Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: HOHP/PF/16/0164

The Property: Flat 0/1, 12 Castlebank Place, Glasgow G11 6BW ('the property')

The Parties:

Scott Murray and Mrs Denise Murray, Flat 0/1, 12 Castlebank Place, Glasgow G11 6BW ("the homeowners")

Newton Property Management Limited, incorporated under the Companies Acts and having their Registered Office at 87 Dundas Road, Glasgow G4 0HF ("the property factors")

Tribunal Members – G Clark (Legal Member) and Mrs S 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 Sections 2.2 and 2.5 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

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 Conduct" 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 became a Registered Property Factor on 1 November 2012 and their 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 homeowners received on 7 November 2016 with supporting documentation, the property factors' written response, sent by e-mail on 25 January 2017 and the homeowners' further written representations, sent by e-mail on 23 February 2017.

Summary of Written Representations

(1) By the Homeowner.

The following is a summary of the content of the homeowners' application to HOHP:-

The homeowners had sent a complaint letter to the property factors on 6 September 2016. In that letter, they stated that they had spoken to Mr McCusker on 25 August 2016 in relation to a leak in the homeowner's bathroom. The bedroom carpet was slightly damp in one very small area and this had led the homeowners to realise there was a leak. Mr McCusker provided the name and number of a plumber that he recommended, a Mr John Mullen. He said that Mr Mullen was at the development regularly and was very familiar with the set up. Mr Mullen had called at the Property and had told the homeowners that the waste pipe in the bathroom had been loose and that he had tightened it.

In the following few days, the bedroom carpet had become saturated with water and the homeowners discovered that Mr Mullen had moved the waste pipe and placed it so that the water would run into the bedroom, with the pipe wedged in the stud partition with a bit of rope nailed against the wall to hold it there. As a result, all the water from the bathroom tap was running straight into the bedroom and what started as a small leak and a repair for which they had paid £90, became a significant flood, damaging the hall and bedroom flooring and a wardrobe fitted to the wall. The bedroom and hall walls were now covered in mould. When the homeowners had raised this with the property factors, Mr McCusker had been very defensive of the plumber that he had recommended. The homeowners' view was that the property factors should have apologised and promised to look into it. The property factors had been advised that Mrs Murray had a chronic health condition and that she had

contracted a potentially dangerous chest infection as a result of the flooding, but the property factors had still shown no urgency in getting the problem resolved.

On Friday 2 September 2016, several e-mails had been sent to the property factors about the flood, as the assessor for the homeowners' contents insurers had advised that the damage was so severe that it would require a claim on the buildings insurance. In these e-mails, the homeowners had asked for the buildings insurance details so that they could submit a claim, but instead of advising the homeowners that the property factors would need to submit the claim, they sent the policy schedule. The homeowners called the insurers, to be told that it was the property factors who would have to submit the claim. The homeowners had emailed the property factors asking for this to be done urgently, but it had only been when they asked for the property factors' complaints procedures that Mr McCusker had telephoned them. It had taken the whole day to get a response to the initial e-mail and this was an urgent situation.

As Mr McCusker had said in the telephone call that he would not be back in the office until the following Wednesday, the homeowners had again e-mailed the property factors on Friday 2 September to make sure that someone else would initiate the repairs with the insurance company in his absence. They had not received any response. When they had chased it up on Monday 5 September, they had been told that it would be dealt with when Mr McCusker came back. This was despite the homeowners advising the property factors of the extent of the damage and the health implications. After contacting the property factors yet again, they had been told to get 3 insurance quotes. They wondered why they had not been told this on the previous Friday when they had spoken to Mr McCusker. Due to the delays and lackadaisical approach, the mould had (as at 6 September 2016, the date of the letter) spread across two bedroom walls and a wall in the hall.

In the letter, the homeowners went on to refer to an incident with the concierge at the development. On Wednesday 31 August, they had had to dismantle the fitted bedroom wardrobe because of the volume of water coming from the bathroom. They had taken it round to the bin area in stages and had met one of the concierges, who had informed them "in a cheeky manner" that they should not be leaving it there. Mr Murray had told him that they would not be moving it that night as he was recovering from spinal surgery and had spent the whole day trying to sort out a flood. There had been no abuse and no argument. About 10 minutes later, Mr Murray had gone to the car park to speak to the concierge and had asked him what was going on as the concierge's manner had been quite rude. The concierge had apologised and Mr Murray had, in turn, apologised and they had then chatted for about 20 minutes.

On Thursday 1 September, on top of being flooded by a plumber recommended by Mr McCusker, the homeowners had then received a very rude and obnoxious e-mail from Mr McCusker, saying that Mr Murray had been abusive to the concierge, which was absolutely not the case. The homeowners had responded immediately to make

that point and to say that they were very unhappy that Mr McCusker had not spoken to them first, to hear what they had to say. Instead of apologising, he had sent another e-mail saying that the homeowners' "version of events was at odds with the concierge". Mr McCusker had advised that he would follow this up with the concierge, but despite having been so quick to e-mail the homeowners after receiving the concierge's report, they had (as at the date of the letter, 6 September 2016) heard nothing back and had not received an apology.

During the conversation with Mr McCusker on Friday 2 September 2016, Mrs Murray advised him that he had handled the situation in a very unprofessional manner and that he should have spoken to them before sending such a rude e-mail. He had said that his e-mail was asking for the homeowners' side of events, but it was clear from the e-mails that this was not the case. Mr McCusker had then said "Look, I don't have time to be dealing with this, I'm far too busy". The homeowners made the point in their letter of complaint that Mr McCusker was, he said, too busy to deal with a homeowner that he had hugely insulted the day before and who had been flooded due to a plumber he had recommended. He had not been too busy to send an incredibly rude e-mail, but was too busy to talk to the homeowners about it or to apologise. He had made an already difficult situation much worse.

On a separate matter in their letter of complaint of 6 September 2016, the homeowners had stated that there was a substantial amount of money being charged to the residents for bulk uplift, when this was a service that Glasgow City Council provided free of charge. The homeowners asked for an explanation and for information about how much was being paid for each uplift and which company the property factors were using. They also asked to know the consultation process the property factors had in place with residents in the development for any works that needed to be carried out outwith the core service.

On 14 October 2016, in response to an e-mail from the homeowners of 11 October, the property factors e-mailed a copy of a letter from Mr S A O'Neill to the homeowners dated 23 September 2016. A copy of that letter was amongst the supporting documents which accompanied the application and it enclosed a copy of the Written Statement of Services. The property factors stated that whilst Mr McCusker may have suggested the services of a contractor, any contract with that person was not something with which the property factors could become involved. The property factors accepted that the homeowners should not have been misinformed about contacting the insurance company directly, as the process was always administered by their office. There had been vast amounts of bulk items dumped within the car park areas, common hallways and bulk uplift cage. The property factors apologised if there had been any crossed wires with regard to the incident between the homeowners and the concierge, adding that it certainly appeared that the story of events that was passed to them was different to the way the homeowners had recounted the matter. Mr O'Neill said that he would sit down

with Mr McCusker to ensure there was a clear understanding of the high level of service and assistance that he wished his staff to deliver.

With reference to the bulk uplifts, the property factors said that there had been more than a few and that it was very difficult to ensure that the communal areas were kept free from bulk refuse and clean in general, when there were so many properties which were let out. The property factors currently used a firm called Junk-It to clear out the bulk refuse cage. Mr O'Brien had spoken with the concierge regarding Glasgow City Council collecting bulk items, but had been told that the Council insisted on the cage being emptied and items left at the roadside, which was almost impossible due to the number of parked cars in the bays and along the street. The property factors considered that the vast majority of the works undertaken at the property fell within their core service, given the complexity of the development and the extent of the existing level of equipment requiring ongoing maintenance.

In their application, the homeowners said that the letter from the property factors did not answer their complaint. They had not reported the claim to the insurer, had not replied to urgent e-mails and phone calls and had given them incorrect information about claiming on the buildings insurance. They had sent the policy schedule and it was when the homeowners had contacted the insurers themselves that they found out that the claim had to come from the property factors. This had delayed the claim over a weekend and the mould and dampness had grown considerably due to the delays by the property factors. The property factors had also told them to obtain three quotes, but the insurers had then told them they only needed one.

The homeowners had asked for a copy of the concierge's report, as they regarded the property factors' e-mail of 1 September 2016 as incredibly offensive and inaccurate. They had not received it as at the date of the application. They had asked for it three times and for an explanation as to why the property factors had not contacted them first before sending it, but had not had either. They had sent the homeowners an e-mail threatening to go to the police if anything like this happened again, but nothing had happened in the first place.

On numerous occasions, the homeowners had asked for the property factors' timescales for handling complaints and enquiries (they referred here to copy e-mails which accompanied the application), but they had still not received this. They had also not received the letter that was supposedly sent on 23 September 2016.

The homeowners contended that the property factors had not, in their letter, addressed the concerns they had. In particular, they had avoided the issue with the plumber. This was someone recommended by them who caused extensive damage to the property. The homeowners accepted that the property factors could not be accountable for this, but would have expected an apology and some kind of investigation if the property factors were recommending him to residents. Instead, they had become defensive and did not offer any help. What was initially a very

small leak had become a serious incident resulting in the homeowners having to move out of the property, which required three replacement walls, new flooring and carpets. The property factors had refused to investigate such a serious matter and had become very defensive when the homeowners phoned them about it. They should have been ensuring that this did not happen to anyone else due to their recommendations.

The homeowners commented on the fact that, in their response to the complaint letter, the property factors had apologised that the homeowners had been ill advised by one of the contractors who had suggested they would need to decant the property, something that was nothing to do with the property factors, but would not apologise for the mistakes they, the property factors, had made. They added that they had been advised by the loss adjuster to move out, so had not been "ill-advised" by the contractor and that the property was uninhabitable for a total of 47 days, partly due to the time it took the property factors to initiate the claim.

The homeowners referred again to the copy e-mails included with their application. When the homeowners had contacted the property factors on Friday 2 September, they had been sent a copy of the buildings policy schedule very late on that afternoon, despite having requested it first thing. They had then called the insurer who had informed them that the factor had to report the claim. The property manager was going to be off until the following Wednesday and the property factors deemed it reasonable to wait until then to deal with the claim. The homeowners had advised the property factors that they had to deal with it urgently as the damage was really bad and Mrs Murray already had a chest infection, but they still did nothing. They had also told the homeowners that they would have to get three quotes for repairs before the insurance company would deal with the claim. By Friday 9 September, the property factors had still done nothing and were not replying to phone calls from the homeowners, who telephoned the insurance company, who informed them that the factor had still not reported the flood to them and that they did not ask for three quotes. They were happy with one reasonable quote. As at the date of the application, the property factors had still not corresponded about the claim with the homeowners, who had had to deal directly with the loss adjuster. The property factors delayed the claim, did not act on behalf of the homeowners and also gave them completely inaccurate information on numerous occasions about the claims process.

The homeowners stated in the application that the property factors had failed to comply with Sections 2.1, 2.2, 2.4, 2.5, 5.4, 5.5, 6.9, 7.1 and 7.2 of the Code of Conduct and had failed to carry out the property factors' duties.

The homeowners concluded their written representations with a list of 10 items which, they argued, were the matters with which the property factors had failed to deal. As the property factors, in their written representations, responded specifically

to those 10 items, they are summarised below, with the property factors' responses added after each item.

(2) By the Property Factors

The property factors' written representations dealt in turn with each of 10 points listed in the section of the homeowner's application headed "Reasons Property Factor has not addressed complaint continued" and the 10 points and the responses are summarised as follows:

1. **The problems the homeowners encountered due to the work carried out by the plumber the property factors recommended.**
   The property factors referred the Tribunal to their e-mail of 2 September 2016, timed at 17.07, in which the property manager had confirmed that this was a private matter between the homeowners and the contractor. They also referred to their letter to the homeowners of 23 September 2016, which stated "your dedicated property manager may have suggested the services of a contractor, you will appreciate that any contract between you and a contractor you instruct, to repair a leak in your flat, is not really a matter that we can become involved in." They had also referred to a statement in a letter of 30 November 2016 to the homeowners that, although they provided details for Mr Mullen, the property factors could not recommend him and it was entirely up to the homeowners who they instructed to carry out repairs in their private property. The property factors concluded that it was unfortunate that the homeowners insisted that the contractor had been "recommended" by them, because, as the contractor would have been acting under a private instruction from the homeowners, there would have been no sense in the property factors recommending Mr Mullen, as they would not be taking part in any contract.
2. **Stating that the homeowners were ill advised by a contractor to move out, apologising for this, yet the homeowners were unable to stay in the property for 47 days. The apology was absurd when the property factors would not apologise for things they actually did themselves.**
   The property factors said they found this statement confusing, as it would be at the sole discretion of the loss adjuster appointed by insurers to agree whether the property was uninhabitable.
3. **Inaccurate information on numerous occasions regarding the buildings insurance claim.**
   The property factors referred to the exchanges of e-mails on 2 September 2016. The homeowners had not asked for details of the claims procedure, nor had they indicated in the e-mails requesting details of the insurance company and the policy number, that they wished to submit a claim to the insurers. It was in the e-mails between 17.07 and 18.03 that Mrs Murray had said she wished to submit a claim. Mr McCusker had also stated that during that period there had been a telephone conversation with Mrs Murray, when it was

agreed that the property was not uninhabitable and that the homeowners would contact the contractor for any damage that might otherwise be claimed through his insurance policy, As the conversation had ended without the homeowner pursuing the question of a claim, Mr McCusker had informed the homeowners that he would be out of the office on the following Monday and Tuesday and it was agreed that the parties would meet in his office on Wednesday 7 September to discuss the overall position. On 5 September, the homeowners had sent an e-mail to the head of business support, saying that "someone needs to get out here to assess the damage". This agitated viewpoint on the urgency of the situation was totally contrary to the conversation with Mr McCusker on 2 September, which resolved to meet in the property factors' office on Wednesday 7 September. The homeowner had contended in an e-mail of 5 September 2016 that this meeting had nothing to do with the flood and had asked that the meeting be cancelled as they would be sending a formal complaint instead. It was the contention of the property factors that it was not only the issue of the concierge that was to have been discussed at the meeting. The leak and a possible insurance claim were also to be discussed, subject to the homeowners' independent enquiries with their contractor. Clearly, as Mr McCusker was to be out of the office on Monday 5 and Tuesday 6 September (as the homeowners were aware) it was not possible for the business support staff to contest or disagree with the homeowners' statement.

There had then followed at 15.45 on Monday 5 September an e-mail from the property factors' business support department, correctly instructing the homeowners to obtain quotations for an insurance claim and providing the homeowners as a courtesy with possible trades to contact. The property factors could not see how the homeowner could contend that inaccurate information was given, particularly as the homeowners had cancelled the meeting which had been called to discuss this matter in addition to others. Once the homeowners' claim had been clarified by the property manager, a claim had been submitted by the property factors to the insurers on 9 September 2016. Due to the complexity and potential complications reported by the homeowners, the insurers had appointed a loss adjuster and, once that had happened, the property factors were unable to arbitrate or otherwise seek to influence or interfere with the insurers' claims procedure.

4. **Failing to report the flood to the insurer.**
   The insurers had been notified as soon as practically possible and after it was clarified by Mrs Murray as to how she wanted to proceed.
5. **Failing to deal with the homeowners' claim directly with the insurers. The homeowners had had to deal with everything themselves.**
   The property factors referred to their detailed representation under numbered item 3.
6. **The homeowners were having problems with the claim, as the insurers had said they would only pay 50% of the cost of alternative**

accommodation, with the balance being the responsibility of the contents insurer. There had been no claim on the contents policy. The property factors had been copied in on every e-mail about this but still had done nothing, or acted on behalf of the homeowners in any way. They had ignored everything and were not corresponding with the homeowners or the insurers.

The response of the property factors was that they had not been contacted by the homeowners with regard to any complaint they might have with the way the loss adjuster had conducted the claim. Had they done so, the property factors would have confirmed that they were unable to arbitrate in such disputes and that the insurers would have their own complaints procedure.

7. **Several pieces of information the homeowners had asked for had still not been received.**

   The property factors assumed that the homeowners were referring here to Mrs Murray's request for timescales for handling complaints and enquiries. They regarded this point as largely vexatious, given that the homeowners had chosen to enact the property factors' complaints procedure and that the terms of that procedure were outlined in their letter of 30 November 2016, following which the homeowners had chosen not to accept the property factors' decision and had referred their complaint to HOHP (now the Tribunal).

8. **The property factors' delays had caused health issues for Mrs Murray and the property factors had not acknowledged this.**

   The property factors said that they were sorry to hear that the homeowners were alleging that they had suffered health issues, but were unsure how they could have assisted in alleviating the alleged health issues. Once a loss adjuster was appointed by insurers, all such complaints would be addressed and dealt with through the insurers' system.

9. **The property factors should not be using Junk-It for bulk items when this could be done by the Council free of charge.**

   The property factors responded that they had stated in their letter to the homeowners of 23 September 2016 that due to the volume of waste (there were 487 apartments in the development with a high turnover), the Council would not uplift bulk items that were accumulated in the main bulk store on ground level. The Council would insist that the cage was emptied and all items left on the street for them to collect. Due to the volume of vehicles parking in the street, the task was improbable and, as such, the Council would not attend to the bulk items. A private firm was required to lift the individual items from the cage into their van for disposal. The homeowners should be aware that over-accumulation of combustible items in the storage cage posed a significant fire risk and it therefore required to be regularly emptied. This task was a core duty of the property factors.

10. **The property factors should be consulting with residents.**

    The property factors stated that this was an extremely large and sophisticated development and, due to the need to provide reliable and consistent services

to cater for the maintenance and health and safety concerns, most, if not all of the regular duties undertaken by contractors had to be considered "core services" or otherwise "not optional". It was ultimately for the residents to dictate what constituted a core service, but to deliberately create inertia with certain services such as bulk uplifts would be a risk to health and safety. Most services carried out at the development formed part of a scheduled maintenance plan, but from time to time it was necessary to have additional works carried out in order to maintain the development. As a matter of courtesy, any items of an unusual or unexpected nature which had to be instructed were detailed in an explanatory note provided by the property manager on a regular basis.

(3) Further Written Representations by the Homeowners

The homeowners sent further written representations to the Tribunal by e-mail dated 23 February 2017. They reiterated their concern that the property factors had been so defensive of Mr Mullen when the homeowners had raised concerns about the work he had carried out, if they were so insistent that it was a private contract between him and the homeowners. The property factors had stated in their letter to the homeowners of 23 September 2016 that they were "concerned that you seem to have been ill-advised by one of the contractors that you contacted (who suggested you would require decanting the property and offered to carry out the re-instatement works at a somewhat inflated cost)". The property factors had at no time expressed concern about the plumber they suggested, yet they were now expressing concern about someone the homeowners had arranged to call at the property to assess the damage. They had been advised to move out by contractors and by their contents insurer's Loss Assessor and the buildings insurers' Loss Adjuster. Why were the property factors concerned about something that was nothing to do with them when they showed absolutely zero accountability for the things in which they had played a part? The homeowners had indeed initially asked for the insurance policy number and details, but that was because they were, at that stage, unaware of the procedure. It was, they said, quite clear from the correspondence that the property needed urgent attention and that the homeowners needed to make an insurance claim. The homeowners' point was that the property factors wasted time, and, since it was a Friday, that mattered, and they should have been told at that point that the property factors would have to deal with the insurers on their behalf.

The homeowners stated that there was categorically no such agreement with Mr McCusker that the property was habitable, that the homeowners would contact the contractor for any damage caused by the plumber to be claimed through the plumber's insurance policy or that the question of whether they wanted to proceed with a claim on the buildings policy would be discussed

during the proposed meeting on 7 September. Mr McCusker had advised them to send photographs of the damage so that he could submit the claim to the insurer. He said that he would be off work on the Monday and Tuesday, but did not say that the claim would have to wait until he returned to the office. In that telephone conversation on the Friday, Mrs Murray had asked Mr McCusker why he had sent the e-mail about the concierge without speaking to them first. Mr McCusker had become very angry and had shouted that he was far too busy to speak to her. Mr Murray had called him back and arranged to meet him on Wednesday 7 September to discuss the issue with the plumber and the e-mail about the concierge. The property factors had been advised of Mrs Murray's health issues on several occasions, as e-mails showed. The homeowners had taken and e-mailed photographs immediately after being asked to do so. Mr McCusker had said that receipt of the photographs would initiate the insurance claim, but the claim had not been submitted at that time and Mr McCusker had not ensured that a colleague would be dealing with this in his absence on the following Monday and Tuesday. It was only when the homeowners telephoned the insurance company themselves on 9 September, as they were at a loss with the property factors, that they were advised that the claim should have been immediately submitted on 2 September when the damage was reported to the property factors and that it was not necessary to obtain estimates for the work before a claim could be submitted. The property factors were supposed to deal with the insurers and submit the claim, but the homeowners ended up having to contact the insurers themselves as, a week after the claim should have been submitted, the property factors had done nothing and the homeowners were in a flooded home.

The homeowners stated that the property factors showed no accountability for anything they arranged. They chose the insurance company for the development. The Loss Adjuster copied them in on every e-mail about the claim, but at no time did the property factors make any contact about it. The property factors had only provided the outline of their complaints procedure on 30 November 2016, but the homeowners had requested it on a number of occasions since the beginning of September.

The property factors had said in their written representations that they were unsure how they could have alleviated the homeowners' "alleged" health issues. The homeowners pointed out that the property factors had been advised of this on Friday 2 September 2016 and that, despite stressing how urgent the matter had become, the property factors had decided the insurance claim could wait. Mr McCusker had not even dealt with it on his return on 7 September. The homeowners regarded the property factors' approach as insensitive and offensive, with the use of the word "alleged".

In relation to the property factors' comments about the bulk items, the homeowners pointed out that the large industrial waste bins were left out on the pavement every week and there was plenty of space for bulk items. The property factors were not acting in the best interests of the residents by failing to take advantage of the Council's free uplift service and, instead, employing contractors at a cost of several thousand pounds. The homeowners did not regard the providing of explanatory notes as fulfilling the property factors' duty to consult appropriately with the residents.

THE HEARING

A hearing took place at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL on the morning of 14 March 2017. The homeowners were present at the hearing. The property factors were represented at the hearing by Mr Tom McCusker, their Property Manager and Mr Derek MacDonald, one of their Directors.

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 homeowners to address the Tribunal with reference to their complaints under each Section of the Code of Conduct. 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 2.1. "You must not provide information that is misleading or false."

The homeowners stated that the property factors had told them incorrectly that they needed 3 quotations for the work, which resulted in a lengthy delay and, in the final call made on Friday 2 September 2016, Mr McCusker had told them that he would initiate the claim when they sent in the photographs, which they had done immediately following the call. He had not then initiated the claim and was then away from his desk until the following Wednesday, with nobody initiating the claim in his absence.

Mr McCusker told the Tribunal that the guidance given by the insurers to the property factors was that they would like 3 quotes, but they sometimes accepted two or even one. He had been back in the office on Thursday 8th September and submitted the claim on the following day. He also stated that, in his telephone conversation with the homeowners on the Friday afternoon, they had told him the problem was not ongoing and that they would not need to vacate the flat. The leak that Mr Mullen had attended to was from a waste pipe and seemed to have been going on for a considerable period of time. A McAlpine joint had come loose, leaving an open-

ended pipe on the floor. This was, in any event, a private repair, not a common repair.

The homeowners referred to the e-mails of 2 September, when Mrs Murray had stressed how important the matter had become and that she had not said the homeowners did not have to move out. The first they had known of a problem had been a small area of sodden carpet. Mr Mullen had carried out a repair, but it was 4 days later that it became apparent that the situation had worsened considerably and the problem did not appear to be from the same part of the bathroom wall. They could not see or hear the water coming out. They were not suggesting that Mr Mullen had been recommended by the property factors. What they were complaining about was the fact that the property factors had become so defensive when the homeowners had told them what he had done or failed to do.

Section 2.2. "You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action."

The homeowners referred the Tribunal to their e-mail of 1 September. At that point they were still dealing with the contents insurers. The homeowners had dismantled the wardrobe and had placed it beside the bulk refuse cage. They accepted that they had not handled the matter with the concierge well, but Mr Murray had then spoken to him again and there had been no abusive language used. The homeowners had asked several times for a copy of the report made by the concierge, but it had not been provided, so they did not even know what had been communicated to the property factors in that report.

The property factors told the Tribunal that this was a large development of 487 flats. They had a concierge and he had placed notices all around the development, asking people to put any bulk items into the cage that they had provided. They also encouraged owners to contact Glasgow City Council. Mr McCusker had received a report from the concierge that he had caught someone dumping wood. When he was challenged, Mr Murray had been abusive and threatening. At that time, Mr McCusker had not realised that these were the same homeowners who had the problem with the water leak. He accepted that the homeowners had challenged this account and that they wanted to see the report. He had arranged a meeting at their office to discuss it, but that meeting had been cancelled at Mrs Murray's request. Mr McCusker had not responded further, as the matter had been "overwhelmed" by the issue of the damage to the homeowners' property. Bulk uplifts by Junk-It had been the practice for many years. Glasgow City Council would uplift free of charge, but only from individual homeowners, not at the request of the property factors. Homeowners were billed quarterly and given updates, which included requests not to deposit bulk items around the development. Mr McCusker told the Tribunal that the concierge's report mentioned in his e-mail to the homeowners of 1 September 2016 had been verbal.

The homeowners responded that notices in the development about bulk refuse were on small pieces of laminated A4 paper, which included a lot of other stuff. They had told the concierge that they would move the wood from the dismantled wardrobe into the cage on the following day. They had cancelled the meeting scheduled for 7 September because of the tone of the e-mail of 1 September. The factoring bill issued in February 2017 had mentioned that people should arrange uplifts by the Council, but this was the first time that it had been mentioned.

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 homeowners stated that they thought using Junk-It was a waste of money and that there had been no consultation in the 10 years that they had lived in the property.

The property factors responded that the disposal of bulk items was not an optional service. It was a functional requirement to manage the development because of the sheer volume involved. From the outset, they had had to put in place a service to deal with bulk refuse. If they had allowed inertia to take over, there would have been serious consequences for the development. Bulk uplifts were part of the core service. The cage was a fallback position and, if there was no note on a bulk item to say it was awaiting a Council uplift, and homeowners did not tell the concierge, the property factors removed the item to the cage. With reference to the February factoring bill, the property factor stated that the payment to Junk-It of £1,670 would have been for the cost of one uplift. It equated to £4.12 per flat. Mr McCusker added that they were constantly having to chase the Council to do the general uplift of waste and he questioned what service they might get for bulk refuse uplifts.

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 homeowners advised the Tribunal that they had still not received the concierge's report that they had been asking for since 1 September 2016. They had asked about response times and had merely been sent a copy of the Written Statement of Services.

The property factors said that they had hoped to have the concierge's written report in time for the meeting scheduled for 7 September. The concierge had told Mr Murray that he had to put the wood into the bulk cage, but Mr Murray had become

abusive and threatening and was swearing. Later, Mr Murray had come out again and had apologised.

The homeowners stressed again that there had been no abuse and that they had told the concierge that they would move the wood into the bulk cage on the following day.

Mr McCusker then told the Tribunal that he had telephoned Mrs Murray within minutes of receiving an e-mail of Friday 2 September about the water leak. She had told him that there was not an ongoing leak and that she did not require a loss adjuster. He had told her he was to be in Inverness on business for the next few days. While he was away, the homeowners were communicating with the office administration team. As there had been no indication that it was an emergency, Mr McCusker thought that estimates would be required. He had then, on the following Friday passed it to the loss adjuster.

The homeowners referred the Tribunal to the e-mails of 2 September which, they said, were quite clear about the worsening situation. Mr McCusker told the Tribunal that the property factors were a close-knit office and he thought his staff would have known that this was a sensitive situation.

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."

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."

These two Sections were dealt with together. The homeowners told the Tribunal that this part was fully covered in the written representations and expressed their view that it was a complete mess. Nobody was taking control to submit the claim and get someone out to the property when they knew that the problem was becoming worse and worse. It had first been reported to the property factors on Friday 2 September.

The property factors referred to a quotation that the homeowners had received from Burns Joinery and Roofing Contractors, which he had passed on to the insurers. The homeowners pointed out that this was a quotation for exploratory works only.

Section 6.9. "You must pursue the contractor or supplier to remedy the defects in any inadequate work or services provided."

At the hearing, the homeowners withdrew their complaint made under this Section and it was not further considered by the Tribunal.

Section 7.1. "You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."

The homeowners told the Tribunal that theirs was really a complaint about how the matter was handled. They had asked for a copy of the complaints procedure at the beginning of September 2016, but had not received it until they had asked again in November.

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 homeowners stated that the reply of 23 September 2016 to their letter of complaint of 6 September was outwith the 7 days' response time set out in the complaints procedure and did not include all the information that they had requested. The final decision had been intimated in a letter of 30 November 2016.

Closing Remarks

The homeowner concluded by telling the Tribunal that this was a matter that the property factors could have resolved very quickly, but they had added fuel to the fire in their e-mail following the discussion with the concierge and had not been sensitive to Mrs Murray's health issues. They could not understand why the property factors had been so defensive of the contractor and their conduct regarding the incident with the concierge had been very unprofessional.

The property factors stated in closing remarks that this had been a totally controllable leak. They had passed on the contact details for a contractor, who had attended to it. The homeowners had to take some responsibility for what had happened after that, as it was a private contract.

Mr MacDonald also asked whether the Tribunal had discretion to apply a test of reasonableness under Section 5.4 of the Code of Conduct, to the property factors' procedures, communication and intentions, homeowners' expectations and outcomes. He felt that the Tribunal should take a holistic view.

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 development of 487 flatted dwellinghouses.
- The property factors, in the course of their business, manage the common parts of the development 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 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 1 November 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 7 November 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 5 January 2017, 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 complaint under Section 6.9 of the Code of Conduct.

The Tribunal did not uphold the complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct. The Tribunal was satisfied that the homeowners had been advised by the property factors that they should obtain 3 quotes for the work and that the property factors had admitted in evidence that the insurers would on occasion settle for 2 quotes, or even only one, if a loss adjuster was involved. The Tribunal's view, however, was that there had been no intention to mislead the homeowners and that no evidence had been led that the

homeowners had been prejudiced by the information they had been given being incomplete, as it was, albeit after a delay of a week, referred to a loss adjuster, who took over the claim. The Tribunal finds that the property factors acted in accordance with their normal procedures where there is no urgency in relation to a claim, but recommends that their staff be trained to do more to identify whether a situation is or has become an emergency and, in particular, to make it clear to homeowners that they (the property factors) and not the homeowners have to intimate claims. Mr McCusker's evidence was that he understood on Friday 2 September that it was not an emergency and that the homeowners did not have to move out of the property. This evidence was disputed by the homeowners, but, in any event, the tone of the homeowners' subsequent e-mails indicated clearly that the problem was becoming very much worse and the property factors do not appear to have reacted quickly enough to that developing situation.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 2.2 of the Code of Conduct. No evidence was led to contradict the statement by the homeowners that they told the concierge they would move the wood to the cage on the following day and no report from the concierge was provided to the Tribunal. Accordingly, the Tribunal accepted the evidence of the homeowners that the conversation with the concierge had ended cordially, although the homeowners did accept that they could have handled the initial conversation better. The tone of the e-mail of 1 September 2016 (sent at 16.04) from the property factors to the homeowners was intemperate and the situation was exacerbated by the evidence given by the homeowners that Mr McCusker had told them in a telephone conversation that he was too busy to deal with the matter. The Tribunal accepted that this was the reason for the homeowners cancelling the meeting with Mr McCusker scheduled for Wednesday 7 September 2016. The Tribunal did not regard the terms of the e-mail of 1 September 2016 as abusive, but it could have been perceived as threatening behaviour, and it was unprofessional to accept the verbal report from the concierge and thereafter to use strong language in an e-mail, with a reference to the police, without having sought to hear the homeowner's version of events. The Tribunal also noted the e-mail from Mr McCusker to Mrs Murray, sent at 16.37 on 1 September, in which he said "Your version of events is completely at odds with the report I received from the concierge supervisor today. I will forward your email for their comments before responding further".

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.4 of the Code of Conduct. The Tribunal noted that, whilst the title deeds provided for the setting up of a Residents' Association, no such Association or Committee had in fact been established. The Tribunal had heard from the property factors that they were dealing with a very large development where many of the flats were privately let and that many landlords, letting agents and tenants did not comply with the procedures they had in place

regarding disposal of bulk items. The Tribunal noted that the removal of bulk refuse was not specifically covered in the Written Statement of Services, but was of the view that the property factors' core service would impliedly include keeping communal areas clear of obstruction and safe to use. The property factors had employed Junk-It for some considerable time to dispose of bulk refuse and the Tribunal held that they were empowered to do so as part of the core service described in the Written Statement of Services. Accordingly, the Tribunal was not able to uphold the complaint under Section 2.4 of the Code of Conduct.

The Tribunal felt, however, that the owner/occupier residents at the development are being made to pay for the shortcomings of landlords, letting agents and tenants in relation to the disposal of bulk items, which owner/occupiers can have removed free of charge by Glasgow City Council. The Tribunal recommends that the property factors should clearly communicate with homeowners as to what they want to happen with bulk refuse, either by working harder to encourage residents to contact the Council and telling them to tell the concierge and clearly mark any items left out for collection, or by telling residents to put everything in the cage and advising them of the quarterly cost involved in emptying it.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 2.5 of the Code of Conduct. The homeowners had given evidence that they had on a number of occasions asked to see the concierge's report on the incident of 1 September 2016, but that this had not been provided to them. This was admitted by the property factors. The homeowners had also told the hearing that they had requested copies of Junk-It invoices, but had not received them. The property factors had not challenged this statement. The homeowners had also in September 2016 and again in October asked the property factors to let them know their response times for complaints, but had not received a reply until November, when the property factors sent them a copy of the Written Statement of Services. Again, this evidence was not challenged by the property factors. The Tribunal was of the view that the property factors had failed to respond within prompt timescales to what was clearly a complaint by the homeowners and, accordingly upheld the complaint under Section 2.5 of the Code of Conduct.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Sections 5.4 and 5.5 of the Code of Conduct. The procedures for submitting claims on behalf of homeowners and for liaising with insurers are clearly set out in the Written Statement of Services, which states that the property factors will intimate claims both common and private to the insurers providing the block buildings insurance. The Tribunal did not, therefore, uphold the complaint under Section 5.4 of the Code of Conduct. The homeowner's complaint related to the delay in intimating the claim, with nobody taking control in the absence of Mr McCusker, when the homeowners' e-mails were indicating a rapidly worsening situation at the property, but the Tribunal could not uphold the complaint under Section 5.5 of the Code of Conduct as, once the claim was intimated to the insurers

on 9 September 2016, the property factors would have had no further involvement in its progress.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 7.1 of the Code of Conduct. The Tribunal was satisfied that there was a clear complaints procedure set out in the Written Statement of Services. The homeowners' complaint had related to the portion of Section 7.1 which states that the procedure must include how property factors will handle complaints against contractors. The Tribunal held that the complaints procedure did cover that matter and that, in any event, the homeowners' complaint about a contractor had related to a private contract with Mr Mullen, not to a contract for common repairs work.

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 held that the letter from the property factors to the homeowners dated 30 November 2016 was signed by Mr MacDonald as a Director of the property factors, stated that it had been referred to the Managing Director who had instructed Mr MacDonald to manage the complaint and that it should be seen as the property factors' final decision. It also provided details of how the homeowners might apply to the Tribunal if they wish to pursue the matter further. The Tribunal noted that the letter of 30 November 2016 was sent after the homeowners' application to the Tribunal had been received, but that their earlier letter of 23 September 2016 had not been the property factors' final decision on the complaint.

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 14 March 2017