Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber reference: HOHP/PF/16/0137

The Property: 1 Craigard Apartments, Ardconnel Terrace, Oban PA34 5DJ ('the property')

The Parties:

Mrs Mairi Bryce, 1 Craigard Apartments, Ardconnel Terrace, Oban PA34 5DJ ("The Homeowner")

Calum MacLachlainn and Nicola MacPhail, trading as West Lettings, having a place of business at 9 Combie Street, Oban PA34 4HN("The Property Factors")

Tribunal Members – George Clark (Legal Member) and Sara Hesp (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in that they have failed to comply with Section 3.6.a of the Code of Conduct.

The Tribunal proposes making a Property Factor Enforcement Order in respect of the failure by the property factors to comply with their duties under Section 14 of the Act.

The Decision 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 as

"the Code of Coduct" or "the Code"; the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations as "the 2016 Regulations"; the Homeowner Housing Panel as "HOHP"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal". The property factors' Terms and Conditions for the Provision of a Factoring Service are referred to as "the Written Statement of Services".

The property factor became a Registered Property Factor on 19 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to: the application by the homeowner received on 20 September 2016 with supporting documentation extending to 24 pages; further representations from the homeowner received on 6 January 2017 and comprising 2 photographs; and the property factor's written response, sent on 13 January 2017, with 39 documents attached.

Summary of Written Representations

(1) By the Homeowner.

The following is a summary of the content of the homeowner's application to HOHP;

The property factors had been employed by the owners of Craigard Apartments in February 2012. A contract, for which the owners had paid, had been drawn up and the owners had each deposited a £200 float and had agreed to contribute a further £100 per annum to a sinking fund. The sinking fund stood at £4,800 in 2016.

It had emerged that the property factors had tradesmen on their books and estimates were not asked for. Tradesmen had been able to tell the owners that as long as their quotes were under £600, the factor could authorise the work. The owners had never had a breakdown of costs and when asked what work was done, the answer by e-mail was basic, with no hourly rate or cost of materials.

The property factors had served 3 months' notice in April 2016 and from then on, had done nothing. Some work was required to the roof of the property.The homeowner had sent e-mails enquiring when this work would start but got nowhere. The property factors had told the roofer that the work was on hold. As far as the roofer was concerned, he would not be doing it unless authorised by the factor. The homeowner was concerned, as she had had a temporary repair done on the roof above her hall in May 2015, following very heavy rainfall which had caused severe damage. The property factors' response was always that as her roof was not now leaking, it was not a priority. The property factors wanted to group all the works together to save costs, but they had not done this during the 3 months' notice period and, as a result, missed the time of year when the weather was at its best and when roofers do the majority of their work. The 3 months' notice had come unexpectedly

and the property factors had then charged the owners £30 each for winding up the accounts. The homeowner accepted that this was in their Written Statement of Services, but felt it could have been waived.

The homeowner had now been waiting since May 2015 for the repair to be done. Out of the blue, however, during the notice period, a joiner (not a builder or bricklayer) had turned up to repair some kerbing at the front of the building and to put up extra clothes poles and a washing line. It was the same joiner who had carried out the temporary repair to the homeowner's roof. Still the roof was not a priority. It was at this point that the owners had found out that the tradesmen knew if they kept the cost under £600, they could go ahead and do the work without first obtaining the consent of the owners.

The common insurance policy for the buildings had been due for renewal at the end of July 2016 and the broker had asked the property factors to pay for it. It could then have been added to the factoring accounts. The property factors had declined to pay it, as their contract was due to expire on 15 July. The homeowner felt that, as a gesture of goodwill, the property factors should have paid it, as the owners were left in a bit of a mess, because it was difficult to find a new factor in a small town.

The property factors had not sent the sinking fund to the new factor for two weeks, as they had not finalised the accounts in time. When they did send it, no interest had been added, suggesting that the owners' money had not been banked in a separate account from that of the property factors, as required by the Code of Conduct. The homeowner had asked the property factors to explain this and also to send a breakdown of contractors' works but, as at the date of the application, had received no reply. The owners had never seen a bank statement.

The attachments to the homeowner's written representations included a copy of a letter from the property factors dated 15 April 2016, giving 3 months' notice, a copy of their letter of 28 July 2016 enclosing their final statement, copies of their statements from 29 November 2014 to 15 July 2016 and copies of correspondence (letters and e-mails) between the parties dated between May 2015 and August 2016, together with a copy of the Written Statement of Services.

The further written representation by the homeowner was received on 6 January 2017 and comprised 2 photographs showing an area of kerbing which had been repaired and the drying green, showing washing poles and a washing line .

The homeowner stated in the application that the property factors had failed to comply with Sections 2.4, 2.5, 3.3, 3.5.a, 3.6.a, 5.4, 5.5, 6.3, 6.6, 7.2 and 7.4 of the Code of Conduct and had failed to carry out the property factors' duties.

(2) By the Property Factors

The property factors' written representations dealt in turn with each Section of the Code that was referred to in the application and their responses are summarised here under the Section headings.

Section 2.4. The property factors had had their Written Statement of Services drafted by specialist solicitors and it had been agreed and voted upon by the owners. A copy was issued to each owner at the beginning of the factoring arrangement and it clearly set out the level of delegated authority agreed by the owners. In various correspondence to the homeowner, the property factors had reiterated their delegated authority to instruct work in line with the thresholds and they felt that they had made it clear that they were looking to assess all the roof issues to ensure that any works instructed were cost-effective for the homeowner and all the owners. They referred to 5 e-mails to the homeowner and 4 e-mails to other owners, copies of which were attached to the written representations.

Section 2.5. In the numerous forms of correspondence with the homeowner and the other owners, the Tribunal would see prompt response times and where they were unable to respond in their usual prompt manner, they e-mailed to inform the owners of this. Some responses were even sent out of hours and when on annual leave. 9 documents attached to the written representations were referred to.

Section 3.3. The property factors stated that they outlined all expenditure in detailed form in their half-yearly statements and they attached the statement from May to November 2015 which, they contended, clearly outlined all expenditure, date paid, description of works and the balance held. The homeowner had requested supporting documentation on 28 August 2016 and they had responded to let her know that the invoices would be with the new factors and would be available for viewing or copying there. The property factors had e-mailed to the homeowner the one invoice that they held in electronic form.

Section 3.5.a. The property factors referred to a bank pay-in book, the cover sheet of which was included amongst the documents attached to their written representations.

Section 3.6.a. The property factors acknowledged that the bank account had not been interest-bearing. They had calculated the interest that might have been earned on the sums held at £60 (£5 per flat) and were willing to reimburse the owners this sum.

Sections 5.4 and 5.5. The Written Statement of Services explicitly set out the property factors' involvement in relation to insurance. They were to arrange renewal only and would not assist or participate in any claims. Also, it had been explained to the homeowner in a telephone conversation on 18 May 2015 that the homeowner would need to inform the property factors of any claim on the communal policy.

There had been no correspondence from her on this matter. The property factors had not been made aware of the claim made by the homeowner. They had received a cheque on Monday 17 August 2015 and had forwarded it to the homeowner. This had been the first they had known of her claim for internal damage.

Section 6.3. The property factors stated again that the Written Statement of Services had been drafted by specialist solicitors at the beginning of the factoring arrangements and had been agreed and voted upon by the residents. A copy had then been issued to all residents and it clearly set out the level of delegated authority agreed to by the owners. This explained how they could categorise work and why they could proceed with some repairs and not others. They had explained to the homeowner that the roof was a common area and that as such any repairs would need to be assessed by factoring in all the repair requests from other owners. A verbal quote of £800 had been received and, as it was above the threshold, the property factors could not authorise the works to proceed without a residents' vote in favour. Concurrently, they were assessing other roof issues experienced by the owners of 3 of the other flats in the building.

During this process, the property factors' aim had been to objectively assess the scale of the works required to the roof as a whole and to ensure that any works proposed to the owners in the form of a vote would be the most cost-effective for all owners. The property factors had struggled to satisfy the homeowner via several e-mails, copies of which were attached to their written representations, of their intention behind assessing the whole roof and not just the section above her flat. The temporary repair to the valley had been done using Acropol+, a flexible cellulose coating that can be applied even in wet conditions. It is traditionally used on flat roofs, but it can be used on a variety of surfaces, including metal. As there had been a large amount of water ingress, their primary aim had been to prevent further water ingress to the property. This had been successful and had prevented further damage to the internal areas of the homeowner's property. The Tribunal were referred to the call log (included within the documents attached to the written representations) which showed the response rate in relation to this repair. The property factors had been able to have a contractor on site within 2 hours of the matter being reported by the homeowner and to have the valley repaired within 24 hours.

Although temporary, the property factors believed that the repair had prevented any further water ingress to date, despite several bad winter storms and high levels of rainfall. If there had been continued water ingress, the property factors would have escalated the repair of the roof above the homeowner's flat, but they had received no reports of further water ingress and continued with the assessment of the whole roof to ascertain the best course of action and cost-effective way to proceed with the repairs. The property factors referred to a number of the documents attached to their written representations in this regard.

Section 6.6. No request for any documentation in relation to any tendering process had been received from the homeowner.

Section 7.2. The complaint from the homeowner had been received on 8 July 2016. On 12 July 2016, Nicola MacPhail, the Managing Partner of the property factors, had e-mailed the homeowner to say that she wished to discuss the matter with her business partner and that, due to hospital appointments and the limited availability of his solicitor to obtain legal advice, they would be unable to respond until the following week. Their written response had been sent on 19 July 2016.

Section 7.3. The property factors stated that all e-mails were still held by them, and that they had explained to the homeowner in e-mails that all relevant factoring correspondence was available from the new factor.

The property factors then turned to the issue of their termination of the factoring arrangement. After having assessed the amount of work required in providing factoring services to Craigard Apartments relative to the annual fees charged (£92.30 per flat per annum), they had made the decision in April 2016 to cease factoring services at Craigard Apartments and had issued the required 3 months' notice in writing. Many owners had been disappointed that they were withdrawing , but delighted with the service received. They referred to e-mails from 5 owners in support of this statement, which were included with the written representations.

The property factors concluded their written representations by stating that they prided themselves on providing the best service possible to clients. The majority of owners had been happy with the service and had wished them to continue even if it resulted in increased fees. They hoped that the Tribunal would see from the frequency and persistence of the e-mails and other correspondence received from the homeowner that despite their attempts to explain their efforts in relation to the issue of the roof repairs, they had been unable to satisfy the homeowner that they were acting in the best interest of all the owners in the development. Additionally, the Tribunal would see in the homeowner's letters and e-mails that she would frequently approach contractors both on site and in the street. The property factors could not comment on the opinions of contractors or on what contractors heard in the town or on discussions that occurred in their absence. Any opinions expressed were those of the contractors, not those of the property factors.

The property factors referred to an e-mail included with their written representations which indicated that owners were aware of the thresholds and appeared to have told contractors the threshold figures.

The property factors concluded by saying that they wished to resolve the issue amicably with the homeowner and under no circumstances wished to cause distress or worry. They were sorry that they had had to make the decision to withdraw from factoring the development, but it was not financially viable, given the nature and extent of the works required and demands put on them. These demands had

frequently exceeded the services outlined in the Written Statement of Services. It was unfortunate that they had not been able to resolve this matter through their internal complaints procedure but they hoped that, through the Tribunal hearing, they could resolve it to the mutual satisfaction of the parties and bring the matter to a close.

THE HEARING

A hearing took place at The Corran Halls, 54 The Esplanade , Oban on the morning of 8 February 2017. The homeowner was present at the hearing. The property factors were represented at the hearing by Nicola MacPhail, their Managing Partner.

Summary of Oral Evidence

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to her complaints under each Section of the Code and in relation to the alleged failure to carry out the Property Factor's duties. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

Section 2.4. "You must have a procedure in place to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold.."

The homeowner told the Tribunal that she accepted there was a procedure in place and a delegated authority of up to £600. Her point was that she did not like the fact that tradesmen knew the threshold figure. **Accordingly, the Tribunal did not further consider the complaint under Section 2.4 of the Code of Conduct and did not uphold it.**

Section 2.5. "You must respond to enquiries and complaints received by letter or email within prompt timescales.. and keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement."

The homeowner told the Tribunal that her complaint was that non-essential work was done during the 3 months' notice period, whilst the necessary permanent repair to her roof was put on hold. Everything was done by e-mail and frequently she could not get hold of anyone on the telephone. The property factors accepted that the

complaints procedure was not set out in the Written Statement of Services, as it was drawn up before the Code was crystallised, but hoped that the Tribunal would accept from the evidence provided that their response times were good, within a day, unless a weekend intervened.

Section 3.3. "You must provide to homeowners, in writing at least once a year...a detailed financial breakdown and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying."

The homeowner told the Tribunal that, during the 3 months' notice period, one owner had told her that they should be receiving invoices. She had not asked for any invoices until she was applying to the Tribunal and had then found that the property factors had handed over all the paperwork to the new factors. This would have meant that she would have to go to the new factors for the information and they would charge her for providing it and for their time in looking it out, as that was the basis on which the new factors, a firm of solicitors, operated. The tradesman were not prepared to look out copy invoices and would only have provided them to the homeowner if the property factors had consented.

The property factors responded by saying that they had had full access to paperwork via the new factor. There had not been any request for copy invoices or documentation prior to 28 August 2016. In their half-yearly statements, the property factors included full details of all the costs, in order to try and be as transparent as possible.

The homeowner referred the Tribunal to the factoring statement for the period from 29 November 2015 to 15 July 2016 and, in particular, to the entries relating to work carried out by Stuart Twort Joinery at a cost of £643.50. This, she said, was actually 2 invoices, as she had discovered from the property factors' written representations, which contained copies of quotations for repairing concrete edging (£289) and for replacing 2 clothes poles (£317) dated 20 January 2016.

Section 3.5.a. "Homeowners' floating funds must be held in a separate account from your own funds."

and

Section 3.6.a "In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened up in the name of each separate group of homeowners."

The homeowner told the Tribunal that she had asked for the final bill to be sent before the homeowners paid it, but the property factors had simply deducted the bill from the owners' floats and billed them for the balance. The floating fund did not attract interest but had bank charges applied to it.

The property factors responded that there was a separate account as required by the Code and it bore the name of Craigard Apartments. They had a separate account for each development that they factored. The float and sinking funds were held in teh same account and the property factors accepted that it should, therefore, have been an interest-bearing account. They had stated in their written representations that they were prepared to reimburse the owners a sum equivalent to the interest that would have been earned had the account been interest-bearing. The homeowner added that it was not about the money, it was the fact that the property factors had failed in their duty to ensure the account was interest-bearing as the Code required.

Section 5.4. "If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example, for private or internal works), you must supply all information that they reasonably require in order to be able to do so."

and

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

The property factors told the Tribunal that they had been unaware of any claim being made on the block insurance policy by any individual homeowner until the cheque, payable to the homeowner, arrived in their office. They had contacted the homeowner to say they would send it on, but she had preferred to collect it from their office. The homeowner contended that it was a claim on the block policy, which implied that the property factors must have known about it. This was categorically denied by the property factors, who stressed that it was clear from the Written Statement of Services that the property factors did not deal with insurance claims. Further, their call log of 18 May 2015, refererred to a telephone conversation with the homeowner in which the property factors told the homeowner that they only arranged the renewal, so would not be enquiring as to whether the policy covered the damage to the roof above the homeowner's flat and that she should let the property factors know about any claims, so that they would know whether it was covered as, if not, the repairs would have to be charged to all the owners.

The property factors told the Tribunal that their services were capped, but they did need to be kept informed by the homeowners about any claims, as they might affect negotiations on renewal premiums.

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

The homeowner told the Tribunal that she did not ask about these things prior to the 3 months' notice period. She said that the owners had discovered there had been no competitive tendering and no evidence of competing quotes for work.

The property factors responded that it was a very old building in a very exposed location and that they used contractors in the town with whom they had a good working relationship. Stuart Twort Joinery was on hand to do any minor works on demand. In respect of the roof, Argyll Access knew the building very well, so were their preferred contractor for the carrying out of annual roof checks.

Winter checks were done to the roof, with any missing or slipped slates being replaced, but 5 owners had been identified as having issues and the property factors needed a comprehensive building condition report to work out what work was required. This would have been outwith the capped service that the property factors were contracted to provide.

The problem the property factors had was that they were going to have to consider whether to bring in, by a tender process, a larger contractor, as it appeared that a lot of work had was required to the roof of the building. It was not easy to persuade contractors to travel a distance merely to provide estimates. In order for the work to be instructed, assessments would have to be carried out, with estimates then being put to a meeting of residents, requiring a 3/4ths majority in favour, but the property factors had been unable to get 3 quotes for the assessment. Only Allied Surveyors had responded and it would have required a meeting of residents and the appropriate majority just to authosrise the assessment, given the cost quoted by Allied Surveyors.

The property factors commented that it was very much a capped service, with one annual visit to the property, arranging minor repairs, organising grass cutting and hedge trimming and arranging annual buildings insurance renewal. Their fees reflected the limited service they were engaged to provide.

The property factors were, at that time, considering the financial viability of providing the factoring service, considering the work that the roof assessments and gathering of quotations would entail and the fees that they were being paid.

The homeowner stated that the last time the roof had been inspected, the contractor had knocked on one owner's door and had said the roof was in good condition and had only required the replacement of a few slates. The homeowner was of the view that the leak into the building was coming from the fabric, not the roof. The homeowner had lost the ability to recover any roof repairs costs from the insurers, due to the length of time they had been waiting for the permanent repair, but the property factors told the Tribunal that the insurance broker had said that what had happened would be a maintenance and wear and tear issue, so would not be covered, although a claim could be made for resulting internal damage. The property

factors stressed, however, that they had not been informed of the progress of any claim.

Section 6.6. "If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge."

The complaint under this heading was not considered by the Tribunal as the homeowner was not contending that any tendering process had taken place and the property factors had stated that no requests for documentation relating to any tendering process had been requested. **Accordingly, the Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with section 6.6 of the Code of Conduct.**

Section 7.2. "When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to [the Tribunal]."

The homeowner told the Tribunal that she had not received anything from the property factors which mentioned the Tribunal (then the HOHP), when they responded to her complaint. That information had been given to her by Citizens Advice. The property factors accepted that they did not have a written complaints procedure, but Ms MacPhail told the Tribunal that she dealt with all complaints personally, as Managing Partner, the highest level within the business. The property factors felt that they had responded to the complaint as fully as they could. Ms MacPhail said that the Written Statement of Services had been due to be reviewed last year, but this had been put on hold, partly on the ground of cost and partly as the property factors had decided to end the factoring arrangement. She stressed, however, that she was involved at a very early stage in any complaint and that she made herself available at all times, day and night. The property factors now had front of house staff and the business was growing and Ms MacPhail appreciated that they now needed to put in place written procedures.

Section 7.4. "You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by [the Tribunal]."

The homeowner told the Tribunal that she had asked for invoices in connection with her complaint and that she had made the complaint within the 3 months' period of notice. Only one invoice had been sent to her. She accepted that she had asked for 3 invoices and that that request had been made after the 3 month period had ended, but she had made the complaint within the notice period and the paperwork should have been retained for 3 years after 15 July 2016.

The property factors stated that they had sent the only one that they held in electronic form. They had asked the owners to let them know when a new factor was appointed and, once they were notified of that, they had passed all the paperwork they held to the new factor, including ring binders of information and records and details of contractors, insurers and the insurance broker.

The homeowner had raised the issue of the property factors' refusal to pay the insurance premium which was due shortly after the factoring arrangement was due to end and commented that this had caused a problem, as the brokers would not accept separate cheques from the various owners. The property factors told the Tribunal that they had to wait for final bills coming in and they were, in any event, no longer the factors. They could not have used the sinking fund to pay the insurance premium, as it was ring-fenced.

The homeowner expressed her concern that non-essential work was being done during the period of notice and said that she thought it was a case of giving a joiner a wage, when the residents were still waiting for a roof repair. The response of the property factors was that they were receiving requests about the washing line, with some of the poles being down and metal posts that had rotted through. They still had to deal with these and continue to get the grass cut and they remained on call for repairs during the notice period. They had to continue doing their job until the factoring arrangement ended on 15 July 2016 and they could not progress the roof repairs as contractors were not happy knowing there might not be a factor in place and were not prepared to deal with 12 owners. The property factors had not dissuaded contractors, but they had to tell them that the factoring arrangement was coming to an end. The property factors could not have dealt with the homeowner's roof in isolation, as they would not have been confident of obtaining payment from the other owners if their roof problems were not being resolved at the same time.

The homeowner confirmed to the Tribunal that there had been no further leaks in her roof since the temporary repair had been done, but stressed the point that 13 months had passed with no progress.

The parties then made their concluding remarks to the Tribunal. The property factors said that they had tried at every opportunity to explain what they were doing to resolve matters. It was a capped service to reflect the very low fees that they were charging.

The homeowner asked why a joiner had been sent up to repair a roof on 6 July 2016. The property factor replied that he was trying to assess a major leak in Flat 7, to see whether it was a leak in the valley gutter or a failure of the valley itself.

The homeowner stated that it was the residents at Craigard Apartments who had started off the property factors' business for them and it was, therefore, very difficult to accept it when they simply give notice. The property factor said that it had turned out to be simply not financially viable to continue. The nature of the work that was

going to be required was outwith their remit and they could not even obtain comparative assessments form surveyors, let alone find contractors to do the work. They did not have the resources to provide the standards of service that this particular building was going to require.

The parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations made by the parties.

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a building which is divided into 12 flatted dwellinghouses.
- The Deed of Conditions by M & K Macleod Limited, relating to the building of which the property forms part, gives the owners of all the flats in the building a right in common to, inter alia, the outside walls, gables, roof and roof space, the refuse area, car parking area and drying green and provides that the owner of each flat is responsible for a 1/12th share of the expense of maintaining the common parts.
- The property factors, in the course of their business, managed the common parts of the building of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors' duties arise from a Written Statement of Services, a copy of part of which has been provided to the Tribunal.
- The date from which the property factors' duties arose is 1 November 2012, the date on which the Act came into force.
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 19 December 2012.
- The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to The Homeowner Housing Panel ("HOHP") received by HOHP on 20 September 2016 under Section 17(1) of the Act.
- The jurisdiction of HOHP was transferred to the Housing and Property Chamber of the First-tier Tribunal for Scotland with effect from 1 December 2016.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.

- On 20 December 2016, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal, for the reasons set out in the Summary of Oral Evidence, did not give further consideration to the complaints under Sections 2.4 and 6.6 of the Code of Conduct.

The Tribunal did not uphold the complaint that the property factors had failed to comply with Section 2.5 of the Code of Conduct. The homeowner's complaint was that non-essential work was being carried out, whilst the roof repair was not being progressed. The Tribunal was satisfied that the question of the permanent repair to the roof above the homeowner's flat was part of a larger picture and that the property factors' inability to obtain competing quotes for an assessment of the condition of the roof was not due to any failing on their part. Without such an assessment, followed by the agreement of the residents and a tendering exercise for the work, the repair could not be progressed. Further, the temporary repair had been effective and the parties agreed that there had been no further leaks since then. The Tribunal was satisfied that, in respect of the particular complaint about having non-essential work carried out when more pressing repairs were necessary, there was no evidence that the property factors had not responded to the complaint within prompt timescales.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 3.3 of the Code of Conduct. The Tribunal has seen a number of quarterly bills and was satisfied that they were sufficiently detailed. The homeowner's request for copy invoices was made after the factoring arrangement had ended and the property factors had supplied a copy of the only one that they held in electronic form. The property factors had no way of knowing that the new factors would charge the homeowner for providing copies of invoices. The property factors had made it clear to the residents in their letter of 15 April 2016, that they intended passing over all papers to the new factors and asked the residents to inform them of who would be the new factor.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 3.5.a of the Code of Coduct, but did uphold the homeowner's complaint that the property factors had failed to comply with Section 3.6.a of the Code of Conduct. The evidence was that the floating funds and sinking funds were kept together in a single separate account from the property factors' own funds, which, therefore, met the requirements of Section 3.5.a, as regarded the floating funds, but the view of the Tribunal was that the sinking fund should have been held in a separate fund in the name of the group of

homeowners and that it required to be an interest-bearing account. The cover sheet of the bank pass book indicated that the account was in the name of the property factors, with the name "Craigard Apartments" added, and the property factors accepted that the account was not interest-bearing. The account did not, therefore, comply with the provisions of Section 3.6.a of the Code.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Sections 5.4 or 5.5 of the Code of Conduct. The Written Statement of Services set out in Schedule 1 the services to be provided by the property factors and numbered paragraph 5 of Schedule 1 stated that the property factors would "arrange renewal of buildings and public liability insurance for the Development on an annual risks block policy". Paragraph 11 of the Written Statement of Services also stated that the property factors would have "no further or other responsibilty in relation to the insurance of the Development or any parts thereof". The Tribunal accepted that these provisions did not specifically state that the property factors would have no involvement with any claims made on the block policy, but was of the view that the residents were aware that this was the case. The homeowner had pursued her own claim on the policy, to recover costs of internal damage to her property caused by the roof leak and there was, in any event, evidence of a telephone conversation with the homeowner on 18 May 2015, in which she had been told that the property factors would not be enquiring whether the damage to the homeowner's roof was covered, as they only arranged the renewal. In that telephone conversation, they had also told the homeowner that she should let them know about any claim or if it was not covered as, were that the case, the cost would have to be borne by all the owners. The Tribunal was, therefore, satisfied that Sections 5.4 and 5.5 of the Code of Conduct did not apply to the arrangements with the property factors.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 6.3 of the Code of Conduct. There was no evidence that the homeowner had asked for any information about the process for appointing contractors before the factoring arrangement came to an end. The Written Statement of Services clearly set out the level of delegated authority given to the property factors and, within that threshold, there was no requirement for the property factors to seek the residents' approval of a list of approved contractors.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 7.2 of the Code of Conduct. The Tribunal was concerned that the Written Statement of Services did not contain or refer to a Complaints Procedure and was of the view that it should have been updated when the final content of the Code of Conduct was known, irrespective of the fact that it would have put the property factors' small business to expense by way of legal fees. The Tribunal noted that the management of the property factors' business was such that complaints were dealt with throughout at Managing Partner level, so no further confirmation of the decision with senior management was

possible, that the factoring arrangement had ended prior to the decision on the complaint being intimated to the homeowner on 19 July 2016 and that there was no evidence that the homeowner had rejected the property factors' response. She had, on 28 August 2016 by e-mail, requested a breakdown of certain invoice items and queried the fact that the final statement did not include any interest on the sinking fund moneys. If the e-mail response of 19 July 2016 was intended as the property factor's final decision, it should have included details of how the homeowner could apply to the Tribunal (then HOHP), but it was unclear to the Tribunal whether this was the case. The property factors had responded adequately to the requests made in the homeowner's e-mail of 28 August 2016. On the evidence before it, the Tribunal was unable to hold that the in-house complaints procedure had been exhausted, so could not uphold the complaint under section 7.2 of the Code.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 7.4 of the Code of Conduct. The Tribunal noted that the request for documentation had not been made until 28 August 2016, more than a month after the factoring arrangement had ended. The property factors had told the Tribunal that they had passed over all paperwork to the new factors and that they had directed the homeowner to the new factor. They had also told the Tribunal that they had been granted access by the new factor to all the documents they required in connection with drafting their written representations and preparing for the hearing. The Tribunal was of the view that it would not be reasonable to expect the property factors to have copied all the documentation prior to passing it on to the new factors, simply in order to be able to comply with Section 7.4 of the Code, in a situation such as this, where they knew the paperwork was held by new factors and that they had access to it if required by the Tribunal

Property Factor Enforcement Order

The Tribunal proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice.

Appeals

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

G Clark

Signature of Legal Chair . Date 20 March 2017