunal asked further questions about the fact that mediation was insisted on that there may be a fee. Mr Boisseau stated that he was alluding to a client using a complaint to disrupt his business. He said that this particular case is taking up time. It is not going to end well. Mr Lee is not going to give up at this point. He has been jilted. He stated that they try to put in their terms that there needs to be some sort of charitable way out of this.

25.5. Mr Boisseau said that 5 February 2018 was the very first time the Complaints procedure was sent to Mr Lee after a complaint had already been made to the tribunal.

25.6. Mr Boisseau accepted that there was nothing in the letter which offered mediation.

**25.7. The tribunal determined that the Property Factor failed to comply with Section 7.1 of the Code of Conduct.**

25.8. The Property Factor had no clear, written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which the Property Factor will follow, including how the Property Factor will handle complaints against contractors.

25.9. A document was produced by the Property Factor after the Homeowners' Application was made to the tribunal (PF doc 7.2). It does not comply with the requirements of Section 7.1 of the Code. The tribunal also noted that it includes outdated references to the Sheriff Court and prescribes that mandatory mediation must be entered into before a complaint is made to the tribunal and that there may be a charge for this.

## **26. Section 7.2**

26.1. Mr Lee said he had nothing to add to his written submissions in relation to Section 7.2.

- 26.2. Mr Boisseau stated that he thought it was correct to tell the Homeowners' Representative to get his lawyer to deal with an issue over the title deeds.
- 26.3. Mr Boisseau stated that he would like to go through the email threads to demonstrate that they were conscious of his complaints and went out of their way to respond. He said it forms part of the Property Factor's procedure and that the "top guy", not minions who was the final decision maker was dealing with the complaint.
- 26.4. The tribunal chair asked whether any of the email correspondence demonstrated that the Property Factor followed its in-house complaints handling procedure (despite the fact that the Property Factor accepted that Mr Lee was not sent a copy of the procedure until after the Application was made.)
- 26.5. Mr Boisseau referred to PF doc 3.5, an email of 4 January 2018 from the PF to the HO; PF doc 6, an email of 26 Feb 2018 from PF to HO. He said that he was just trying to demonstrate that they were in constant email contact to try and resolve the problem.
- 26.6. The tribunal determined that the Property Factor did not fail to comply with Section 7.2 of the Code of Conduct as it was not relevant on the facts.**
- 26.7. The tribunal took the view that the in-house complaints procedure was not provided to the Homeowners or the Homeowners' Representative and was not started by the Property Factor, therefore it cannot have been exhausted. On that basis a failure under this subsection was not established.

## **27. Property Factor's Duties**

- 27.1. Mr Lee adopted everything stated in his written notification to the Property Factor. Essentially there are two issues: the primary one related to the Property Factor's failure to take any action upon being notified that there was a problem with the guttering which was causing leaks into the Homeowners' Property, in particular a failure to investigate or consult with the other owners; and the other is the fact that the Property Factor's primary business is letting flats and he is the agent for a number of flats in the Tenement and the adjoining Property is a conflict with being the factor for those buildings.

- 27.2. In relation to the first matter, the tribunal heard evidence and submissions from Mr Lee and evidence from Mr McDonald, building surveyor about the problems with the guttering in heavy rainfall and the fact that these had been reported to the Property Factor in February 2018 and that no action had been taken by the Property Factor, as referred to above.
- 27.3. The Property Factor accepted at the hearing that there an issue with the guttering in heavy rain causing water to cascade down to ground level outside the Property and that he had known about it for some months since being notified by Mr Lee. The tribunal were shown footage filmed with a drone of the problem occurring. The Property Factor also accepted that he had done nothing to investigate the issues with the guttering or to carry out any consultation with the liable owners in the Tenement and the adjoining building. Instead he had told Mr Lee that it was not a matter in common ownership and not a matter for the Property Factor.
- 27.4. In relation to the second point, Mr Lee said that he has asked several times for addresses of the other owners in the Tenement and the adjoining Property. They are all absentee owners other than one permanent resident.
- 27.5. During the hearing the tribunal chair asked whether, if ordered by the tribunal to produce a list of the names, current correspondence addresses and email addressed for each of the properties in the Tenement, he could do that. Mr Boisseau confirmed that he could and he gave an undertaking to produce that information to Mr Lee within 14 days. Thereafter the Property Factor produced a list of the properties in the Tenement and the adjoining building which confirmed that he acts or has acted as letting agent for a number of the properties. The tribunal noted that there was an error on the spreadsheet which was lodged as it appeared to show that he was a letting agent for the Property but it was clarified during the hearing that this was a typographical error.
- 27.6. The tribunal determined that the Property Factor had a duty in terms of its appointment under the Deed of Conditions for the Tenement to take appropriate action within a reasonable timescale once notified by the Homeowners' Representative that there was an issue with the common guttering which was causing leaks into the Property during heavy rainfall; namely to carry out investigations and consult with all the liable owners and to seek a mandate in relation to the instruction of remedial works; and thereafter if agreement was reached in terms of the Deed of Conditions about the instruction of works, to instruct those works.**

- 27.7. In the majority of its dealings with the Homeowners' Representative, the Property Factor has focussed on the water penetration issue at ground level, stating that it is the Homeowners' problem, and the Property Factor has ignored the common repairs issues at roof level.
- 27.8. Despite being aware that there is an issue with the common guttering in heavy rain, the Property Factor has not obtained instructed any surveys or obtained any quotes for remedial work; and the Property Factor has not put any proposals to or consulted with the owners in the Tenement and the adjoining building.
- 27.9. The tribunal determined that in failing to investigate the issues and propose solutions to the owners in the Tenement, including the Homeowners and the owners in the adjoining building, the Property Factor has neglected his duties by not investigating the issues and coming up with solutions that could be put as proposals to all of the proprietors of the Tenement and the adjoining building. The Property Factor has made assumptions that the owners will not want to pay for the required remedial work. The tribunal is of the view that ignoring the problem could affect the cost of any repairs which are now required and over the medium to long term, property values in the Tenement, including the Property.
- 27.10. The tribunal observed that the owners in adjoining block, for which the Property Factor is also the factor, and who share common liability for the roof and guttering with the owners in the Tenement, have not been advised by the Property Factor and may be unaware that there is a common repairs issue with the guttering on the building.
- 27.11. The Homeowners' Representative incurred the expense of instructing a survey report from a building surveyor and he also incurred the expenses of the witness's attendance at the hearing. The total figure, as per invoice of 30 April 2018, was £3672.00. The tribunal is of the view that the Property Factor should pay a proportion of this fee to reflect the fact that he should have consulted with the owners about carrying out investigations which may have included instruction of a surveyor. While the tribunal accepts that the cost of any such inspection and report would have been chargeable to the liable owners rather than the Property Factor, the fact that the Property Factor did nothing was what prompted the Homeowners' Representative to instruct the inspection and survey report for the hearing. The tribunal considers the sum of £750.00 to be an appropriate contribution by the Property Factor and this is reflected in the proposed Property Factor Enforcement Order.
- 27.12. **The tribunal determined that the Property Factor breached his duties in relation to the conflict of interest which arises as a result of**

**acting in the capacity as letting agent for a number of properties in the Tenement and the adjoining building as well as acting as the property factor for both buildings, without disclosing the same to all of the affected proprietors.**

- 27.13. If there was a WSS which complied with the Code of Conduct, the Property Factor would be obliged to make a declaration of interest to the factoring clients.
- 27.14. Mr Boisseau accepted that there is no declaration of that interest in terms and conditions document which were sent out to the Homeowners. He accepted that there was not even a general statement that the Property Factor acted for other owners as a Letting Agent.
- 27.15. At the hearing, the Property Factor ultimately stated his involvement with each property and proprietor on the schedule of properties which was produced by him.
- 27.16. The tribunal was of the view that even if there was no actual conflict, there was an appearance of conflict, because until he had produced the schedule, the fact of the dual roles performed in relation to some properties in the Tenement and the adjoining building had been undisclosed to the factoring clients, including the Homeowners.

## **28. Property Factor Enforcement Order**

- 28.1. The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Notice in terms of Section 19(2) of the 2011 Act.
- 28.2. The parties will be allowed to make representations on the proposed PFEO.
- 28.3. The tribunal is proposing a number of orders to ensure that the Property Factor complies with the Code of Conduct by production of certain documents, including a revised written statement of services. The tribunal is also proposing the said payment of £750.00 in respect of the breach of factoring duties in relation to failing to taking action to address the reported issue with the guttering which resulted in the Homeowners' Representative requiring to instruct an independent surveyor to inspect the Property and the common areas and produce a report. The tribunal is also proposing that the Property Factor should pay to the Homeowners' Representative the sum of £250.00 in respect of the distress, worry and inconvenience occasioned by

the Property Factor's failures to comply with the Code of Conduct and failures to carry out Property Factor's duties which resulted in the Homeowners' Representative requiring to make an Application to the tribunal.

## **29. Appeals**

**29.1. A homeowner or property factor 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.**

Susanne L M Tanner QC  
Legal Member

10 December 2018

