Housing and Property Chamber
First-tier Tribunal for Scotland

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

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 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber Ref: FTS/HPC/PF/22/0231

Property: 59/5 Hesperus Broadway, Edinburgh EH5 1FW ("the Property")

The Parties:-

Mark Coyle and Mrs Gillian Coyle, 59/5 Hesperus Broadway, Edinburgh EH5 1FW ("the homeowners")

James Gibb Property Management Limited registered in Scotland under the Companies Acts (SC299465) and having their registered office at Bellahouston Business Centre, 423 Paisley Road West G51 1PZ Limited ("the property factors")

Tribunal Members:

George Clark (Legal Member/Chairman) and Ahsan Khan (Ordinary Member)

Decision
The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the property factors have failed to comply with their duties under Sections 2.5, 5.2 and 7.1 of the Code of Conduct for Property Factors, effective from 1 October 2012, made under Section 14 of the Property Factors (Scotland) Act 2011 ("the 2012 Code") and Sections 5.3, 6.1, 6.4, 6.7 and 7.1 of the Code of Conduct for Property Factors effective August 2021 ("the 2021 Code") . The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By applications, dated 29 January 2022 and re-submitted on 31 March 2022, the homeowners sought a Property Factor Enforcement Order under Sections 17 and 20 of the Property Factors (Scotland) Act 2011 ("the 2011 Act") in respect of a failure by the property factors to comply with Sections of the Code of Conduct for Property Factors effective from 1 October 2012 (the 2012 Code") and the Code of Conduct for Property Factors effective from 16 August 2021 ("the 2021 Code"), both made under Section 14 of the 2011 Act .

2. The homeowners' applications related to Sections 2.5, 3.3, 4.3, 5.2, 6.4, 7.1 and 7.2 of the 2012 Code and OSP1, OSP2, OSP3, OSP4, OSP5, OSP6, OSP11 and Sections 2.7, 3.1, 5.3, 6.1, 6.4, 6.7, and 7.1 of the 2021 Code. They also contended that the property factors had failed to carry out the Property Factor's duties under Sections 1.2, 4.4.7, 4.7.1, 5.2.2, 6.6.1 and 7 of their Written Statement of Services.

3. Two applications were required, as the conduct and issues to which they related occurred both prior to and subsequent to 16 August 2021.

.

4. The application was accompanied by copies of the property factors' Written Statement of Services.

5. For ease of convenience and to avoid repetition, the details of the complaints under each Section of the Codes of Conduct and the evidence led under each Section at the Hearing are summarised below, along with the Tribunal's decisions, in the "Reasons for Decision" portion of this Decision.

6. In their application, the homeowners stated that there were many issues, but there were two particular and ongoing issues. The first of these related to lift maintenance and the failure of the property factors to follow the provisions of the title deeds in allocating the costs. The second was the failure to apportion insurance costs in accordance with the title deeds and the property factors' failure to follow a decision of the Homeowners Housing Panel, a decision of which they were well aware, especially when they had obtained architects' plans of the development at the expense of the owners.

Case Management Discussion

7. Following a Case Management Discussion on 27 July 2022, the Tribunal directed the homeowners to provide written representations clearly setting out their complaint under each Section of the 2012 Code and the 2021 Code and issued appropriate Directions to the Parties, to be complied with by 9 September 2022. The homeowners lodged documentation which was received by the Tribunal on 2 September 2022, but the property factors did not lodge submissions until 4 October 2022 and, whilst the Tribunal decided on 10 October 2022 that it was in the interests of justice that they be received, albeit late, the Tribunal decided that the homeowners had not been given sufficient time to read them and to respond prior to the date of a Hearing scheduled for 12 October 2022. That Hearing was, therefore, postponed.

There were formatting issues with the property factors' representations, and they were re-sent on 14 October 2022.

The Hearing

8. A Hearing was held at George House, 126 George Street, Edinburgh on the morning of 1 December 2022. The homeowners were present. The property factors were represented by Mr Roger Bodden, their Regional Director (East).

9. The homeowners told the Tribunal at the outset that they were extremely disappointed that the property factors had not opted to be represented also by either Mr Nic Mayall or Mr David Reid, as they had much greater knowledge of the background to the case and Mr Mayall in particular could have spoken as to his recollection of the meetings held prior to the appointment of the property factors in 2018. The homeowners also advised the Tribunal that the one witness they had intended to call was unwell and unable to attend, but they had a written statement from her which they lodged at the Hearing, with a copy being given to Mr Bodden.

10. The Tribunal told the Parties that, as there was considerable overlap between the provisions of the 2012 Code and the 2021 Code, it proposed to consider the application under the various Sections of the 2012 Code and that it would not be necessary to lead the same evidence under the 2021 Code where the provisions of the two Codes coincided.

11. The homeowners told the Tribunal that, prior to the appointment of the property factors, 3 members of the then Residents' Committee had met with Mr Mayall and had discussed the problems they had with the then property factors. One of their number had then walked round the development with Mr Mayall, who had identified two areas of concern that he stated ought to have been dealt with by the incumbent factors. Four years after their appointment, the property factors had not even obtained quotes for that work, which Mr Mayall had identified as being urgent.

12. There had then been a public meeting of residents, at which the property factors and another possible candidate company had made presentations and answered questions. The Committee then sent voting slips to all owners asking them to indicate whether they wished to retain the existing factors or to appoint one of the companies who had presented at the public meeting.

13. Members of the Committee then met with Mr Mayall on 28 August 2018. They made it clear that it was a deal breaker if the property factors could not apportion insurance premium costs in accordance with the Deed of Conditions, the issue being that one-bedroom flats were paying the same as two and three-bedroom flats. The homeowner, Mrs Coyle, had given Mr Mayall a copy of an earlier Decision of the then Homeowner Housing Panel (which is now the Tribunal) which ordered the then factors to apportion costs according to the title deeds and to issue refunds to those who had overpaid, but not to invoice those who had underpaid. The property factors had not, however, apportioned costs in accordance with the title deeds. This led to the

Committee losing faith in the property factors at an early stage and to the breakdown of the Committee. There is currently no Residents' Committee.

Findings in Fact

a. The homeowners are the proprietors of the Property, which comprises a three bedroom flat in a development which comprises 4 blocks which have 14 three bedroom flats and 7 two bedroom flats and two further blocks, owned by Dunedin Canmore Housing Association and each having 5 one-bedroom flats and 13 two bedroom flats.

b. 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").

c. 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.

d. The date of Registration of the property factors was 23 November 2012 and the date of their current registration is 17 May 2019.

e. The homeowners have notified the property factors in writing as to why they consider that the property factors have failed to carry out their duties arising under section 14 of the Act.

f. The homeowners made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, dated 29 January 2022, resubmitted on 31 March 2022, under Section 17(1) of the Act.

g. The concerns set out in the application have not been addressed to the homeowners' satisfaction.

h. In terms of the Deed of Conditions registered 24 December 2003 by Forth Ports PLC and Forth Property Developments Limited ("the Deed of Conditions") regulating the development of which the Property forms part, each owner is responsible for a share of the total premium for insuring the Common Property of the Development and the Common Property of the stairs and the Flatted Dwellinghouses "based on the proportion which the square footage of their Flatted Dwellinghouse bears to the total square footage of all the Flatted Dwellinghouses within the stair of which the same forms part and an equal share along with all other Proprietors in the Development of the premium for insuring the Common Property of the Development and the Common Property of the Stair."

i. The Deed of Conditions also specifies that "a Proprietor of a ground floor Dwellinghouse in any Stair within the Development where access to the Car Deck is not facilitated by a lift the Proprietor of such ground floor Flatted

Dwellinghouse so affected will have no responsibility to contribute towards the expense, maintenance, repair and renewal, if necessary, of the lift, lift shafts, lift motors and associated equipment."

j. The property factors' Written Statement of Services states that for general written requests (outwith repair requests) their staff will endeavour to acknowledge receipt of an email within 5 working days.

Reasons for Decision

14. The homeowners did not include Section 2.1 of the 2012 Code in their application, but in their written representations they made reference to it, contending that the property factors had failed to ensure that they did not provide information which is misleading or false. The Tribunal was unable to consider this head of complaint, as it was not included in the application, but noted that the representations did not contain any specific allegation of false or misleading information having been given, but referred only to a failure by the property factors to deal with block insurance and lift maintenance costs in accordance with the title deeds, and would be dealt with elsewhere in this Decision.

15. **Section 2.5 of the 2012 Code** states that "*You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement."* The provisions of Section 2.7 of the 2021 Code are practically identical.

16. The homeowners contended that after more than 27 months of escalating complaints, they had still to receive a response that meets any kind of "prompt timescale". In their written representations, the property factors argued that the homeowners had made no reference to support their complaint, but, on reviewing their communications, the property factors accepted that they had not always met the response times set out in their Written Statement of Services and offered compensation of £250. The homeowners stated in their written representations of 29 August 2022 that they were unwilling to accept that offer. At the Hearing, the homeowners said that there had been 20 findings of the Tribunal against the property factors under this Section of the Code of Conduct and that it seemed the property factors regard this as an acceptable cost of doing business, offering money rather than improving their service. The property factors responded that an average of 5 breaches upheld in a year across a portfolio of 54,000 managed properties was reasonable.

17. The Tribunal upheld the complaint under Section 2.5 of the 2012 Code and Section 2.7 of the 2021 Code, the property factors having accepted that they had not always met the response times set out in their Written Statement of Services. There were a number of examples within the very extensive Productions provided by the homeowners of complaints by them that previous emails had not been answered. On 16 April 2021, for example, the property factors responded with an apology to what the homeowners had described as

their 3rd request for clarification and on December 2021, the homeowner sent an email to the property factors in which they stated that they had received no response to their email of 29 November 2021.

18. **Section 3.3 of the 2012 Code** states "*You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made 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."*

19. The homeowners' complaint under these Sections was that the property factors invoicing repeatedly fails to offer enough detail on charges to identify their origin or accuracy, both in terms of work carried out and the apportionment of charges. These issues had been flagged up multiple times in the last 3 years. They provided copies of the property factors' invoices. They told the Tribunal at the Hearing that they never knew in advance what was going to be charged to them. They stated as an example that there had been a cherrypicker outside their flat and someone on the roof the previous day, but they had no idea what it was for. The owners had received an invoice for stair painting, with the work instructions being issued only one day before the invoice was produced.

20. The property factors' response to the complaint in the application was that no reference had been made to any evidence to support the claim. They considered that presentation of 4 detailed invoices a year and the information contained therein satisfactorily meets the requirements of Section 3.3 of the 2012 Code. They pointed out that they have a delegated authority limit and that it was not uncommon that verbal instructions are given and for the relevant works order to be generated only to enable the invoice to be paid. They produced copies of a Works Order dated 7 April 2021 and an Invoice for £348, dated 8 April 2021, for decoration works following an ingress of water.

21. The Tribunal did not uphold the complaint under Section 3.3 of the 2012 Code of Conduct. The invoices sent by the property factors contain the level of detail that would be expected, and it was open to the homeowners to query individual items in terms of Section 3.3. There was evidence that they had indeed raised a large number of such queries following each invoice, but the Tribunal did not regard it as reasonable to expect the property factors to present the level of granularity in their invoices that the homeowners were seeking. The property factors should, however, be encouraged to do more to inform and educate homeowners as to what level of detail they can expect from their invoices and noted that Mr Bodden had stated at the Hearing that , they were introducing a summary, in advance of bills being presented, of any unusual/extraordinary items.

22. **Section 4.3 of the 2012 Code** states "*Any charges that you impose relating to late payment must not be unreasonable or excessive."*

23. The homeowners were referring here to the late payment charges of £30 levied by the property factors. They regarded it as excessive, and cited an instance when it had been charged to them in respect of an amount due of only £120.86, which the homeowners were disputing at the time. They also complained that the property factors apply charges to every resident for "debts" which are the responsibility of one resident.

24. The property factors said in their written submissions that no reference had been made to any evidence to support the homeowners' claim. They did not consider a late payment charge of £30 as excessive, but had credited the payment back to the homeowners' account as a gesture of goodwill. As regards the recovery of debts, they referred the Tribunal to their "Income Recovery/Distribution of Debt/Legal Costs etc." Guide, a copy of which was with their written representations.

25. The Tribunal did not uphold the complaint under Section 4.3 of the 2012 Code. The view of the Tribunal was that the amount of the late payment charge was reasonable and, regardless of the amount due, the administration costs to the property factors were the same. The "Income Recovery" document's provisions were clear and unambiguous.

26. **Section 5.2 of the 2012 Code** states "*You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge."*

27. The homeowners' complaint here relates entirely to their contention that the property factors have not complied with the title deeds in apportioning the costs of block insurance. At the Hearing, they stated that this Section had never been complied with despite multiple opportunities being offered to rectify the apportionment errors.

28. The property factors' response was that no reference had been made to any evidence to support the claim. They referred the Tribunal to an "Evidence of Insurance" document submitted with their written representations. It covered the period from 28 May 2020 to 27 May 2021 and, in the opinion of the Tribunal, it met the requirements of Section 5.2 of the 2012 Code, apart from the fact that it did not show the apportionment of the premium amongst the owners in the Development.

29. The Tribunal upheld the complaint under Section 5.2 of the 2012 Code, as the document to which the property factors had referred did not show the basis upon which the homeowners' share of the insurance premium is calculated.

30. The Tribunal then considered the consequences of this failure. In Paragraph 5.2.2 of their Written Statement of Services the property factors state that “the split (or apportionment of costs) is normally determined by the Deed of Conditions. If there is no provision in the Deed of Conditions for some costs, the Tenements (Scotland) Act 2004 or Title Conditions (Scotland) Act 2003 will apply, where relevant.”

31. In the present case, the terms of the Deed of Conditions registered 24 December 2003 by Forth Ports PLC and Forth Property Developments Limited (“the Deed of Conditions”) regulating the development of which the Property forms part, each owner is responsible for a share of the total premium for insuring the Common Property of the Development and the Common Property of the stairs and the Flatted Dwellinghouses “based on the proportion which the square footage of their Flatted Dwellinghouse bears to the total square footage of all the Flatted Dwellinghouses within the stair of which the same forms part and an equal share along with all other Proprietors in the Development of the premium for insuring the Common Property of the Development and the Common Property of the Stair.” “The Common Property of the Stair” is defined as including lifts, lift shafts, lift motors and associated equipment and lift motor rooms.”

32. The Deed of Conditions also specifies that “a Proprietor of a ground floor Dwellinghouse in any Stair within the Development where access to the Car Deck is not facilitated by a lift the Proprietor of such ground floor Flatted Dwellinghouse so affected will have no responsibility to contribute towards the expense, maintenance, repair and renewal, if necessary, of the lift, lift shafts, lift motors and associated equipment.”

33. The property factors did not, in their written representations or at the Hearing, deny that it had been made clear to Mr Mayall at the outset that the owners required the property factors to apportion block insurance costs in accordance with the Deed of Conditions, or that he had been provided with a copy of a previous Decision of the Homeowner Housing Panel confirming that costs should be so apportioned and ordering the then factors to reimburse those who had overpaid as a result. The application in that case had also been made by the present homeowners. The Deed of Conditions unambiguously states that the block insurance liability is to be based on square footage and that, in respect of the lifts, ground floor proprietors are exempt unless the lift gives access to a car deck for the block. The property factors have been reminded of this consistently since their appointment, but have still apportioned block insurance equally amongst all the flats in the Development and lift insurance equally amongst all owners, other than those who fall within the “ground floor exemption.” This method of apportionment has resulted in owners of one-bedroom paying the same for block insurance and lift insurance as owners of two and three-bedroom flats, in direct contravention of the terms of the Deed of Conditions. It also has the consequence that owners within blocks that have a lift which descends to a car deck are paying the same as owners of blocks where the lift stops at the ground floor.

34. The property factors included with their written representations a spreadsheet giving cost estimates, but this was prepared prior to their appointment and is headed up “Catalina Quay” and was illustrative only. The homeowners stated at the Hearing that the document had been sent to only one owner. The view of the Tribunal is that the property factors cannot rely on that document, which had not been circulated to all owners, or on the fact that other owners have not queried the insurance apportionment as implying agreement of the owners in the Development to depart from the Deed of Conditions. The property factors' Written Statement of Services states the split of costs is normally determined by the Deed of Conditions. At the Hearing, the property factors had stated that their offer to provide factoring services was based on equal shares, but the view of the Tribunal was that they had been reminded repeatedly that this was incorrect and they had still continued to act. The Tribunal did not accept the view of the property factors, expressed at the Hearing, that there was no logic in apportioning lift insurance and maintenance costs block by block, rather than simply dividing the total cost equally amongst all owners who have access to a lift. The provisions of the Deed of Conditions are clear.

35. The Tribunal accepts that apportioning insurance and lift maintenance costs as provided for in the title deeds will involve additional work for the property factors, but it is an exercise that need only be carried out once and it may be possible to do from plans rather than requiring the area of each flat to be calculated by a surveyor. That exercise will enable them to set the apportionments once and for all. It would not be necessary, given the terms of the Deed of Conditions, to calculate the square footage of common areas in the various blocks.

36. The Tribunal was concerned that the property factors have, since their appointment, and in the full knowledge that they were not following the title deed provisions, continued to charge block insurance to each proprietor on an equal basis and lift insurance and maintenance equally, after excluding the ground floor flats in blocks which do not have lift access to a car deck.

37. The Tribunal accordingly upheld the complaint under Section 5.2 of the 2012 Code.

38. **Section 6.4 of the 2012** Code States “*If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must provide a programme of works.”*

39. The homeowners' complaint was that, despite promising it at their first meeting with the Residents' Committee, a programme of maintenance had not been forthcoming.

40. The Property factors' response was that there was no reference to any evidence to support the claim. They stated that Section 6.4 refers to the core services agreed with homeowners. Neither their Development Schedule, to be read in conjunction with their Written Statement of Services (“WSS”), nor the

WSS itself include an agreement with the homeowners to prepare a planned programme of cyclical maintenance.

41. The Tribunal did not uphold the complaint under Section 6.4 of the 2012 Code, as the core service set out in the WSS does not include a planned programme of cyclical work.

42. **Section 7.1 of the 2012 Code** states "*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."*

43. **Section 7.2 of the 2012 Code** states "*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]."*

44. The Tribunal dealt with the complaints under Sections 7.1 and 7.2 together.

45. The homeowners stated that, whilst the property factors have a clear complaints process outlined on their website, it is not followed by staff. Their initial complaint had been escalated several times before being eventually referred to the new Group Managing Director. In that period of many months, It passed over the desks of multiple staff, several of them senior in the organisation. At no time were the homeowners given a complaint reference or an indication as to who would be responding. It was not remotely reasonable that residents should be expected to wait for months - or in their case more than two years- for resolution to repeated, already escalated, complaints.

46. The property factors' response was that no reference had been made to any evidence to support the claim that they had breached Sections 7.1 or 7.2 of the 2012 Code. They stated that it was clear that numerous attempts had been made by senior members of the organisation to resolve the homeowners' complaints, but these had often adopted a more informal approach, rather than adhering strictly to their formal complaints procedure. They were prepared to offer the homeowners £250 as a gesture of goodwill relating to any failure to comply with that procedure. In relation to Section 7.2 of the 2012 Code, they said that they continued to seek a resolution, so had not yet stated their final position on the complaint or provided details of how the homeowner might apply to the Tribunal. The alleged breach related to the period prior to 16 August 2021 and they did not believe it had reached a point where it would have been appropriate to state a final position prior to 16 August 2021.

47. The homeowners accepted that they had had meetings with Mr Mayall and Mr Reid, but since then there had been virtually no communication until Mr

Bodden wrote to them in January 2022, despite Mr Reid having told them in December 2019 that he would sort matters out in 12 weeks.

48. The Tribunal upheld the complaints under Sections 7.1 of both the 2012 Code and the 2021 Code. The property factors appear to have more or less completely disregarded their formal complaints procedure over a very protracted period of time. It should have been apparent to them long ago that informal attempts at a resolution were not succeeding and they should have followed their formal complaints procedure for the protection of both Parties. It was incomprehensible to the Tribunal that the property factors had been unable to state a final position on the complaints, but, as they had not, the Tribunal did not uphold the complaint under Section 7.2 of the 2012 Code.

49. The Tribunal then considered the homeowners' complaints under the 2021 Code of Conduct.

50. **OSP1 of the 2021 Code** states "You must conduct your business in a way that complies with all relevant legislation." The homeowners did not provide evidence as to specific legislation with which the property factors had failed to comply, so the Tribunal did not uphold the complaint under OSP1.

51. **OSP2 and OSP3 of the 2021 Code** provide "You must be honest, open and transparent and fair in your dealings with homeowners" and "You must provide information in a clear and easily accessible way." The homeowners' complaint was that the property factors' invoicing detail left a lot to be desired in terms of transparency, clarity and fairness. The property factors responded that there was no reference to any evidence to support the claim

52. The Tribunal did not uphold the complaint under OSP2 or OSP3 for the reasons set out in its Decision in relation to Section 3.3 of the 2012 Code (Paragraphs 18-21 of this Decision).

53. **OSP4 and OSP5 of the 2021 Code** state "You must not provide information that is deliberately or negligently misleading or false" and "You must apply your policies consistently and reasonably."

54. The homeowners' complaints under OSP4 and OSP5 related to the issue of block insurance and lift maintenance bills not being apportioned according to the title deeds. They argued that the property factors had been told repeatedly since 2018 that they should follow the provisions of the title deeds in these matters and their failure to do so meant that they had knowingly been charging the homeowners incorrectly. The property factors once again responded that there was no reference to any evidence to support the claim.

55. The Tribunal did not consider separately the complaints under OSP4 or OSP5. The question of billing according to the title deeds was more appropriately dealt with under Sections 5.2 of the 2012 Code (Paragraphs 26-37 of this Decision) and 5.3 of the 2021 Code.

56. **OSP6 of the 2021 Code** requires property factors to "carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective." The homeowners contended at the Hearing that the fact that common areas of the Development and of blocks within the Development had been so seriously neglected, allowing, in the case of the garage steels, paint to decay and flake, and rust to establish itself along with progressive mould, was evidence of a failure to comply with OSP6. The property factors' written response was again that there was no reference to any evidence to support the claim.

57. The Tribunal noted in Paragraph 11 of this Decision that the homeowners had stated that, on a walk-round by three members of the Residents' Committee with Mr Mayall before the factoring contract was awarded, he had pointed out to them two issues, that he described as urgent, that should have been dealt with by the then property factors. One of these was the condition of the garage steels. The Tribunal considered that this was a matter more appropriately dealt with under Sections 6.1, 6.4 and 6.7 of the 2021 Code and did not uphold the complaint under OSP6.

58. **OSP11 of the 2021 Code** says "You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure."

59. The Tribunal did not consider this complaint separately, as it had been dealt with and upheld in relation to Sections 2.5 of the 2012 Code (Paragraphs 15-17 of this Decision).

60. **Section 2.7 of the 2021 Code** repeats almost exactly the wording of Section 2.5 of the 2012 Code and was not considered separately by the Tribunal, as it had upheld the homeowner's complaint under Section 2.5 of the 2012 Code (Paragraphs 15-17 of this Decision).

61. **Section 3.1 of the 2021 Code** includes a provision that "Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment request are included on any financial statements/bills."

62. The homeowners, in their written representations summarised all the queries they had made following receipt of invoices from the property factors in September and December 2021 and March and June 2022. These included questioning an “Owner Reimbursement- Insurance repair in lieu of excess” of £600. The property factors responded that, in, as set out in their “Communal Insurance Cover and Claims Process” document, some circumstances, if the cost of an insurance claim is too near the excess on the policy, they will, for the benefit of the Development apply an “in lieu of excess” policy. In the case in point, the homeowner of the affected property had paid to have reinstatement works carried out, then claimed the money back from the property factors, who in their billing refer to this as an “Owner Reimbursement” and charge it to all homeowners as they would if it were an insurance excess.

63. The Tribunal’s view was that this was a reasonable way of dealing with such matters, as it might reduce the number of insurance claims and the impact they might have on insurance premiums going forward.

64. It was clear that the homeowners had raised a number of queries relating to every account submitted by the property factors, and, at the Hearing, the property factors accepted that, whilst they believed their invoices satisfy the requirements of the Code, they may not give sufficient information. Accordingly, they were introducing a summary, in advance of bills being presented, of any unusual/extraordinary items.

65. The Tribunal decided that the only potentially “improper payment request” related to a disagreement between the homeowners and the property factors as to the apportionment of block insurance premiums, lift insurance premiums and lift maintenance costs. These matters were to be considered under Property Factors Duties and the Tribunal did not uphold the complaint under Section 3.1.

66. **Section 5.3 of the 2021 Code** requires property factors to provide an annual insurance statement to each homeowner with clear information demonstrating the basis on which their share of the insurance premium is calculated, the sum insured, the premium paid, the main elements of insurance cover provided by the policy and any excesses which apply, the name of the company providing insurance cover and any other terms of the policy.

67. The homeowners’ arguments were the same as set out in their complaint under Section 5.2 of the 2012 Code (Paragraphs 26-37 of this Decision). The property factors contended that the complaint was not relevant to Section 5.3, as it focused on the apportionment method rather than the requirement of property factors to provide information. The Tribunal did not agree with the property factors’ view and upheld the complaint, as the Evidence of Insurance document did not demonstrate the basis on which the homeowners’ share of the insurance premium had been calculated.

68. **Sections 6.1, 6.4 and 6.7 of the 2021 Code** relate to carrying our repairs and maintenance. In summary, while it is the homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard (Section 6.1). Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work (Section 6.4). It is good practice for periodic property visits to be undertaken by suitable qualified/trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure that a property is maintained appropriately (Section 6.7)

69. The homeowners' complaints under these Sections related to erosion of the steels in the garage. Mr Mayall had told the Residents' Association representatives on a walk-round in September 2018 that he would obtain quotes for this work. The homeowners accepted that the COVID-19 pandemic restrictions had played a part, but 4 years on, still no quotes had been obtained and nobody appeared to have picked up a worsening situation during the property factors' monthly inspections. The property factors had, in an email to Tricia MacKenzie, one of the residents, of 17 January 2022 stated that they had provided an update on their portal on 30 April 2021 saying that they were ingathering quotations for attending to some of the steel beams and supports where the intumescent paint was flaking, but they had failed to do so. The same applied to an issue of mould and water damage to the garage entrance at the block of which the Property forms part. This had been raised with 6 or 7 of the property factors' Development representatives in the last 4 years and the mould had, during that period, spread widely to walls and flooring, resulting in costly refurbishment, which an early repair would have avoided.

70. The property factors' written response was that they did not believe the homeowners had evidenced a breach of any of Sections 6.1, 6.4 or 6.7 of the Code. At the Hearing, however, Mr Bodden said that he was disappointed to be talking about the issue of the garage steels 4 years after it was highlighted by a senior member of their team. He told the Tribunal that his job was to make sure the property factors learn from previous mistakes and move on.

71. The Tribunal upheld the homeowners' complaint regarding the delays in progressing repairs to the garage steels that had been identified in 2018 as being necessary and in dealing with issues raised with them regarding water damage to the garage entrance to the block of which the Property forms part. The property factors had stated on their portal on 30 April 2021 that they were obtaining quotes for attending to the steel beams, but it appeared that they had not done so, even during the many months since receiving copies of the homeowners' applications to the Tribunal. The Tribunal regarded the delays as a serious failing on the part of the property factors, but could not speculate on the impact they might have on the costs of remedial work.

72. **Section 7.1 of the 2021 Code** refers to complaints handling procedures. Its wording is more expansive than that of its 2012 Code equivalent, but its meaning is the same. The Tribunal upheld the complaint, as it had done in respect of Section 7.1 of the 2012 Code, for the reasons set out in Paragraphs 42-48 of this Decision, as the complaint was ongoing, so was covered by both versions of the Code. In addition, Section 7.1 of the 2021 Code requires property factors to apply their written procedure "consistently and reasonably." The view of the Tribunal was that they had failed to apply it reasonably, given they had not followed it and had not, more than 9 months after the date of the application to the Tribunal, issued their final response.

73. The Tribunal then considered the homeowners' complaint that the property factors have failed to comply with the Property Factor's Duties.

74. The property factors, in their written representations, contended that, in relation to the complaints in the application made under the 2012 Code, all the issues raised in relation to Property Factor's Duties had been addressed in the complaints about alleged breaches of the Code, so could not also be considered as breaches of the Property factor's Duties and that, as regards complaints under the 2021 Code, the Tribunal was unable to consider the matter, as the homeowners' notification to the factor of their intention to apply to the Tribunal, made on 25 March 2022, made no mention of breaches of the Property Factor's Duties.

75. In the event, it was not necessary for the Tribunal to determine those questions, as the issues raised under Property factor's Duties had all been addressed by reference to one or other of the Codes of Conduct, but, for the avoidance of doubt, the Tribunal stated that, it would have upheld the homeowners' complaints that the property factors had failed to comply with Paragraphs 4.7.1, 5.2.2 and 6.1.1 of their Written Statement of Services. Accordingly, they had failed to comply with the Property Factor's duties. Paragraph 4.7.1 states that an acknowledgement of a request for a routine repair will be made within 2 working days of the request and the property factors accepted that there had been issues with communication. Paragraph 4.7.1 also provides that, if the cost of a repair is considered to be in excess of the limit of their delegated authority, they will seek to provide quotations for consideration. The property factors failed, over a period of 4 years, to obtain estimates for repairs to the garage steels. They had told the owners in the Development on 30 April 2021 that they were seeking quotes, but had failed to do so. Paragraph 5.2.2 states that the apportionment of costs is normally determined by the Deed of Conditions, but they had, throughout the period of their appointment, failed to follow the Deed of Conditions' provisions for apportioning the costs of block insurance, lift insurance and lift maintenance. There was ample evidence of failures by the property factors to acknowledge general requests within five working days of receipt, which was the timescale stated in Paragraph 6.1 of the Written Statement of Services. This, too, was acknowledged by the property factors at the Hearing.

76. Having decided that the property factors had failed to comply with Sections 2.5, 5.2 and 7.1 of the 2012 Code and Sections 5.3, 6.1, 6.4, 6.7 and 7.1 of

the 2021 Code", the Tribunal then considered whether to make a Property Factor Enforcement Order. The Tribunal's view was that the homeowners have been very badly let down by the property factors over a protracted period of time. They have failed to deal with a succession of complaints. It is not sufficient for them to offer modest sums "as a gesture of goodwill", as they have done in this case. They need to conduct a thorough review of all their processes, including staff training, communication and accounting to ensure that homeowners receive the standard of service they are entitled to expect from a reputable and competent property factor. The Tribunal noted that Mr Bodden had indicated at the Hearing some steps he was taking steps to improve matters, and did not feel it would be appropriate to make a Property Factor Enforcement Order in that regard. The Tribunal, however, expects the property factors to act on the assurances that Mr Bodden gave at the Hearing.n

77. The Tribunal the considered whether an award of compensation should be made against the property factors. The Tribunal could see clearly from the written representations and oral testimony that the homeowners have had to spend an inordinate amount of time seeking answers from the property factors to their reasonable queries and complaints. Property factors act under delegated authority from homeowners, who should be careful not to micro-manage everything done by the property factors, but in this case, as the homeowners' trust in the property factors had been lost due to clear failings to deal with the issues raised with them, the attention to detail was understandable and reasonable. The Tribunal proposes, therefore, to make a Property Factor Enforcement Order requiring the property factors to pay the homeowners the sum of £1,000 as reasonable compensation for the inconvenience and distress caused by the property factors' failures to comply with the Codes of Conduct.

78. The Tribunal's Decision was unanimous.

Right of Appeal

In terms of Section 46 of the Tribunal (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.

George Clark
Legal Member/Chair

18 January 2023