

# **Housing and Property Chamber**

## **First-tier Tribunal for Scotland**

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### **Decision**

**Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.**

**Chamber Reference: FTS/HPC/PF/22/2514**

**Re: Flat 2/1, 19 Southpark Avenue, Glasgow, G12 8JA (“the Property”)**

### **Parties:**

**Mrs Sheila Kirkwood, 36 Kirkbrae, Edinburgh, EH16 6HH (“the Applicant”)**

**Sandstone Property, 14 Coates Crescent, Edinburgh (“the Applicant’s Representative”)**

**Redpath Bruce, 152 West Regent Street, Glasgow, G2 2RQ (“the Respondent”)**

### **Tribunal Members:**

**Martin McAllister, solicitor, (Legal Member) and Eliabeth Dickson, (Ordinary Member) (“the tribunal”)**

### **Decision**

**In relation to the application before it, the tribunal determined that the Respondent had complied with the Code and the property factor’s duties.**

### **Background**

1. This is an application by the Applicant in respect of the Property in relation to the Respondent’s acting as a property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). The application alleges that the Respondent has not complied with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (the 2021 version) and has failed to carry out the property factor’s duties. The application alleges that the Respondent has failed to comply with sections 1,2,3,4,5,6 and 11 of the Overarching Standards of Practice and Section 2.1,2.4,2.7,6.1,6.4,6.6,6.7 and

6.12 of the Code. The Tribunal accepted the application for determination on 1<sup>st</sup> September 2022. The application was accompanied by a number of documents.

2. A case management discussion was held on 17<sup>th</sup> November 2022.

### **The Hearing**

3. A Hearing was held by video conference on 25<sup>th</sup> January 2023. The Applicant was present and was represented by Ms Forshall of Sandstone Property. The Respondent was represented by Mr McMillan, one of its directors.
4. Neither party had submitted additional documentation prior to the Hearing. Both relied on the communications between them and the documents lodged with the application.

### **Matters not in dispute**

5. The Property is a second floor flat in a tenement of eight flats and has been owned by the Applicant since 2003. The Applicant has never lived in the Property and it is let to students.
6. The Respondent has factored the tenement for a number of years.
7. The Respondent does not arrange a common insurance policy for the tenement.
8. On 21<sup>st</sup> September 2021, the Respondent received a report of water ingress to the Property.
9. On 21<sup>st</sup> September 2021, the Respondent instructed a contractor to investigate and to resolve the issue.
10. A number of contractors were involved in attempting to resolve the issue.
11. The issue of the water ingress was resolved by a contractor on 4<sup>th</sup> May 2022.
12. As a consequence of the water ingress, the Applicant charged a reduced rent to her tenants because they could not enjoy full use of the Property. The monthly rent is £2,500 and the total loss sustained by the Applicant in respect of the reduction of rent was £2,456.25.
13. The Respondent instructed a report from a building surveyor and subsequently recommended to owners of the tenement that steps be taken to progress an exercise to be carried out to assess the possibility of a substantial restoration of the tenement for which there might be grant funding support from the local authority. The Applicant and two other owners approved of such an exercise being undertaken but the Respondent was unable to get the necessary approval from other tenement owners.

## **The Issue**

14. The issue is focused. The Applicant considers that the Respondent took too long to organise the repair to stop the water ingress. The Applicant's position is summed up by Ms Forshall's statement that the Respondent must be at fault because it took thirty eight weeks for an effective repair to be done and that the breaches of the Code and failure to comply with the property factor's duties flow from that.
15. The Respondent's position as articulated by Mr McMillan was that it was unfortunate that the matter took so long to be resolved but that the fact that it did so was not due to any failing of the Respondent. He said that the Respondent acted quickly when it received the report of water ingress and thereafter took necessary steps to arrive at a resolution.

## **Evidence**

16. The Applicant's Representative had provided a document which set out the timeline of events and which the tribunal found useful.
17. Mr McMillan took no issue with the dates contained in the timeline or details such as the identity of contractors and works carried out.
18. On 21<sup>st</sup> September 2021, Sandstone Property ("Sandstone"), the Applicant's agent had reported to the Respondent that there was water ingress to the Property. Mr McMillan said that, on the same day, the Respondent had instructed AGM, a contractor to attend. He said that the contractor had attended and had cleaned gutters and carried out rodding of pipes.
19. On 11<sup>th</sup> October 2021, the Respondent emailed Sandstone and advised that the contractor had advised that it believed the issue to be an internal downpipe. Mr McMillan said that the contractor had hoped that the issue had been resolved by rodding but that the tenants should monitor the situation.
20. On 1<sup>st</sup> November 2021, Sandstone emailed the Respondent and stated that the work done had not stopped the water ingress, that the damp patch had grown and asked for further investigation to be undertaken.
21. The Respondent replied on the same date and indicated that it believed that the issue was coming from an internal downpipe and that it was for the Applicant to take matters forward with her insurers as the Respondent did not arrange property insurance for the tenement owners. Mr McMillan said that he was responding on the basis of the information provided to him by the contractor and that he believed the Homeowner would have insurance cover for paying the cost of tracking the source of water ingress.
22. Sandstone was not satisfied with the response and instructed a contractor to inspect on 3<sup>rd</sup> November 2023. The cost of the inspection by the contractor was £101.52.

23. On 9<sup>th</sup> November 2021, Sandstone advised the Respondent that the contractor instructed by it had reported that the issue was communal.
24. On 10<sup>th</sup> November 2021, the Respondent replied and said that its contractor had advised that it was not a common repair and that it was for the Homeowner to take the matter further. The email stated that, if the problem was due to an internal downpipe then the Respondent would not be authorised to open up an internal wall and that the easiest course of action would be for the owner to submit an insurance claim for damage to the flat which would include trace and access cover for the source of the water ingress. Sandstone responded and asked that the Respondent consider matters again.
25. On 18<sup>th</sup> November 2021, the Respondent advised that it would get another contractor, Hightower, to attend the tenement and assess what required to be done. Mr McMillan said that the Respondent relied on the expertise of its contractors and had accepted what it had been told by AGM. He said that it was decided to instruct another contractor because of the fact that the problem had not been resolved by the work done by the first contractor and because another contractor instructed by Sandstone had given the opinion that the issue of water ingress would be rectified by a common repair being carried out.
26. On 19<sup>th</sup> November 2021 and 25<sup>th</sup> November 2021, Sandstone emailed the Respondent seeking an update. On 25<sup>th</sup> November 2021, the Respondent said that Hightower had completed works at the tenement. Sandstone was advised by the Respondent that the contractor had sealed three gutter joints and had dealt with some roof repairs. The Respondent advised that the damp area within the Property should dry out and that it should be monitored by the tenants.
27. On 14<sup>th</sup> January 2022, Sandstone emailed the Respondent and advised that the walls had not dried out and that the issue had not been resolved.
28. On 19<sup>th</sup> January 2022, the Respondent replied to Sandstone and said that it was arranging for Hightower to go back to the tenement and stated that it had instructed Wiseman Associates ("Wiseman") to carry out a full building survey. Mr McMillan said that Wiseman is a firm of building surveyors. He said that a decision had been taken to have a building survey done to avoid "throwing good money after bad." He explained that, when work to remedy defects becomes protracted, it is a good idea to get a professional view of the whole building if contractors have been unable to resolve the issue.
29. Ms Forshall suggested that the Respondent should have instructed a building surveyor much earlier and specifically when it was clear that the first contractor had been unable to resolve the water ingress. Ms Forshall said that the building survey should have initiated on 3<sup>rd</sup> November 2021 when the contractor instructed by Sandstone had identified that the work was a common repair. Mr McMillan said that would have been an unreasonable approach. He said that such surveys have to be paid for by all homeowners and that it would have been premature to instruct one at the point where it had been concluded that the original contractor had not resolved the water ingress.

30. On 28<sup>th</sup> January 2022, the Respondent advised Sandstone that Hightower had sealed sections of the gutter and found that a downpipe had become disconnected from a gutter which was causing water to cascade down the stonework of the tenement. The email advised that the contractor would require access from a neighbouring tenement and that blocked outlets in the neighbouring tenement could be causing issues for the Property.
31. On 31<sup>st</sup> January 2022, the Respondent advised Sandstone that resealing works had been done and that it is a “process of elimination” to try and determine the cause of the water ingress: the disconnected downpipe or the outlets of the neighbouring tenement.
32. On 14<sup>th</sup> February 2022, following a phone call with Sandstone, the Respondent emailed Sandstone and set out in detail the steps which it had taken as a consequence of the report of water ingress. The email referred to the Respondent having arranged for Hightower to reattend and that it had also asked Thomas McMaster and Son Ltd (“McMaster”) to give an opinion on the condition of the tenement. The email quoted from the McMaster report: *“I was out looking at this property and all elevations have extensive render repairs. It would require a surveyor led plan to fully assess the extent of the works. Honestly could be 40k here it is in a terrible condition.”*
33. The email of 14<sup>th</sup> February 2022 states that the Respondent had asked Wiseman Associates (“Wiseman”) to carry out a visual inspection and produce a Building Report and that the survey and a proposal would be issued to owners “this week.”. The email confirmed the work which Hightower had done and referred to attempts which has been made to liaise with the property factor for the neighbouring tenement.
34. On 14<sup>th</sup> February 2022, Charlene Kyle of the Respondent emailed Sandstone and stated that she had been in contact with three members of staff from Sandstone. She recommended that the homeowner submit an insurance claim on her own policy which would have cover for tracing the source of water ingress. The email referred to the contractor requiring dry weather before accessing the roof.
35. On 15<sup>th</sup> February 2022, the Respondent emailed Sandstone and advised that it had made contact with the property factor for the adjoining tenement and had suggested to it that it arrange for a “full gutter and outlet clean.”
36. The timeline document discloses that an associate director of Sandstone telephoned a director of the Respondent on 16<sup>th</sup> February 2023 and that an email was then sent to the Respondent to confirm the content of the telephone conversation.
37. The email states that the associate director of Sandstone requests that other areas of the tenement are investigated because it is not considered that the work done has been sufficient to resolve the water ingress to the Property. The email requests detail of the works carried out, a copy of the building surveyor’s report and a copy of the planned programme of maintenance for the Property and details of what

action the Respondent was planning to take as a consequence of the advice of Hightower that sections of the stonework of the tenement were delaminating. The email also stated that Sandstone did not consider it appropriate for *“an owner to have to instruct their insurer to undertake trace and access for what are known defects likely causing the ingress to our property.”*

38. On 18<sup>th</sup> February 2022, the Respondent replied after receiving a reminder from Sandstone. In the timeline document, Sandstone had stated that the Respondent had advised that emails can take up to five days to be responded to. Mr McMillan said that this just reflected the position set out in the written statement of services and that the timeline produced by Sandstone showed that, in most instances, the Respondent replied sooner.
39. The email by the Respondent on 18<sup>th</sup> February 2022 confirmed that Hightower had carried out works and provided a copy of a report from the contractor. The Respondent advised Sandstone that it had sent a copy of the report to the factor of the neighbouring tenement and that Hightower still had some work to do. The Respondent advised Sandstone that, according to the contractor, once the works were completed, the water ingress should be resolved until further recommended works were done. The email also provided advice about drying out the Property.
40. On 22<sup>nd</sup> February 2022, following a phone call between Sandstone and the Respondent, an email was sent by Sandstone requesting that a second opinion be obtained in relation to the water ingress and that Wiseman Associates be asked for comment about the source of the water ingress. The Respondent replied to this email on 23<sup>rd</sup> February 2022.
41. On 28<sup>th</sup> February 2022, the Respondent emailed Sandstone with correspondence from Wiseman and a quotation from Gilmour Building Services (“Gilmour”). Mr McMillan explained that it had been decided to get a quotation from Gilmour for works and that this quotation had been passed to Wiseman Associates for comment and a slightly revised specification had been recommended. He said that this had been passed to Gilmour.
42. The Respondent sent to Sandstone a copy of a report received from Wiseman which was additional to the report from them dated 14<sup>th</sup> January 2022. This report is contained within an email to the Respondent from Wiseman and is dated 25<sup>th</sup> February 2022. The report states *inter alia*: *“We note that repairs have been completed to higher level with it found that an outlet was not connected and that the downpipe was blocked and that this would have caused the ingress through defective stonework and pointing. With this problem rectified in the short term and a further more permanent repair imminent this will have alleviated the issues that have been caused internally in flat 2/1.”* The report goes on to refer to the works proposed by Gilmour suggested additional work in relation to an internal junction to ensure there are no defects behind a particular downpipe.
43. Mr McMillan said that the Respondent had to wait for the revised quotation from Gilmour before instruction could be given for the works to commence and on 10<sup>th</sup> March 2022 the Respondent had sent an email to Sandstone indicating that they were trying to get the quotation but had no control over when it would be received.

Mr McMillan said that matters were so advanced with Gilmour that there would be no point in going elsewhere for a quotation. He said that the Respondent had made Gilmour aware of the urgency of the situation. The email of 10<sup>th</sup> March 2022 also stated that, in due course, an update would be provided to owners regarding the recommendations in the Wiseman survey.

44. On 17<sup>th</sup> and 22<sup>nd</sup> March 2022, Sandstone emailed the Respondent seeking an update. On 23<sup>rd</sup> March 2022 the Respondent advised Sandstone that Gilmour had been instructed and that owners would be contacted about the Wiseman survey.
45. On 25<sup>th</sup> March 2022, the Respondent wrote to Sandstone and referred to its earlier letter of 25<sup>th</sup> February 2022 when it had sent all homeowners a copy of the Wiseman report of 14<sup>th</sup> January 2022. The letter of 25<sup>th</sup> March 2022 enclosed a copy of the Gilmour quotation for a total of £1,025 plus V.A.T. and stated *"Whilst in some instances it may be necessary for a Property Factor to seek advance funding from homeowners prior to works of this value proceeding, we would advise that in view of the serious ongoing concerns being reported to our office by the owners of flat 2/1, via their appointed letting agent, and the potential for water ingress occurring and impacting several flats in this location of the block, we can confirm that on this occasion instructions have been passed to Gilmour Building Services to proceed with these works as soon as possible."*
46. The letter of 25<sup>th</sup> March 2022 also included a proposal to instruct Wiseman to prepare a report and tender document at a total cost of £1,600 plus V.A.T. to owners.
47. On 28<sup>th</sup> March and 19<sup>th</sup> April 2022, Sandstone emailed the Respondent seeking information on whether the work had been completed by Gilmour.
48. On 20<sup>th</sup> April 2022, the Respondent advised Sandstone that the contractor had encountered a delay with scaffolding and that Gilmour would commence works on site on 3<sup>rd</sup> May 2022.
49. Mr McMillan advised that the works had been completed on 4<sup>th</sup> May 2022. The Respondent emailed Sandstone on 6<sup>th</sup> May 2022 to confirm that works had been completed by Gilmour.
50. On 25<sup>th</sup> May 2022, Sandstone advised the Respondent that the tenants in the Property consider that the water ingress was worsening and, on the same day, the Respondent replied seeking contact details for access.
51. On 17<sup>th</sup> June 2022, the Respondent emailed Sandstone and advised that Gilmour had inspected and confirmed that there is no further water ingress or moisture readings on the wall.
52. Mrs Kirkwood said that the water ingress had been resolved and that she had undertaken reinstatement works. She said that she had done this with the support of her insurers and that the insurance excess which she had to pay was £350.

53. Mr McMillan said that the report of Wiseman recommended that works required to be done to the tenement. He said that homeowners were written to in this regard. Reference was made to the letter of the Respondent dated 25<sup>th</sup> February 2022. This informed the homeowners of the works being carried out to resolve the water ingress and also enclosed a copy of the report from Wiseman which included recommendations. The letter suggested that a meeting of homeowners be convened to discuss the report and to explore the availability of grant funding for a project to deal with the defects identified by Wiseman.
54. Mr McMillan said that homeowners were subsequently written to on 25<sup>th</sup> March 2022 seeking authority for instructing Wiseman to prepare a report and tender document for what Wiseman described as an *“all- encompassing fabric repair scheme.”* He said that this would be an initial step in the process and that the commitment for each homeowner would be £240. He said that follow up letters had been sent to owners on 11<sup>th</sup> and 19<sup>th</sup> April and 10<sup>th</sup> and 23<sup>rd</sup> May 2022. He was questioned on whether he thought that owners would have received the letters because some may not reside in the tenement and he said that five out of eight owners receive quarterly invoices by email and that all homeowners’ letters were sent or emailed to the addresses used for invoices. He said that there is no record of non payment by homeowners in the tenement so he had to assume that the letters had been received. He said that unfortunately a majority of homeowners had not approved the expenditure. Only three had provided authority to proceed and Mrs Kirkwood said that she was one of those owners. Mr McMillan said that he would have discussions with Mrs Kirkwood to see if there was any way to take the matter forward.
55. Sandstone submitted a letter of complaint to the Respondent on behalf of the Applicant on 19<sup>th</sup> April 2022. The letter detailed sections of the Code which it considered had been breached, that the Respondent had not complied with the property factor’s duties and that it had not complied with the written statement of services. The letter sought an apology, completion of outstanding works, agreement reached with carrying out the works identified by Wiseman and a payment of compensation in respect of loss of rent and costs.
56. An acknowledgement was sent by the Respondent on 22<sup>nd</sup> April 2022 in which it stated that it would endeavour to provide a full response within fourteen days. The Respondent emailed on 3<sup>rd</sup> May 2022 and provided a detailed response on why it rejected the assertion of Sandstone that it had breached the Code or failed to comply with its statement of services and the written statement of services.

### **Alleged Breaches of the Code**

The Applicant’s Representative had submitted a copy of the notification given to the Respondent on the alleged breaches of the Code and Ms Forshaw said that she relied on it as the Applicant’s written representations and she also provided oral evidence. Mr McMillan and Mrs Kirkwood provided oral evidence.

### **Overarching Standards of Practice (OSP)**



57. OSP1: You must conduct your business in a way that complies with all relevant legislation.

The Applicant's position is that the Respondent had a duty as agents of the owners to maintain the building in line with the title deeds and the Tenements (Scotland) Act 2004 and failed to do so. Ms Forshaw said that the reasons for this belief are evidenced by the Respondent's failure to ensure that the water ingress was attended to in a timely manner.

58. Mr McMillan said that the Respondent had a straightforward property management role and assisted the homeowners to maintain the tenement. He said that the limitations of the role are set out in the written statement of services.

59. OSP2: *You must be honest, open, transparent and fair in your dealings with homeowners.*

The position of the Applicant is that the Respondent was "extremely unfair in their dealings with the homeowner's letting agent, and at times appeared obstructive and most unhelpful when the letting agent was trying hard to highlight very serious and serious repair issues."

60. Mr McMillan disagreed with the Applicant's position and said that the email correspondence demonstrates that the Respondent was honest, open, fair and transparent. He said that the Respondent was trying as best it could to resolve the issue of the water ingress and be fair to the homeowners. He said that the delegated limit of the Respondent's authority for repairs was £500 but, notwithstanding that, the Gilmour works were instructed without the Respondent being in receipt of grant funding which effectively meant that the Respondent was bearing the financial risk of not recovering the cost of the works. He said that the Respondent did this because of the urgency of the situation.

61. OSP3: *You must provide information in a clear and easily accessible way.*

The Applicant said that the factor failed to provide information on the progress of repairs.

62. Mr McMillan said that the correspondence supports the Respondent's position that information was given to the Homeowner's agent and was clear. He said that there were periods where the Respondent was not able to give information because it was waiting for this to come from contractors.

63. OSP4: *You must not provide information that is deliberately or negligently misleading or false.*

The Applicant's position is that the Respondent negligently provided false information to Sandstone in relation to the repair which it said was private and therefore the responsibility of the Homeowner.

64. Mr McMillan said that the information which the Respondent gave to Applicant's agent on the matter was that which was provided by the contractor: that resolution

of the water ingress involved an internal downpipe. He said that, in the fullness of time, this proved not to be the case. He said that he did not consider that the Respondent had given such information negligently.

65. OSP5: *You must apply your policies consistently and reasonably.*

The Applicant's position is that the Respondent failed to follow its complaints procedure and failed to apply its own policies to deal effectively to complete repairs and to appoint contractors. The Applicant also considers that the Respondent failed to provide appropriate advice to the Applicant's agent and that, as a consequence, damage was caused to the internal parts of the Property. The representations also state that some communications from the Applicant's agent were not responded to within five working days and that this was in breach of the written statement of services.

66. Mr McMillan did not accept the Applicant's position and said that the correspondence bears out the that Respondent had dealt properly with the repair and that it did appoint contractors appropriately. Mr McMillan referred to his email to Sandstone of 23<sup>rd</sup> June 2022 which constituted a response to its letter to the Respondent dated 19<sup>th</sup> April 2022. He said that the email summarised the Respondent's position. That letter also referred to an earlier response which had been sent to Sandstone by one of Mr McMillan's colleagues on 3<sup>rd</sup> May 2022.

67. OSP6: *You must 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 Applicant's representations state that the Respondent failed to take reasonable care to understand the repair issue in a skilled and timely way and to ensure that its staff was properly trained to "work with their contractor base to effectively diagnose the issue and effect a permanent repair.

68. Mr McMillan said that the Respondent provides a service of management for homeowners and that, in respect of that, they are not surveyors and require to heed the advice of contractors and surveyors. He said that this is what was done in relation to the ingress of water.

69. OSP11: *You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.*

The Applicant's position was that the Respondent had failed to reasonably address the matters raised in a letter of complaint.

70. Mr McMillan said that the Respondent had dealt properly with the complaint raised by the Applicant's Representative. He said that he accepted that there could be differences of opinion in that regard but said that the Respondent had addressed the issues raised and he referred to emails of 3<sup>rd</sup> May and 23<sup>rd</sup> June 2022 which had been referred to previously.

71. 2.1 of the Code: *Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.*

72. The representations of the Applicant state that the Respondent failed to nurture good communication in relation to disputes which she or Sandstone, her agent, had with it. The representations state that the Respondent failed to update homeowners on the progress of repairs and, in its dealings, acted defensively and did not work collaboratively with the Applicant's letting agent to seek a quick resolution to the issue.

73. Mr McMillan said that he relied on the correspondence before the tribunal and the information contained in the timeline document. He said that this demonstrated that the Respondent did communicate effectively with the Applicant's agent.

74. 2.4 of the Code: *Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is good reason not to.*

The Applicant's representations state that the Respondent failed to initially provide information around the source of the water ingress because they had not made sufficient efforts to identify this. The representations also state that the Respondent had failed to provide information to homeowners at regular intervals.

75. Mr McMillan said that the Respondent put in hand resolution of the issue the same day as it had been advised of the water ingress. He said that the Respondent could have had no knowledge of the source of the ingress and relied on the advice of contractors which, at various times, were involved in dealing with the repair.

76. 2.7 of the Code: *A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall, a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.*

77. The Applicant's representations were that the Respondent failed to respond effectively to the initial complaint, and when the initial response was rejected, it failed to respond within the timescales set out in the written statement of services and didn't respond effectively.

78. Mr McMillan said that he was satisfied that the Respondent had dealt properly with issues of complaint. He referred to the timeline document which he said demonstrated that the Respondent had dealt with matters timeously.

79. 6.1 of the Code: *This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is 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.*

The representations of the Applicant state that the Respondent failed to "make prompt repairs" to a good standard resulting in further damage and deterioration to the Property both external and internal.

80. Mr McMillan said that the Respondent had endeavoured to arrange for prompt repairs to be done. He said that action was taken as soon as the matter was reported to the Respondent on 21<sup>st</sup> September 2021. He said that, thereafter, the Respondent took all necessary steps to effect repairs and took advice from contractors who had been engaged. He said that an example of the prompt action that was taken was that Gilmour was instructed to do works without the Respondent having advance funding from the homeowners of the Tenement.

81. 6.4 of the Code: *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, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.*

The representations of the Applicant state that the Respondent failed to pick up the repair at any time during their inspections or failed to carry out inspections. The representations state that the Respondent did not carry out the repair within a reasonable timescale or keep the homeowners properly advised about progress of repairs and that it only did so when the Applicant's agent pressed it to do so.

82. Ms Forshall said that the issue of the downpipe should have been noticed at an inspection on the tenement by the Respondent. Mrs Kirkwood said that dampness on the external would have been noticeable.

83. Mr McMillan said that the Respondent is a property factor and that, in relation to the management of the Tenement does not act as surveyors. He said that the Respondent does not carry out inspections and that, in terms of the written statement of services, it carries out periodic site visits. He said that, in general terms, such a site visit would be annually but that visits were suspended during the Covid restrictions. He said that he knew that there was a site visit in August 2022 and he did not have records to hand with regard to earlier visits.

84. 6.5 of the Code: *If emergency arrangements are part of the service provided to homeowners, a property factor must have procedures in place for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for providing contractors access to properties in order to carry out emergency repairs, wherever possible.*

The representations of the Applicant state that the Respondent did not deal with the water ingress as an emergency repair.

85. Mr McMillan said that the Respondent has systems to deal with reports of repairs and that, within twenty four hours of the matter being reported to it, a contractor had been instructed. He said that the fact that Gilmour was instructed without the Respondent being in possession of advance funding demonstrated that the Respondent dealt with matters on an urgent basis.

86. 6.6 of the Code: *A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.*

87. The Applicant's representations state the Respondent failed to consider alternative options for repair and indicated that the Applicant was responsible for the repair because it was not common. They state that the Respondent failed to identify the source of the water ingress and that the Respondent has failed to provide a range of options on the wider building repairs and drive these forward and "educate the other homeowners."

88. Mr McMillan said that, at all stages of the repair process, the Respondent got input from contractors and also instructed a building surveyor when there was a divergence of opinion with regard to the cause of the water ingress. He said that the Respondent had tried to get homeowners to engage in relation to more substantial work to the tenement and had written to them on multiple occasions. He said that he is happy to continue this and try and get the necessary support for taking the investigations for such work to the next stage.

89. 6.7 of the Code: *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. If this service is agreed with homeowners, a property factor must ensure that people with appropriate professional expertise are involved in the development of the programme of works.*

The Applicant's representations state that the Respondent has failed to arrange visits by suitably qualified staff or put in place a programme of planned maintenance to ensure that the tenement is effectively maintained.

90. Mr McMillan said that, up until the repairs issue which commenced in September 2021 and the subsequent realisation that more extensive work is required for the tenement, there had not been particular repair issues. He said that staff of the Respondent carried out periodic visits in accordance with the written statement of services. He said that there is annual cleaning of the gutters and, if contractors

carrying out this work identify repairs which are needed, then that is fed back to the Respondent and matters are progressed.

91. Mr McMillan said that there is grant funding available from Glasgow City Council and that it is possible for owners in a tenement to submit an application for assistance where major works are proposed. He said that that this can only be progressed if a majority of owners engage with the process. He said the written statement of services does not state that there should be a planned programme of cyclical maintenance and he said that, if owners wanted this, the first step would be for a detailed survey to be done.

92. 6.12 of the Code: *If requested by homeowners, a property factor must continue to liaise with third parties i.e. contractors, within the limits of their 'authority to act' (see section 1.5A or 1.6A) in order to remedy the defects in any inadequate work or service that they have organised on behalf of homeowners. If appropriate to the works concerned, the property factor must advise the property owners if a collateral warranty is available from any third party agent or contractor, which can be instructed by the property factor on behalf of homeowners if they agree to this. A copy of the warranty must be made available if requested by a homeowner.*

The representations of the Applicant state that the Respondent failed to continue to liaise with the “contractor through to full repair and had to be directed to do this by the letting agent.” The representations state that the Respondent failed to remedy the defective workmanship and allowed the water ingress to continue. Ms Forshall said that the letting agent had been constantly chasing the Respondent to have the issue resolved.

93. Mr McMillan said that it was not in the interests of the Respondent to delay in having the repair completed. He said that the Respondent had to rely on contractors for information and also to carry out required works. As an example, he referred to Hightower which had carried out work on 30<sup>th</sup> January 2022 to seal a corner section of gutter and that it had returned on 18<sup>th</sup> February 2022 to replace a section of downpipe. Mr McMillan did not accept that the Respondent only reacted when “chased” by the letting agent and said that he was reassured that the correspondence reflected that it had been pursuing contractors to do the works and then give appropriate reports.

#### Property Factor's Duties

94. The Applicant's position is that the Respondent failed to comply with the terms of the written statement of services. The letter of notification sent to the Respondent and dated 21<sup>st</sup> July 2022 simply set out the written statement of services and stated that there had been non compliance with it. Ms Forshaw said that the Respondent did not comply with the written statement of services and therefore did not comply with the property factor's duties in relation to repairs and dealing with contractors as well as communication with the Applicant or her agents and the complaints procedure. She said that the Respondent did not comply with the title deeds and, in particular, the relevant deed of conditions.

95. Mr McMillan said that the written statement of services had been refreshed in 2021 when the Code was updated. He said that the service provided to the owners of properties in the tenement is what he described as “standard factorial services.” He said that no insurance services were provided and that what the Respondent did for owners was to deal with common repairs and maintenance. Mr McMillan said that it is for homeowners to comply with the terms of their title. He said that he considered that, in all respects, the Respondent had complied with the property factor’s duties.

#### Losses sustained by Applicant

96. Mrs Kirkwood said that there are five students in the Property who each have their own room and who share a living room. She said that the monthly rent was £2,500 and that, because of the water ingress, the tenants did not have use of the living room. She said that, because of this, she rebated rent and that the total loss sustained by her in this regard amounted to £2,456.25. She said that her insurance excess was £350 and that the cost of the contractor instructed by the letting agent was £101.52.

#### Submissions

97. Ms Forshall said that she relied on the documentation which she had submitted and which was before the tribunal. She said that these demonstrate the Respondent’s failure to comply with the Code and the property factor’s duties.

98. Mr McMillan said that the circumstances about the water ingress were unfortunate but that did not mean that the Respondent had failed to comply with the Code or the property factor’s duties. He said he was confident that the correspondence and information before the tribunal supported his view. He said that it is evident that there are longstanding issues with the tenement which would benefit from a significant scheme of repair.

99. Mr McMillan said that he saw no reason why the Respondent should be responsible for any losses sustained by the Applicant. He said that it might have been a different situation if the Respondent had failed to respond to the report of the water ingress and had not attempted to resolve the issue.

#### 100. Findings in Fact

100.1 The Applicant is the owner of the Property which is situated in a tenement of eight flats at 19 Southpark Avenue, Glasgow, G12 8JA.

100.2 For some years, the Respondent has provided a property management service for the tenement.

100.3 On 21<sup>st</sup> September 2021, the Applicant’s agent made a complaint to the Respondent about water ingress to the Property.

100.4 The Respondent instructed three contractors to find the source of the water ingress and to carry out necessary repairs. The second contractor was instructed when the water ingress had not been resolved by the first contractor and the third contractor was instructed when the water ingress had not been resolved by the second contractor.

100.5 The water ingress was resolved on 4<sup>th</sup> May 2022 after works carried out by the third contractor.

100.6 The water ingress caused damage to the internal part of the Property.

100.7 As a consequence of the water ingress, the Applicant sustained loss of £2,456.25.

## 101. Findings in Fact and Law

101.1 In relation to the application submitted by the Applicant, the Respondent has complied with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

101.2 In relation to the application submitted by the Applicant, the Respondent has complied with the property factor's duties in terms of the Property Factors (Scotland) Act 2011.

## Reasons

102. The tribunal considered that the Applicant's overarching complaints in relation to the Code and the compliance with property factor's duties can be considered under three headings: Repairs, Communication and Complaints Handling. If, for example, the tribunal found that the Respondent had not properly dealt with responding to the issue of the water ingress and organising the necessary repairs then certain breaches of the Code and failure to comply with property factor's duties would flow from such failure.

### Repairs

103. It was clear to the members of the tribunal that the water ingress was significant and must have affected the tenant in the Property. The Applicant's Representative had submitted photographs of the affected area. The tenants had reported the matter to Sandstone, the letting agent for the Applicant and, on 21<sup>st</sup> September it reported the matter to the Respondent.

104. The tribunal accepted that the Respondent had responded on the same day and had reported that its nominated contractor would attend within twenty four hours.

105. AGM, the nominated contractor carried out some rodding works but reported that it suspected that the issue was an internal downpipe. The tribunal accepted



that it was reasonable for the Respondent to accept the advice of the contractor in this regard.

106. It is perhaps unfortunate that there seemed to be a communication problem between Sandstone and the Respondent in relation to the possibility of a claim being made on the Applicant's insurance policy. It was a reasonable course of action given the contractor's advice that the issue was an internal pipe which had to be accessed via an internal wall and making a claim could have allowed work to be done to trace the source of the leak. The water ingress was later confirmed to be a common repairs issue which could be dealt with from external parts of the tenement but, at that point, on the information provided to the Respondent, it was fair to assume that it was not.
107. On 9<sup>th</sup> November 2021, Sandstone advised the Respondent that a contractor instructed by it had concluded that it was a common repair. On 10<sup>th</sup> November 2021 the Respondent reiterated what it had stated earlier and Sandstone asked it to reconsider.
108. On 18<sup>th</sup> November 2021, the Respondent advised that it would get another contractor, Hightower, to look at the issue. Works were subsequently carried out by that contractor and the Respondent reasonably assumed that these works would have resolved the issue of water ingress. It was only after a period of eight weeks that it transpired that the works had not been effective when Sandstone advised that the tenants has reported this.
109. The Respondent arranged for Hightower to check on the works which it had done and also instructed a building surveyor to carry out a wider review of the tenement.
110. The tribunal did not agree with the Applicant's position that a building surveyor should have been instructed when Sandstone's contractor had identified the repair to be common. That would have been premature and excessive. Water ingress to tenements is not unusual and property factors are entitled to rely on findings of contractors. In this case, when the Respondent became aware of a divergence of opinion, it instructed yet another contractor to deal with the issue as a common repair. The Respondent took the correct approach in the instruction of a building survey when the matter was becoming protracted and contractors had been unable to resolve the issue.
111. The additional works carried out by Hightower did not resolve the ingress of water and, by 28<sup>th</sup> February, the Respondent provided Sandstone with the Wiseman report and the original Gilmour quotation. That quotation required to be amended in the light of advice from Wiseman and there was delay in Gilmour providing it. Gilmour was instructed on 23<sup>rd</sup> March and this was done without the Respondent receiving advance funding from owners. The tribunal considered that this demonstrated the urgency that the Respondent was applying to the issue. In instructing Gilmour and liaising with Wiseman on the scope of the works, the Respondent acted appropriately.

112. Because of a scaffolding issue which was beyond the control of the Respondent, the works were not completed until 4<sup>th</sup> May 2022. The tenants in the Property reported that the water ingress had not been resolved but this must have been during a period of drying out and a subsequent inspection by Gilmour had confirmed that the water ingress had stopped. Reinstatement of internal parts of the Property had been undertaken by the Applicant.
113. As previously stated, water ingress in tenement properties is not unknown and what is also not unknown is that the source of such ingress can be difficult to identify and it is often a process of elimination. In this particular tenement the matter was made more difficult because of its condition and also because resolution also involved a neighbouring tenement.
114. Upon the report of water ingress, the Respondent instructed a contractor who did some work but advised that the issue was due to a matter which was not a common repair. Whilst that ultimately proved to be inaccurate, the Respondent acted reasonably in accepting that advice. When a contractor instructed by Sandstone came to a different conclusion, the Respondent instructed another contractor. Whilst it could be argued that it delayed in doing so, it was only for around a week. The tribunal did not consider that to be material. When the issue was still not resolved, the Respondent instructed a building survey and another contractor.
115. The tribunal accepted that the Respondent acted reasonably in relation to site visits to the tenement. The written statement of services allowed for periodic visits and Mr McMillan described these as annual. The tribunal could make no finding, on the basis of the evidence before it, if the dampness on the external wall caused by the disconnected downpipe should have been spotted by the Respondent.
116. There was no evidence before the tribunal that any work carried out by contractors had been defective or inadequate. Failure to resolve water ingress in a tenement property would not, in itself, been evidence of defective or inadequate work.
117. The Respondent also acted appropriately in promoting extensive work to the tenement and had tried to get the owners of properties in the tenement to support this.
118. The actions of the Respondent in relation to the repairs were reasonable and the tribunal, on the balance of probability, did not find that the Respondent had breached the Code or had failed to carry out the property factor's duties in relation to repairs.
119. In relation to the application, the tribunal did not find that the Respondent had failed to carry out the property factor's duties in relation to the repairs or failed to comply with Overarching Standards of Practice 5 and 6 and the following paragraphs of the Code: 6.1, 6.4, 6.5, 6.6, 6.7 and 6.12.

## Communication

120. The tribunal had the benefit of sight of the emails between the Respondent and Sandstone from the report of the water ingress to resolution of the issue.
121. Sandstone indicated that the statement in emails that the Respondent can take up to five days to respond to emails was indicative of an issue with communication. The tribunal accepted that this reflected that this target was within the written statement of services. The majority of emails seen by the tribunal showed that responses were well within that period and sometimes were on the same day. Some emails did take longer but that was because the Respondent was waiting for information. This was sometimes from a contractor.
122. The tribunal accepted that Sandstone, in all its communications, was trying to do the best not only for the Applicant but also for her tenants who presumably would have been pressing for information and ultimate resolution. It appreciated that it must have been frustrating.
123. In considering the communications which the Respondent had sent to Sandstone, the tribunal found that they had been fair and open. The communications show that the Respondent acknowledged the issues raised by Sandstone and tried to find a resolution. There was no discourtesy and the tribunal did not find that, in any way, the Respondent acted in a defensive manner or that any information which it provided was misleading or was negligently provided.
124. The tribunal found that the Respondent had provided information on progress of repairs and did so in a reasonable time after it had been available. It did not find that the Respondent failed to give information on the source of the leak. It provided the information which at various times it had from contractors. Sometimes such information proved to be incorrect but the Respondent provided what it had been given from various contractors.
125. The Applicant's agent submitted a complaint and considered that the Respondent failed to respond effectively to the complaint. The Respondent did respond fully to the complaint. It did not accept the grounds for complaint but that did not mean that it did not respond effectively although clearly the Applicant's agent did not agree with the response.
126. In relation to the application, the tribunal did not find that the Respondent had failed to carry out the property factor's duties in relation to the communications with the Applicant or her agent or had failed to comply with Overarching Standards of Practice 2,3,4 and 11 and the following paragraphs of the Code: 2.1, 2.4 and 2.7.

## Complaints

127. Section 7 of the Code deals with complaints resolution. The application made no specific reference to breaches of paragraphs of this section of the Code although in general terms in relation to communication, reference is made to complaints.

128. The Applicant's position is that the Respondent failed to address matters raised in a letter of complaint. The letter of complaint dated 18<sup>th</sup> April 2022 was extremely detailed and a full response was provided on 3<sup>rd</sup> May. Both letters were detailed but they dealt with a basic issue: there had been water ingress which had taken time to resolve. The Applicant's position is that such delay was down to the failures of the Respondent and this was not accepted by the Respondent. A further response had been provided by the Respondent on 23<sup>rd</sup> June 2022.
129. In relation to the application, the tribunal did not find that the Respondent had failed to carry out the property factor's duties in relation to the complaints resolution or had failed to comply with Overarching Standards of Practice 11 and paragraph 2.7 of the Code.
130. The Application also stated that the Respondent had failed to comply with Overarching Standard of Practice 1 because it had failed to maintain the Property in line with its title deeds and the Tenement (Scotland) Act 2004. The Applicant's position was that this failure was evidenced by the Respondent's failure to ensure that the water ingress was dealt with in a timely manner.
131. The tribunal accepted that there was no evidence that the Respondent had failed to deal with the resolution of the water ingress in a timely manner. The Applicant had made no submissions on why it should be considered that the Respondent had failed to comply with the title deeds of the Property and the said statute and why it had an obligation to comply rather than assist with maintenance of the Property in terms of the written statement of services.
132. The tribunal determined that, in relation to the Application, the Respondent had complied with Overarching Standard of Practice 11 and paragraph 2.7 of the Code.

## **Decision**

**In relation to the application before it, the tribunal determined that the Respondent had complied with the Code and the property factor's duties.**

## **Appeals**

**A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

Martin J. McAllister

Legal Member  
16<sup>th</sup> February 2023