Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Chamber Ref: FTS/HPC/PF/22/4380

Flat 0/1, 187 Knightswood Road, Glasgow, G13 2EX ("the Property")

Parties:

Tom Gunion, Flat 0/1, 187 Knightswood Road, Glasgow, G13 2EX ("the Homeowner)

Speirs Gumley Property Management Ltd ("the Property Factor")

Tribunal Members:

Josephine Bonnar (Legal Member)
Mary Lyden (Ordinary Member)

DECISION

The Tribunal determined that the Property Factor has not failed to comply with the Code of Conduct for Property Factors as required by Section 14(5) of the Act and has not failed to carry out its property factor duties.

The decision of the Tribunal is unanimous.

Introduction

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

Background

1. The Homeowner lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application comprises documents received by the Tribunal on 12 December 2022 and

states that the Property Factor has failed to comply with Overarching Standards of Practice ("OSP") 3, 4 and 5 and Sections 2.4, 2.6, 2.7 and 7.1 of the 2021 Code of Conduct ("the 2012 Code"). The application also states that the Property Factor had failed to carry out its property factor duties. Documents were lodged in support of the application including a copy of the Property Factor's written statement of services (WSS), a copy of a Land Certificate for the property, a spreadsheet and correspondence with the Property Factor.

2. A Legal Member of the Tribunal with delegated powers of the President referred the applications to the Tribunal. The parties were notified that a case management discussion ("CMD") would take place on 15 March 2023 at 10am by telephone conference call. Prior to the CMD, both parties lodged submissions and documents. The Property Factor also indicated that it would not be represented at the CMD.

3. The CMD took place on 15 March 2023. Mr Gunion participated. The Property Factor was not represented.

Summary of discussion

4. **Rule 8 of the Tribunal Procedure Rules**. The Tribunal noted that the Property Factor had referred to Rule 8 of the Tribunal Procedure Rules in their written submissions They stated that the application should not be accepted because the complaints were vexatious and similar to matters already determined by the First tier Tribunal in 2021 in relation to a previous application. The Tribunal advised Mr Gunion that the application had already been accepted by a Legal Member of the Tribunal on 22 December 2022. However, although Rule 8 no longer applied, the Tribunal could conclude that one or more of the Homeowner's complaints had already been determined in a previous case. If so, the doctrine of res judicata would apply and the Tribunal would be unable to consider those complaints. The Tribunal indicated that a decision on this issue would not be taken until a later stage.

5. **Failure to comply with the decision in the Tribunal in case reference PF/20/2149.** In the application, Mr Gunion stated that the Property Factor had not only failed to comply with the Code and carry out its property factor duties, but also contravened the decision of the Tribunal is relation to the previous application. The Tribunal advised Mr Gunion that they could only consider whether there had been a breach of the Code or a failure to carry out duties. The previous decision, which did not uphold any of the Homeowner's complaints, did not impose any obligations on the Property Factor which could form the basis of a further application. The only relevance of that decision to the present application was as outlined in paragraph 4.

6. **Point 7 on letter of complaint dated 6 September 2022**. The Tribunal noted that point number 7 in the letter, which is part of the application, refers to a failure by the Property Factor to respond to correspondence dated 13 January 2020. Mr Gunion told the Tribunal that there was a typographical error in his letter and that the correspondence in question was actually dated 13 January

2022. As the Property Factor's response of 13 October 2022 and submission to the Tribunal made no reference to this complaint, it was not clear whether they were aware of the error or what their position was in relation to this complaint. This therefore required to be clarified.

7. **Notification of complaints**. The Tribunal noted that the application form refers to breaches of OSP 5 and Section 7.1 of the Code. However, as the notification/complaint letter dated 6 September 2022 did not include complaints under these sections, the Tribunal could only consider them if Mr Gunion could provide evidence that they had been notified in other correspondence to the Factor. Mr Gunion stated that he would review his paperwork as he thought that he had raised the relevant issues with the Property Factor, even if there was no specific reference to the sections of the Code. Mr Gunion also explained that this complaints under these sections related to an open letter issued by the Property Factor on 20 September 2022, which he found to be intimidating.

8. The Tribunal noted that the Property Factor had lodged a complete copy of their response to Mr Guinion's complaint and stated that the version lodged by Mr Gunion had been redacted. Mr Gunion advised the Tribunal that it had not been redacted but that he had deleted some of it before submitting it with the application. The Tribunal advised Mr Gunion that they would consider the version lodged by the Property Factor when dealing with the application, as it was the complete version.

9. Mr Gunion advised the Tribunal that the issues which are in dispute can be summarised as follows: -

(a) The term convenor and the failure of the Property Factor to call a meeting of homeowners.

(b) The claim that redecoration every 5 years is compulsory.

(c) The confusing nature of correspondence from the Property Factor.

(d) The breach of confidentiality in relation to the letter of 25 January.

(e) The victimisation by the Property Factor in relation to the alleged debt, not applying a proper debt recovery process.

(f) The Property Factor obstructing the calling of a homeowners meeting.

(g) The Property Factor withholding information about the votes received in relation to the re-decoration. They have refused to provide details of this. However, 2 other homeowners agreed with him that it was not required.

(h) The Tribunal also noted that the application includes a complaint that the Property Factor has failed to respond to points 4 to 7 in the complaint letter of 6 September 2022.

10. The Tribunal noted that the Deed of Conditions appears to state that any proprietor can call a meeting and that the Homeowner's are bound to carry out the redecoration of common areas every five years. Mr Gunion said that he disputed that this was the case and said that he could elaborate on his argument at a future hearing. The Tribunal noted that the application states that 10 requests for a meeting to be convened have been ignored. The Tribunal stated that copies of these requests, and the responses received, should be lodged. It was also put to Mr Gunion that the letter of 25 January 2022 did not identify him by name. He conceded that he is not specifically named as the person who made the previous application and would give some further consideration to his complaint about this letter.

11. In response to questions from the Tribunal, Mr Gunion said that the re-decoration work has not been carried out. The re-planting work was completed, despite his objection, and he has now paid his share.

12. The Tribunal determined that the application should proceed to a hearing and that a direction should be issued for the production of additional information and documents.

13. The parties were notified that an in person hearing would take place on 19 June 2023 at Glasgow Tribunal centre. Both parties lodged further documents in advance of the hearing and the Property factor indicated that it would not attend.

14. The Hearing took place on 19 June 2023. The Homeowner attended. The Property Factor did not participate.

The Property Factor's submissions

15. Submission dated 20 January 2023 – The complaint is vexatious and already determined by the Tribunal in a previous application. The complaint relates to internal decoration which is mandatory every 5 years. 39 of the 40 owners paid their share and the other 4 blocks had the work carried out. The other owners in Mr Gunion's block did not agree to cover his share. A full response was issued to his formal complaint dated 6 September 2022. Correspondence was issued to the owners to ask if they wanted a meeting. On the first occasion, two confirmed they wanted a meeting. On the second eight did so. As there has to be a quorum of 15, the Property factor said that they would not attend but would circulate the details of the meeting to all homeowners if one was arranged. The Homeowner did not arrange a meeting.

16. The Homeowner has not exhausted the complaints procedure. The complaint response covered all of the points in the complaint even if points 4 to 7 were not specifically mentioned. Block owners were properly consulted in relation to the re-decoration and re-planting works. The latter only cost £32.50 and was covered by delegated authority and there are no financial thresholds for this. There is no appetite for a block or development meeting. The Homeowner cannot compel the Property Factor to call a meeting.

The Hearing

17. Mr Gunion told the Tribunal that OSP 5 and Section 7.1 had not been in the original complaint letter because the subject matter of these complaints had not arisen until later. In response to questions about the previous Tribunal decision, Mr Gunion said that when the previous Tribunal made its decision, the Property Factor said that meetings were not taking place because of COVID 19. It was just before the first lockdown. The Tribunal said that he had a right to call a meeting but did not grasp that the term "convenor" applied. This is not defined in the deed of conditions. Mr Gunion challenged their findings but was unsuccessful. He had not appreciated that he could seek a review within 14 days as the decision only referred to a right of appeal. The attempt to obtain permission to appeal was unsuccessful and no review was requested. It took a while to recover from the decision and he has no internet facilities.

18. **The term convenor, the failure by the Property Factor to call a meeting, illegal correspondence voting**. Mr Gunion told the Tribunal that a google/dictionary search of the word "convenor" or "convener" indicates that the definition of the word is an elected person. He has not been so elected, only the property factor meets this criterion. He has also looked at the websites of other Property Factors. Taylor and Martin state that it is part of their role to organise meetings. Redpath Bruce also say that they "might" do this, depending on the terms of the deed of conditions (DOC). The Property Factor's WSS refers to "additional meetings". Clause 9 (page D7) of the DOC refers to a convenor. Mr Gunion told the Tribunal that the previous Property Factor, who had been appointed by the developer, had been sacked because of their connection with the developer. After interviewing candidates, the Homeowners selected the current Property Factor. There had been an owner's association which fell apart when the previous factoring contract was terminated.

19. Mr Gunion said that a convenor or convener is "a person who convenes or chairs a meeting, committee…especially one who is elected to do so". An example might be a shop steward. (Collins concise dictionary 21st edition). The Law Insider defines it as a person who impartially assists an agency in determining whether the establishment of a negotiated rule making committee is feasible or appropriate …" He said that there are multiple definitions.

20. **The claim that redecoration every 5 years is compulsory**. Mr Gunion told the Tribunal that a letter was sent out on 2 December 2021 which says that the redecoration "should" be every 5 years. This was incorrect as the word used in the DOC is "shall". They go on to say that they recommend one of the contractors who tendered and that the work will proceed There is therefore direction and recommendation in the same sentence. The letter also says that they require the owners' agreement which suggests that there is a choice. On the other hand, the DOC says that it is compulsory. However, if all owners in the block said no, would the Factor take them to court? In response to questions from the Tribunal, Mr Gunion said that there are 13 flats in the block. He

confirmed that all of the other owners paid the charges for the redecoration, which was split over two invoices (February and May 2022). He referred to pages 30 and 31 on his submission, emails from 2 other owners. Jackie McQueen said that he only paid because he thought he had no choice. Mr Gunion said that the use of the word "shall" in the DOC has caused confusion. However, it is qualified by a necessity factor. He did not think the redecoration was needed.

21. **The confusing nature of correspondence** . Mr Gunion referred to a letter from the Property Factor dated 25 January 2022, issued to the residents. There are 4 points. The 4th states that the owner who wants the work to be suspended until a meeting is convened, intends to apply to the Tribunal. However, he had not mentioned this until 13 January 2022. He did not say it on 2 December 2021, as is suggested in the letter. The letter contains a lot of legal terminology which people would not try to read. A meeting was required to explain what was needed. The quotations from the DOC were confusing. The previous letter used "should" erroneously. The second last paragraph of page 2 of this letter corrected the earlier statement.

22. In response to a question from the Tribunal about whether redecoration every 5 years was standard cyclical maintenance, Mr Gunion said that it was aesthetic and might affect re-sale values but that the owners could decide that they didn't want it. He said that only 5 responded to the first correspondence vote, then 6. The letter of 15 August 2022 stated that all owners in the other blocks had paid and only one had not paid from this block. In the letter of 20 September 2022, they gave the owners 3 options – cancel the work by majority agreement and refund the money, agree as a group that the 12 other owners would pay the missing share or host a meeting to discuss the work. They only got 5 responses but did not specify which option had selected by the 5 who had responded. Then in January 2022, they got 9 responses. 2 wanted a meeting. 7 did not. Jackie Queen wanted a meeting. Another owner told him that he wanted a meeting and thought the redecoration was compulsory.

23. **The victimisation in relation to the alleged debt, not applying a proper process**. Mr Gunion referred to the "Notice prior to court proceedings" from John Campbell, Sheriff Officers dated 26 April 2022. He said that his Councillor told him that this notice didn't seem right. The Notice was from John Campbell but says that he is to pay Speirs Gumley. He told the Tribunal that no court proceedings have been raised yet. There is no detail of the debt procedure in the WSS. He objects to the way they have pursued the debt between 21/12/21 and 8/12/22. They applied a late payment fee in the May 2022 invoice for the February invoice.

24. The Tribunal noted that the Notice specified a sum outstanding of £109.90. Mr Gunion said that £34.21 of this was an unpaid management fee. This was because they did not arrange an owners meeting. The redecoration charge was £115.38 which was divided between 2 invoices. The first part was included in the demand for £109.90. However, this has been removed since the funds ingathered for re-decoration were paid back to the other owners. Currently, the sum of £120.26 is unpaid. This comprises 2 management fees, two late

payments fees of £18 and John Campbell's fee for the Notice of £15.84 He disagreed with the Notice as it included a charge for the re-decoration which had not yet been carried out so could not be a debt. In response to questions from the Tribunal, Mr Gunion said that the Property Factor went ahead with the re-planting, although he had not paid, at a cost of £1300. However, they offered the 3 options to the owners in relation to the re-painting, and would not proceed, although the cost was similar. The last painting took place in 2016 and only cost £900. He challenged the increased cost as it was 60% more. He would have been prepared to pay more for the re-planting. He thinks more is needed and there should have been a meeting to discuss what was needed.

25. Mr Gunion said that by applying a late payment charge in the May 2022 invoice the Property Factor failed to take account of the fact that he had sent an email stating that there was a dispute in relation to the February invoice. On 26 March 2022 he posted a notice which stated that the re-decoration was not compulsory. On 26 April 2022 he received the Notice from John Campbell. On 10 June 2022 he had an email from the accounts department asking them to contact him. He phoned and was asked to pay and provide his security code over the phone. He refused and said that he would pay another way. On 25 July 2022 he had an unannounced meeting with the property inspector and Ross Moffat (associate director). They came to the door, said they were doing their quarterly inspection, said they wanted to resolve matters but just asked him to pay the charges. On 6 September 2022 he submitted a formal complaint. On 22 September the Property Factor issued a letter to all 13 residents with 3 options regarding the re-decoration. He posted a notice in his block to say that he could not be accused of holding things up as they could proceed with the work and take him to court. One neighbour came to speak to him and just told him to pay up. On 28 November 2022 the Property Factor sent another letter regarding the three options with a closing date of 7 December. There were emails between 22 December 2022 and January 2023, badgering the owners. In February 2023 a further late payment fee was applied, the first since May 2022. They also refunded the money that month for the re-decoration. He does not understand this. They should have held a meeting.

26. In response to a question from the Tribunal Mr Gunion said that there are 8 owner occupiers and 5 private lets in the block. He asked the Property Factor whether the people who voted for a meeting were owners or landlords, but they would not say. Jackie Queen wanted a meeting.

27. In relation to the complaint letter Mr Gunion said that he is not satisfied that his complaint numbers 4 to 7 were addressed in the response. He said that the letter of 2 December 2022 breached OSP 3 and 4. The letter of 25 January 2023 also breached OSP 4. In relation to OSP 5, the correct procedure should have been to do the work and sue him for it.

28. The breach of 2.4 relates to the correspondence voting instead of holding a meeting. Also, the failure to give a breakdown of the votes received between landlords and owner occupiers. He did not expect them to give names. He also wanted a block-by-block breakdown. Section 2.6 relates to the failure to have meetings, when these are required for voting. 2.7 relates to the failure to

respond to the letter of 13 January 2022 and points 4 to 7 in the complaint letter. 7.1 is based on the Property factor badgering the owners about the 3 options and changing the closing date.

29. Mr Gunion referred the Tribunal to his application form which states (highlighted in red) that all of this could have been avoided if the Property Factor would agree to have a meeting. A vote taken by correspondence can only be indicative. The previous case referred to the fact that the COVID lockdown was about to start, and people were hesitant to attend. He therefore proposed that the re-decoration be suspended until a meeting could be arranged. It was not emergency work. Mr Gunion told the Tribunal that the previous property factor was sacked because of their association with Barratt. The current Property Factor was appointed because they said that they had never worked with Barratt. However, that may be about to change.

Findings in Fact.

30. The Homeowner is the owner of the property at flat 0/1, 187 Knightwood Road, Glasgow

31. There are 40 flats in the development and 13 in the block where the property is located.

32. The Property Factor is the property factor for the development.

33. The property factor duties which apply are contained in the deed of conditions for the development and the written statement of services.

34. On 6 September 2022 the Homeowner submitted a formal complaint to the Property Factor. This complaint notified the Property Factor of alleged breaches of the Code of Conduct and failure to carry out property factor duties.

35. On 12 October 2022, the Property Factor issued a detailed response which addressed all aspects of the complaint.

36. On 2 May 2021, the First tier Tribunal issued a decision with statement of reasons in relation to a previous application by the Homeowner. The Tribunal did not uphold the complaints. The Tribunal made a determination that the Homeowner is entitled to call a meeting of proprietors in terms of the deed of conditions.

37. The Homeowner has not called a meeting of homeowners.

38. The Property Factor told the Homeowner that if he arranged a meeting, they would notify the homeowners of the meeting and circulate the agenda but would not attend.

39. The Homeowner has made ten requests that the Property Factor arrange a meeting. They have refused to do so.

40. The Property Factor consulted with the homeowners in the development about calling a meeting to discuss the internal re-decoration of the blocks and re-planting of the common areas. Only two homeowners responded to say that they wished to attend a meeting.

41. The Homeowner paid his share of the re-planting work, after it had been carried out. He did not pay his share of the re-decoration work.

42. The other 39 homeowners in the block paid their share of the re-decoration work. The work was carried out in the other 4 blocks. The Homeowners' block was not painted, and the funds repaid to the owners as a result of the Homeowner's failure to pay his share.

43. There is no provision in the WSS which requires the Property Factor to arrange meetings.

44. The Property Factor consulted with the homeowners about the re-planting and re-decoration. The letters did not propose a correspondence vote on whether the work was to proceed.

45. The Property Factor instructed a Sheriff Officer to serve a Notice prior to Court Proceedings in relation to unpaid invoices. The Notice was served on 26 April 2022.

46. The Homeowner has refused to pay the sum of £120 which relates to two management fees, two late payment charges and the Sheriff Officer fee.

47. The Homeowner has withheld payment because the property Factor failed to arrange a meeting.

48. The Property Factor refused to tell the Homeowner how many responses had been received from owner occupiers and how many from landlords in relation to a letter which proposed proceeding with the re-decoration or holding a meeting to discuss it, on 11 March 2022.

49. The Property Factor responded to the Homeowner's email dated 13 January 2022 on 14 January 2022. In the response they stated that a letter would be issued to all homeowners regarding his concerns.

Reasons for Decision

Is the application premature as the complaints procedure was not exhausted?

50. The Tribunal notes that a formal complaint was submitted to the Property Factor on 6 September 2022. A response extending to 24 pages was issued on 13 October 2022. This concludes by advising the Homeowner that he can

escalate the complaint to the next stage and provides details. It appears that he did not do so and proceeded to make an application to the Tribunal on 12 December 2022. Section 17(3) of the 2011 Act states that an application cannot be made unless the Homeowner has notified that Property Factor of his complaints and given them the opportunity to resolve them. He has certainly complied with this. There is extensive correspondence between the parties culminating in his complaint dated 6 September 2022 which fully articulates his complaints by reference to the legislation, the Code, the WSS and the Deed of conditions. Section 17(3) does not specifically state that the complaints procedure must be exhausted. Although this may be desirable in some cases, the fully articulated complaint and lengthy response appear to meet the requirements of the legislation. The Tribunal is satisfied that the application is not premature.

51. As discussed at the CMD, the Tribunal is satisfied that the Homeowner did not notify the Property of the complaints under OSP 5 and Section 7.1. As a result, these were not considered.

The term convenor/convener and the failure by the Property Factor to call a meeting/obstructing the calling of a meeting.
Property Factor duties

52. The first part of this complaint is about whether the Homeowner can call a meeting. The Tribunal considered the submissions from the Property Factor and the evidence given by the Homeowner. In their decision dated 4 May 2021 in relation to application PF/20/2149, the FTT considered a similar complaint. They concluded, " In any event, the Applicant's complaint that the Respondent denied him his right to call an owners meeting is misconceived. The Applicant himself has always had that right in terms of the Deed of conditions. We appreciate that the practice was that the Respondents would deal with the organisation and calling of such meetings and that the Applicant may not have had readily available contact details of his fellow owners. That said, he had a right to call an owners meeting but did not do so." The Tribunal also concluded that the explanation for the Property Factor failing to call a meeting, the imminent COVID 19 lockdown, was entirely reasonable.

53. It was clear from the evidence given by the Homeowner that he had been unhappy with this decision. He said that he had attempted, unsuccessfully, to appeal and would have sought a review had he appreciated that this was an option. However, the doctrine of res judicata provides that a party cannot litigate the same matter twice. Having failed to persuade the previous Tribunal or successfully challenge their decision, he is not entitled to make another attempt at the same argument. The Tribunal is satisfied that the issue of whether he, as an owner, is entitled to convene a meeting has already been determined and cannot be re-visited.

54. Although the Tribunal does not require to consider the matter further, it should be noted this Tribunal agrees entirely with the conclusion reached in the previous case. The Homeowner's argument is illogical. It is largely based on

dictionary definitions of the word “convenor”. However, he has chosen the definitions which suit his argument best and rejected others. Furthermore, he fails to appreciate that the word has to be read in context. The DOC stipulates that any proprietor may call a meeting. The term convenor is used thereafter to describe the proprietor who has done so. The suggestion that only an appointed or elected factor can convene makes no sense. What would happen if there was no factor or owners’ association?

55. The second part of this complaint is that the Property Factor has failed to call a meeting when asked to do so by him. The Homeowner lodged evidence in the form of a number of emails to the Property Factor between January and August 2022. As these emails/requests postdate the previous case, they can be considered by the Tribunal in connection with this case. From the written submissions, it appears that the Property Factor does not dispute that he made these requests. However, the Homeowner has failed to provide any evidence that the Property Factor is obliged to call a meeting when asked to do by one of the homeowners. The Tribunal considered the following documents.

(a) The WSS. This document is essentially the contract between the Property Factor and the homeowners. There is no provision in the WSS which requires the Property Factor to call meetings. The only reference is to the possibility of charges being levied for additional meetings.

(b) The DOC. Clause 9 gives the proprietors the power to call meetings, identifies the number of attendees required to constitute a quorum and lists what it is “competent” to be done at a meeting. This includes ordering common repairs and appointing a factor. The clause goes on to say that the factor is entitled to exercise the whole rights and powers which may be competently exercised by a majority of those present at a meeting. The DOC does not state that maintenance or repair can only be instructed where it has been ordered at a meeting or that meetings must take place.

(c) The Code of conduct. There are no provisions in the Code which specifically require a property factor to call meetings.

56. The Homeowner referred to the website and WSSs of other property factors. However, these are not relevant. It is the contract between the parties and the DOC for the property which determine the responsibilities of the factor. The Tribunal is not persuaded that the Property Factor’s failure to call a meeting in relation to the internal re-decoration (or the re-planting) is either a breach of the Code or a failure to carry out property factor duties. Furthermore, the Property Factor has provided evidence that a meeting was not required. Firstly, they offered to arrange one. However, the responses received indicated that there was insufficient interest on the part of the homeowners . Secondly, they offered to circulate details of the meeting to all homeowners if the Homeowner wished to arrange one. He did not do so. Thirdly, the clause in the DOC relating to internal re-decoration gives the Property Factor the final decision on the colour scheme or the need to re-decorate. Lastly, all other homeowners in the development paid their share. This is a clear indication that they were happy

for the work to proceed without a meeting to discuss it.

57. The Tribunal is therefore satisfied that there has been no breach of the code failure to carry out property factor duties in relation to the failure to arrange a meeting to discuss the internal decoration.

Illegal correspondence voting
Letters of 2 December 2021 and 25 January 2022
Property Factor duties
Section 2.6 – A property factor must have a procedure to consult with all homeowners and seek homeowners consent, in accordance with the provisions of the deeds of conditions or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core services Exceptions to this are where there is an agreed level of delegated authority, in writing to homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations.

58. This issue was also considered by the Tribunal in the previous case, albeit in relation to different works. In the present case, the Homeowner relies on the letters issued to the homeowners in relation to the internal re-decoration and re-planting. In the letter of 25 January 2022, the Property Factor very clearly states that they are not seeking votes on whether the work iss to proceed . Their use of the word “agreement” in the previous letter had been an error. They stated that the internal re-decoration is compulsory, and they were only seeking approval of the preferred contractor. They offered to arrange a meeting, if at least 15 homeowners wanted this. Otherwise, they intended to use their delegated authority under the DOC to proceed with the work.

59. Although the work and associated correspondence are different, the issue is essentially the same as in the last case. There is no provision in the DOC for a vote to be taken by correspondence. However, the DOC does not state that work can only be carried out if a meeting has been convened and a vote taken. Furthermore, the Property Factor has the delegated authority to instruct the work without a vote being taken. They did “consult” with the homeowners on the matter, as required by section 2.6.

60. The Tribunal is not persuaded that there has been a breach of section 2.6 or a failure to carry out property factor duties in relation to the correspondence issued and the consultation which took place in relation to the specified work.

Claim that internal re-decoration is required every 5 years.
Letters of 2 December 2022 and 25 January 2022

OSP 4 – You must not provide information that is deliberately or negligently misleading or false.

61. The Homeowner's evidence on this issue was sometimes difficult to follow. He initially indicated that the Property Factor's letter of 2 December 2022 was misleading and/or false because it wrongly used the word "should" when the DOC says "shall". This may be a valid point since the use of the word "should" might suggest that re-decoration is not mandatory. Furthermore, the letter also indicates that owner's agreement was required before the work could proceed. However, the letter of 25 January 2023 clarified the position, acknowledging the error. Furthermore, the letters do not appear to have caused confusion among the other homeowners. They all appreciated that the Property Factor meant that the work had to proceed and paid their share.

62. The Homeowner then told the Tribunal that both letters were misleading or false because the DOC does not require the work to be carried out. The obligation is qualified by the issue of "necessity".

63. Clause 6 of the DOC states, that the proprietors " shall be bound to arrange for the painting or other treatment" of all woodwork, common entrance, stairs and landings and the walls and ceilings enclosing same, "at least once every five years. In the event of disagreement amongst the proprietors as to colour scheme or as to the necessity of painting etc…" the owners " shall submit the matter to the factor whose decision shall be final and binding on all proprietors".

64. The Tribunal notes that the obligation on the homeowners is to paint the internal common areas, "**at least**" once every 5 years. This suggests that the owners can elect to do it more often. It is this option which seems to give rise to the possibility of disagreement about "necessity" and the factor's ultimate decision-making power should this occur. The Tribunal is satisfied that the stipulation in the correspondence that the work is mandatory is not misleading or false. However, even if this interpretation of the DOC is incorrect, and there is a discretionary element to the obligation, the Property Factor's understanding of the clause is reasonable. It is, at least, one of the possible meanings of the clause. As such, there is no evidence of deliberate or negligent provision of incorrect information.

65. The Homeowner's complaint about the use of the word "should" is somewhat at odds with his other argument. On the one hand he says that the Property Factor was wrong when it said that there was an element of discretion. On the other, that the use of this word, rather than "shall" is misleading. The Tribunal is satisfied that the error is a minor one, corrected the following month. There was no intention to mislead the homeowners. The Tribunal also considered the Homeowner's statement that it is unlikely that the Property Factor would take all the homeowners to court if, as a group, they refused to pay for the work. This argument is irrelevant since the other owners all paid. It is also misconceived. It is the homeowners who are bound by the deed of conditions. The Property Factor only applies it, as their agent. If all homeowners had failed to pay for the work, the Property Factor would not have instructed it. But it would have been the owners, not the Property Factor, who would have been in breach of the title conditions.
66. The Tribunal is satisfied that there has been no breach of OSP 4 in relation to the letters of 2 December 2022 and 25 January 2023.

The confusing nature of correspondence from the Property Factor
Letter of 25 January 2022
OSP 3 – You must provide information in a clear and easily accessible way.

67. The Tribunal considered the content of the letter of 25 January 2022 and the Homeowner's evidence in relation to same. He indicated that he objected to the legal jargon and the fact that large sections of the DOC were quoted. However, the Tribunal found the letter to be clear and comprehensive. It retracted inaccurate information contained in an earlier letter and very properly provided the homeowners with evidence to support the statement that the re-decoration is mandatory. The suggestion that the Property Factor should assume that homeowners will not read a letter which includes sections of the DOC is ridiculous. The letter is not overly legalistic, and it must be accurate and informative. No breach of OSP 3 is established.

Victimisation by the Property Factor in relation to the alleged debt, not applying a proper debt recovery process.
Property Factor duties

68. The Tribunal heard a great deal of evidence regarding this issue. However, the application does not include Part 4 of the Code, which deals with debt recovery and there was no evidence of notification of OSP 5, which might have applied to this complaint. The Tribunal therefore considered the complaint only in relation to property factor duties.

69. Once again, the Tribunal had some difficulty in understanding the precise nature of the complaint. It is not disputed that there are unpaid charges. These are not substantial and only relate to management fees, the re-decoration costs, and John Campbell's fee. As the re-decoration was cancelled, the only sums now due are management fees and the fee charged by John Campbell. The Homeowner appears to believe that the Property Factor is not entitled to take debt recovery action where there is dispute over a charge. This is not the case. The Property Factor rejected his complaint and were entitled to seek recovery of any sums not paid. However, a property factor is not permitted to apply late payment charges or proceed to court action while there is an ongoing Tribunal case which is related to a dispute over the charges (Section 4.7 of the Code). This means that they are currently precluded from applying further late payment fees until the case is concluded. If they did apply a charge in February 2023, this should be removed from the account since the application was served in December 2022. However, they are still entitled to issue invoices (to include previous late payment and all unpaid management fees) and to send reminders.

70. The Property Factor is entitled to charge a management fee for their services. In this case, that fee does not appear to include the arrangement of meetings since the WSS does not state that they will do this, and the DOC does not oblige them to do so. Indeed, although the WSS is somewhat unclear, it seems that

the arrangement of meetings will give rise to an additional fee, as it is not part of their core services. As they are entitled to charge a management fee, they are also entitled to pursue a homeowner who fails to pay it.

71. The Tribunal agrees with the Homeowner that the inclusion of the re-decoration charge in the Notice prior to court proceedings was invalid. This work had not been carried out or even instructed. It should not have been part of the debt recovery process. However, at the point the notice was issued, there was an unpaid management fee and late payment charge, so they were entitled to issue the notice. While the Property Factor was rather prompt, especially when the sum in question was very small, they were entitled to pursue it. This was not a situation where an owner had forgotten to pay or had delayed due to financial issues. The Homeowner had made it clear that he was withholding payment. They did not accept that he had grounds and were entitled to proceed to seek recovery, until the application to the Tribunal was made. Furthermore, the number of requests and the steps taken by the Factor to secure payment do not appear to be excessive.

72. The Tribunal was also not persuaded by the argument that the Property Factor should have proceeded with the re-decoration work and taken court action to recover the Homeowner's share. It was evident that he does not appreciate the costs associated with court proceedings or the time and effort involved. Generally, a property factor will instruct a solicitor to pursue debts and will wait until a large sum is owed before incurring the substantial costs involved in doing so. These costs will be passed on to the homeowners. Meantime, the property factor may have had to use its own funds to cover contractors' invoices. It is entirely unreasonable for the Homeowner to expect the property factor to do this.

73. As the work is mandatory, and as the Property Factor has the final decision in relation to same, they were entitled to chase the Homeowner for his share and to cancel the work when he refused to pay. They are also entitled to pursue him for the management fees. As the John Campbell notice did not relate solely to the re-decoration costs, they are entitled to pass on this cost. However, if the fee was based on a percentage of the overall sum owed, the Homeowner is only liable for the proportion of the fee that relates to the management fee and the late payment charge.

74. The Tribunal is satisfied that the Homeowner has failed to establish as failure to carry out property factor duties in relation to the debt recovery action.

Failure to provide information about the votes cast by the other homeowners.
Failure to respond to all aspects of the complaint dated 6 September 2022.
Failure to respond to email of 13 January 2022

Section 2.4 – Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is good reason not to.

Section 2.7 – A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales in their WSS. Overall a property factor should aim to deal with enquiries and complaints quickly and as fully as possible. And to keep the homeowners informed if they are not able to respond within agreed timescales.
Property factor duties

75. It was not clear from the Homeowner's evidence why he required to know the breakdown between owner occupiers and landlords in relation to the votes which were cast. The 2011 Act and the Code do not treat landlords any differently from those who reside in the property. The Homeowner seemed to think that landlords are less interested in factoring issues and are not affected by them. As many property factor applications are made by landlords rather than owner occupiers, this is certainly not always the case. In any event, they have the same rights and obligations as those who reside in the factored properties.

76. There is no provision in the Code which obliges a Property Factor to disclose to a homeowner on request, whether the owners who voted on a particular issue are resident or otherwise. It therefore appears that, even if the request was made, Section 2.4 does not apply.

77. From the documents lodged, it appears that the Homeowner requested the information in an email dated 10 March 2022. The Property Factor, in their complaint response, say that they responded to the request on 11 March 2022. The email stated that they were not prepared to provide the information as they were not required to do so, and it was not justified. Neither party submitted a copy of this response. However, the Homeowner's complaint is that he did not get the information, not that he did not receive a response. The Tribunal is therefore satisfied that a breach of Section 2.7 has not been established.

78. For the sake of completeness, the Tribunal also considered the complaint in terms of Property Factor duties and is satisfied that it is not part of the Property factor's duties to provide this information to a homeowner.

79. For the reasons already stated, the Tribunal is also satisfied that the Property Factor has not breached section 2.4 in relation to the complaint response dated 12 October 2022, insofar as it relates to the breakdown of the votes.

80. The Tribunal proceeded to consider the complaint dated 6 September 2022 and the response dated 13 October 2022, and whether the Property Factor had failed to respond to point 4 to 7. It is not in dispute that, while the complaint response appears to follow the layout of the complaint, there are no specific responses numbered 4, 5 6 or 7. It is not clear why this is, and no explanation was offered. It may be, as was suggested by the Homeowner, that they did not notice that there was a second page to the complaint. Alternatively, they may have concluded that these were essentially duplicates of or extensions to the earlier complaints. The response is lengthy and includes a summary of the correspondence between the parties. The Tribunal noted the following:-

(a) **Point 4 – The Property Factor has denied him the right to call an owners meeting on 10 separate occasions.** On page 22 of the response the Property Factor quotes the relevant clause of the DOC and states that this document does not compel them to call a meeting or to act as convenor if a homeowner calls one. They also refer to correspondence in which they undertook to provide all homeowners with a copy of the agenda if the Homeowner arranged a meeting. This response appears to address this complaint, although it would have been better if the section of the letter headed "My decision" made a specific reference to it.

(b) **Point 5 – the Property Factor has promoted and undertaken illegal correspondence voting on three occasions**. This point is related to point number 1 on the complaint letter which refers to the voting arrangements specified in the DOC. This appears to be addressed on page 22 (as above) and in part 2, on page 23 of the response. In particular, they refer to the findings of the Tribunal in the previous application.

(c) **Point 6 – The Property Factor has continually refused to provide the specific details/breakdown of the results of the illegal correspondence voting.** The only reference to this in the letter is in the summary of the correspondence. Although it would have been preferable if it was mentioned at the end, the point is addressed by reference to the request which was made and the response which was issued.

(d) **Point 7 – failure to respond to correspondence from January 2022 which requests an explanation for the change in philosophy over the calling of meetings since 2016**. This is certainly addressed at the conclusion of the response. The Property Factor states that they are not compelled to call meetings, that the owners do not want to attend a meeting and that there is no disagreement among the other owners regarding the re-painting, as evidenced by the fact that all have paid their shares.

81. The Tribunal is therefore satisfied that, although the layout of the letter is not ideal, the response does comprehensively address the complaints and that no breach of section 2.7 is established.

82. In relation to the complaint that the Property Factor did not respond to the email of 13 January 2022, the Tribunal noted that the Property Factor addresses this in their submission dated 22 May 2023. They refer to documents previously lodged and say that the email was acknowledged on 14 January 2022 and the Homeowner was told a letter would be issued to all homeowners regarding his concerns. This letter was issued on 25 January 2022. The Tribunal also notes that the Homeowner lodged a copy of his email and this response. They may not have provided a full response to all matters raised but did tell him of the action they proposed to take. Furthermore, the issues raised in the letter have the subject of extensive correspondence between the parties both before and after this email and the Property Factor has clearly articulated their position in that correspondence. The Tribunal is satisfied that a breach of Section 2.7 has

not been established.

83. The Tribunal is therefore satisfied that the Homeowner has failed to establish that the Property Factor has failed to comply with the Code of Conduct or carry out their property factor duties.

Appeals

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.

Josephine Bonnar, Legal Member
8 July 2023