

# **Housing and Property Chamber**

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

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**First-tier tribunal for Scotland (Housing and Property Chamber)**

**PROPOSED PROPERTY FACTOR ENFORCEMENT ORDER: Property Factors (Scotland) Act 2011, section 19(2)**

Chamber Ref: FTS/HPC/PF/17/0090

**The Property:**

**Shepherds Court, Kinneskie Road, Banchory, AB31 5TG**

**The Parties:-**

**Maureen Loy, 5 Shepherds Court, Kinneskie Road, Banchory, AB31 5TG**

**("the homeowner")**

**and**

**Strutt & Parker LLP, St Nicholas House, 68 Station Road, Banchory AB31 5YJ**

**("the factors")**

**Tribunal Members:**

**Adrian Stalker (Chairman) and Helen Barclay (Ordinary Member)**

**This document should be read in conjunction with the tribunal's decision of 2 June 2017**

The tribunal proposes to make a Property Factor Enforcement Order in the following terms:

**Considering that the factors have failed, in the years 2013, 2014, 2015 and 2016, to provide proprietors at Shepherds Court, Kinneskie Road, Banchory, with:**

**(a) a detailed financial breakdown of charges they have made and a description of the activities and works carried out which they have charged for, under paragraph 3.3 of the Code of Conduct; and**

**(b) a full statement of account of their intromissions validly vouched, under clause (TWENTY FIFTH) of the Deed of Conditions applicable to Shepherds Court;**

**the factors shall make a deduction of £200 from each of their next two fees to the Shepherds Court Residents Association**

**(which fees are invoiced six monthly) in respect of Professional Services, being "Management Consultancy services", "Factoring/Accountancy" or similar.**

Section 19(2) and (3) of the 2011 Act provides as follows:

- (2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—
  - (a) give notice of the proposal to the property factor, and
  - (b) allow the parties an opportunity to make representations to it.
- (3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order.

The intimation of the tribunal's decision and this proposed Property Factor Enforcement Order to the parties should be taken as notice for the purposes of section 19(2)(a), and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the Tribunal Office by no later than 14 days after the date that the decision and this proposed Property Factor Enforcement Order are intimated to them. If no representations are received within that time, then it is likely that the tribunal will proceed to make a Property Factor Enforcement Order without seeking further representations from the parties.

**Failure to comply with a Property Factor Enforcement Order may have serious consequences and may constitute an offence.**

Signed A. Stalker

Date 02/06/17

Chairperson

# **Housing and Property Chamber**

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

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**First-tier tribunal for Scotland (Housing and Property Chamber)**

**STATEMENT OF DECISION: Property Factors (Scotland) Act 2011, section 19(1)(a).**

**Chamber Ref: FTS/HPC/PF/17/0090**

**The Property:**

**Shepherds Court, Kinneskie Road, Banchory, AB31 5TG**

**The Parties:-**

**Maureen Loy, 5 Shepherds Court, Kinneskie Road, Banchory, AB31 5TG**

**("the homeowner")**

**and**

**Strutt & Parker LLP, St Nicholas House, 68 Station Road, Banchory AB31 5YJ**

**("the factors")**

**Tribunal Members:**

**Adrian Stalker (Chairman) and Helen Barclay (Ordinary Member)**

**Decision:**

**The First-tier tribunal for Scotland (Housing and Property Chamber) ('the tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the factors had complied with the Code of Conduct for Property Factors, and with their duties as property factors, determined that the factors had failed to comply with the Code, and their duties. It proposes to make a property factor enforcement order, in the following terms:**

**Considering that the factors have failed, in the years 2013, 2014, 2015 and 2016, to provide proprietors at Shepherds Court, Kinneskie Road, Banchory, with:**

**(a) a detailed financial breakdown of charges they have made and a description of the activities and works carried out which they have charged for, under paragraph 3.3 of the Code of Conduct; and**

**(b) a full statement of account of their intromissions validly vouched, under clause (TWENTY FIFTH) of the Deed of Conditions applicable to Shepherds Court;**

**the factors shall make a deduction of £200 from each of their next two fees to the Shepherds Court Residents Association (which fees are invoiced six monthly) in respect of Professional Services, being “Management Consultancy services”, “Factoring/Accountancy” or similar.**

### Background

1. By an application to the Housing and Property Chamber received on 8 March 2017, the homeowner sought a determination of whether the factors had failed: (a) under section 14(5) of the Property Factors (Scotland) Act 2011 (“the Act”), to comply with the Code of Conduct for Property Factors (“the Code”); and (b) the property factor duties, as defined in section 17(5) of the Act, in respect of their factoring of Shepherds Court, Kinneskie Road, Banchory. On 28 March 2017, a Convener having delegated powers under section 18A of the Act made a decision, under section 18(1)(a), to refer the application to a First-tier tribunal.
2. The application contended that the factors had failed to comply with section 3.3 of the Code (set out below). It also stated that the factors had failed to comply with their duties, by: not issuing accounts annually, and inaccurate management reporting, in respect of the accounts for the year 2015/2016, and for the period from 1 May to 30 September 2016.
3. These complaints were further specified in forms completed by the homeowner on 17 March 2017, and sent to the factors. The first form indicates that the complaint, as regards section 3.3 of the Code is: “Failure to provide homeowners in writing at least once a year a detailed financial breakdown of charges made and description of the activities and works carried out which are charged for”. For the purposes of this decision, this is referred to as “the first complaint”.
4. The second form of 17 March 2017 identified three respects in which the factors were said to have failed to comply with property factor duties. The first is: “Not issuing annual accounts annually” For the purposes of this decision, this is referred to as “the second complaint”.
5. The next complaint is described thus (in the second form of 17 March 2017):

“Inaccurate Management Reporting

Inaccurate annual account 2015-2016:

- 1) Professional services Strutt and Parker dates wrong;
- 2) Proprietors’ Contributions not divided equally should be one third retail unit and one sixth for flats, Deed of Conditions (Page 15);
- 4) [*sic*] Charges for Esslemont Photos £65 2-7-15.”

For the purposes of this decision, this is referred to as “the third complaint”.

6. The next complaint is described thus (in the second form of 17 March 2017):

“Inaccurate annual account 1st May 2016 to 30 September 2016:

- 1) Invoices not paid due to “Low Funds”

2) Professional Services Strutt and Parker copy with date and tax point raised same as in annual account 2015-2016.”

For the purposes of this decision, this is referred to as “the fourth complaint”.

7. The homeowner’s application also referred to a “Catalogue of Events”, attached to the application. This comprises a statement headed “Catalogue of Events Which Have Happened to Lead to My Complaints.” That, in turn, refers to a bundle of documents grouped under letters “A” to “H”, which was included in the papers attached to the application. In particular, the papers grouped under letter “G” in the bundle attached to the application provided further detail and specification of the complaints made in the application form and the forms of 17 March.
8. The documents grouped under the letter “D” comprised an Annual Report sent by the factors to residents of Shepherds Court, including the homeowner. This comprises: (a) a letter dated 4 October 2016; (b) an “Annual Management Report” running to 3 pages, for the period from 1 May 2015 to 30 April 2016; (c) a “Written Statement of Services”; (d) a single page which describes “Strutt & Parker’s Complaints Handling Procedure”; (e) a single page account showing the factors’ income and expenditure in respect of Shepherds Court. Documents (b) (“the Annual Management Report”) and (e) (“the single page account”) are of particular interest, as regards the homeowner’s complaint.
9. On 3 May, the tribunal issued a direction which sought to focus the issues raised by the homeowner, and directed the factors to provide a written response. On 4 May the factors submitted written representations. By email to the tribunal clerk dated 12 May, the factors indicated that, in response to the direction, they had nothing to add to their representations of 4 May.
10. A hearing took place in respect of the application on 19 May, at the Credo Centre, 14-20 John Street, Aberdeen. The homeowner, Mrs Loy, was present. Mr David Smart, one of the factors’ partners, represented them. Mr Smart has recently had a substantial involvement in the factoring of Shepherds Court. He has met with the homeowner to discuss her complaints. At the hearing, the tribunal heard evidence and submissions from Mrs Loy and Mr Smart, on the four complaints described above. The reasons for the tribunal’s decision are as follows.

*The first complaint: failure to comply with paragraph 3.3 of the Code*

11. Section 14(1) of the 2011 Act states that the Code of Conduct is to set out “minimum standards of practice” for registered property factors. Under section 14(5), the factor must “ensure compliance” with it.
12. Part 3 of the current Code of Conduct is headed: “Financial Obligations”. The initial paragraphs of this part include the statements:

“While transparency is important in the full range of your services, it is especially important for building trust in financial matters.

Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved”.

Paragraph 3.3 of the Code is as follows:

“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. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.”

13. At the tribunal hearing, it was a matter of agreement that, as regards the period from 1 May 2015 to 30 April 2016, the factors sought to meet the Financial Obligations in part 3 of the Code by sending the letter of 4 October 2016 and attached documents, described at paragraph 8 of this decision. Mr Smart maintained that the obligation under paragraph 3.3 was met by the single page account, supplemented by information in the Annual Management Report. He also pointed out that proprietors were advised that they could seek further information, if they wished to do so. The homeowner maintained that the information contained in these documents was insufficient to meet the paragraph 3.3 obligation.
14. The single page account, the following information is given as to “Actual” expenditure (as opposed to figures given for budgeted expenditure):

**Expenditure:**

Insurance	£2,901.00 insurance reduction negotiated
Factoring/Accountancy	£1,441.13 detail in report
Gardening/Cleaning	£2,367.00 gardening contract reviewed and cost reduced
Property Repairs and Maintenance	£3,422.00 inc. intercom repairs (Block 2)
Bank Costs	-
Misc.	-
	<b>£10,131.13</b>

15. Clearly, these are total figures for expenditure under certain headings. There is not a “a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for”. It is thus apparent that the single page account is not adequate, in itself, to comply with the obligation under paragraph 3.3.
16. However, as Mr Smart pointed out to the tribunal, additional detail is provided in the Annual Management Report. This gives certain information under the heading “Buildings Insurance”, which describes the current cover, and confirms that the

single premium for Shepherds Court for 2016/7 is £2,900.55, which is divided between the various proprietors. From this information, one is left to infer that the premium for 2015/6 was £2,901.00 (the figure given in the single page account), though that is not expressly stated in the Annual Management Report.

17. As regards the entry "Factoring/Accountancy - £1,441.13 – detail in report", the following statement appears in the Annual Management Report, under the heading: "Role of the Factor".

The Deed of Conditions stipulates that remuneration, along with all expenses and charges incurred by the Factor in carrying out his duties shall be payable by the proprietors. All work undertaken by Strutt & Parker on behalf of the proprietors is recorded in multiples of 15 minutes and the accumulated time is charged to the Association of Residents of Shepherds Court Account at six-monthly intervals. *Additional charges are also made by Strutt & Parker for providing book-keeping and accountancy services to the Association.* A total of 18.75 hours have charged to the Association of Residents of Shepherds Court during period 1<sup>st</sup> May 2015 and 30<sup>th</sup> April 2016 at the rate of £61 per hour. [Italics added]

18. As regards the entries in the single page account for "Gardening/Cleaning" and "Property Repairs and Maintenance", the following information is given in the Annual Management Report:

#### **Cleaning & Window Cleaning**

Gold Star Cleaning currently employed to attend at Shepherds Court on a fortnightly basis to clean the common stairwells and hallways and cleaning the windows of the communal stairwells. Costs for cleaning for the year to 30th April amounted to £1,747. A budget sum of £1,740 has been allowed for the year to 30 April 2017.

#### **Gardening Services**

Gardening and grounds maintenance services have been re-tendered during the last 12 months and this has resulted in a reduction in budgeted expenditure. In the 12 months to 30th April 2017 the budgeted gardening costs are projected as £780 and are being provided by Classic Abode.

#### **Repairs**

A total of £3,422 was paid to various tradesmen who undertook repairs on behalf of the Residents Association in the year to 30th April 2016. £1,983 was spent on roof maintenance, routine gutter clearing and gutter maintenance whilst £1,189 was spent on intercom repairs for various blocks with £823 recovered from Block 1 residents relating to the replacement of the Block 1 intercom. A budget figure of £3,000 has been allowed for the year to 30th April 2017.

19. The tribunal considered that, even allowing for the details contained in the Annual Management Report, the information provided to the proprietors, including the homeowner, did not amount to “a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for”.
20. In particular, as regards the entry “Factoring/Accountancy - £1,441.13 – detail in report”, the proprietors are not informed how the factors arrive at the total figure. It is said in the relevant passage from the Annual Management Report that: “A total of 18.75 hours have charged...at the rate of £61 per hour.”  $18.75 \times 61 = £1,143.75$ . That is £297.38 less than the figure stated in the single page account for factoring and accountancy services. There appears to be no explanation for that difference in the documents provided to proprietors on 4 October 2016. There is some further information regarding these figures in invoices 16367 and 15885 (see the discussion of the third complaint below). These were obtained by the homeowner from the factors. The invoices show that the difference of £297.38 is due the addition of VAT, as well as “Postage, Stationary and Telephone @ 5%”. However, it is notable that these invoices (to the Shepherds Court Residents Association) are for “Management Consultancy services”. There is no reference to additional book-keeping and accountancy services, to which reference is made in the Annual Management Report. Thus, even if one obtains the invoices, the nature and cost of the additional book-keeping and accountancy services is not clear.
21. As regards the entry “Gardening/Cleaning £2,367.00 gardening contract reviewed and cost reduced”, the total figure is not broken down, in the single page account, or the Annual Management Report. There is no description of the charges for Gardening and grounds maintenance services, or the activities being carried out.
22. As regards the entry: “Property Repairs and Maintenance £3,422.00 inc. intercom repairs (Block 2)”, the information in the relevant entry in the Annual Management Report is difficult to interpret. The breakdown into 3 figures is not “detailed”, and those figures (£1,983, £1,189 and £823) do not total £3,422. The figure of £823 relates to block 1 residents, whereas the figure of £3,422 in the single page account relates to block 2.
23. The tribunal finds it surprising that the level of information provided by the single page account is so limited (even when supplemented by the Annual Management Report), if the factors are charging the proprietors for “book-keeping and accountancy services”.
24. The tribunal also observes that, within paragraph 3.3 of the Code, there is a clear distinction between: (1) information which *must* be provided to homeowners at least once a year, being “a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for”; and (2) “supporting documentation and invoices or other appropriate documentation”, which *must* be provided, for inspection or copying, “in response to reasonable requests”. The key point here is that the “detailed financial breakdown” must be provided to proprietors at least once a year, whether they ask for it or not. In essence, the factors position confused (1) and (2), by treating the “detailed



financial breakdown” as something that the proprietors of Shepherds Court could request.

25. In the factors’ written representations, and at the hearing, it was accepted by Mr Smart that, following the introduction of the Code of Conduct in October 2012, the factors had sent accounts to proprietors in 2013, 2015, and in October 2016, but not in 2014. Mr Smart advised the tribunal that, as regards the accounts provided to proprietors in 2013 and 2015, the information given was even less than that contained in the 2016 accounts. In those years, proprietors were provided with an equivalent of the single page account, some detail regarding the budget for next year, and a letter advising proprietors where they could obtain further information from the factors, if they wished to do so. In other words, there was no equivalent, in 2013 and 2015, of the Annual Management Report.
26. It follows that the factors have failed to comply with paragraph 3.3 in respect of any of the years since the Code of Conduct came into force, in October 2012.

The second complaint: not issuing annual accounts annually

27. As regards the second, third and fourth complaints, it is necessary firstly to consider the nature of the duty on which the homeowner relies. The Shepherd’s Court development is subject to a Deed of Conditions by Banchory Contractors Ltd, dating from 1987. Clause (TWENTY FIFTH) contains the following stipulation

DECLARING THAT the Factor shall, if requested, within one month from First December in each year thereafter make available, to a meeting of proprietors...*a full statement of account of his intromissions validly vouched* and failing such a request shall make such statement and vouchers available in his place of business to any proprietor...” [italics added]

28. It appears that over time, the factors have developed a practice of sending out accounts, rather than presenting them to a meeting of proprietors. Mr Smart explained that proprietors at Shepherds Court have no interest in arranging such meetings. Also, over time the date of supplying the accounts has changed from December to October. That notwithstanding, the tribunal considered that the fundamental obligation in clause (TWENTY FIFTH) still applies. That is to produce, annually, accounts that provide proprietors with a “*full statement of account of [the factor’s] intromissions validly vouched*”.
29. Having heard submissions from Mrs Loy and Mr Smart, the tribunal found the second complaint to be established. This was for substantially the same reasons that applied to the first complaint. The 2016 single page account provides total figures under certain headings, supplemented by a summary in relation to each of those headings, in the Annual Management Report. That is not, in the tribunal’s view, a “*full statement of account of intromissions validly vouched*”. The same applies to the accounting information supplied in 2013 and 2015. No statement was provided at all, in 2014.

The third complaint: Inaccurate Management Reporting - annual account 2015-2016

30. This complaint breaks down to three points, which are listed in paragraph 5 of this decision.
31. *3/1) Professional services Strutt and Parker dates wrong*. In the papers grouped under letter "G" in the bundle attached to the homeowner's application, there is an invoice 16367. This is an invoice by the factors to the Shepherds Court Residents Association for "Management Consultancy services for the period 1st October 2015 to 31<sup>st</sup> March 2016". This invoice is for a total of £614.88. There is also an earlier invoice, 15885, for period 1<sup>st</sup> April to 30 September 2015, for £826.25. These two figures add up to £1,441.13, being the amount given for "Factoring/Accountancy" in the single figure account attached to the letter of 4 October 2016.
32. Mrs Loy has obtained two copies of invoice 16367 from the factors. The only differences between the copies are that they have different dates, and one has been stamped "Copy". Mr Smart explained that the date difference was created by the factors' software system, when a fresh copy was generated, at a later date. Mrs Loy was concerned that there was an issue of "double accounting", and that the later of the copies might be an additional invoice which was to be added to the accounts for 2016/7. Mr Smart confirmed that this was not the case. The tribunal was satisfied with Mr Smart's explanation of this issue. These are two copies of the same invoice, which relates to financial year 2015/6. There is no issue of double accounting.
33. *3/2) Proprietors' Contributions not divided equally should be one third retail unit and one sixth for flats, Deed of Conditions (Page 15)*. This point arises from a statement made at the beginning of the "Proprietors' contributions" section of the Annual Management Report:
- Each year, Strutt & Parker estimate the cost of maintaining and repairing the common property at Shepherds Court. Once a total estimated cost is arrived at, the sum is divided equally between the 19 proprietors to give an Annual Management Charge.
34. As Ms Loy pointed out, and Mr Smart accepted, that is not an accurate statement of the division of costs stated in the Deed of Conditions. That division depends on the part of the building that is subject to repair and maintenance. Mr Smart confirmed in the accounts sent to proprietors for October 2017, this statement would be revised, so as to more accurately reflect the position.
35. The tribunal did not understand Mrs Loy to identify any particular intromission on the part of the factor, in which apportionment between the proprietors was said to be wrong. Therefore, the tribunal was not satisfied that this could be regarded as an instance in which the factors had failed to provide a: "*full statement of account [the factor's] intromissions validly vouched*". Therefore, the complaint is not made out. However, the tribunal trusts that the concern raised by Mrs Loy, as to the accuracy of the relevant section of the Annual Management Report, will be addressed in the next version of that report.

36. 3/4) *Charges for Esslemont Photos £65 2-7-15*. At the hearing, Mrs Loy indicated that she did not wish to pursue this aspect of her complaint, as she was satisfied with the explanation provided by the factors in their written representations.

37. For the foregoing reasons the tribunal declines to uphold the third complaint.

*The fourth complaint: Inaccurate Management Reporting - 1 May 2016 to 30 September 2016*

38. This arises from material that Mrs Loy has been given, by the factors, in advance of the accounts for 2016/17 being issued by them in October 2017. At the hearing before the tribunal, Mrs Loy accepted that this complaint was premature. Given the way in which the accounts are now being provided (i.e. every October), the factors' obligation to provide accounts which meet paragraph 3.3 of the Code of Conduct, and are a "*full statement of account of [their] intromissions validly vouched*", does not arise until October 2017. There can be no inaccuracies in the accounts, because they have not yet been prepared.

39. For this reason, the tribunal declines to uphold the fourth complaint.

*Section 17(3)(b) of the 2011 Act: refusal to resolve complaint*

40. It is appropriate that this decision also addresses an argument made by Mr Smart in the factors' written representations, which he reiterated at the hearing. He maintained that the application should not have been considered by the tribunal, because the factors had not, for the purposes of section 17(3)(b) of the Act, "...refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern." In particular, he maintained that the factors had had meetings with Mrs Loy, at which they had tried to address her concerns.

41. The tribunal observes that Mrs Loy's first and second complaints are to the effect that the factors have failed to provide accounts, annually, which meet the requirements of part 3 of the Code of Conduct, and clause (TWENTY FIFTH) of the Deed of Conditions. The factors' position, both in their submissions, and at the tribunal, was that (save for 2014), they had provided annual accounts to the proprietors that fulfilled these requirements. It is thus evident that the concern expressed by the homeowner is one which, prior to the application, and the hearing, had not been resolved.

42. The tribunal also formed the impression, from the factors' written representations, and Mr Smart's remarks at the hearing, that the factors had not given serious consideration to Mrs Loy's complaints about these matters. In particular, it was suggested that: a) she had made a number of complaints over the years; b) none of the other proprietors complained; c) she could ask for further information if she needed it; and d) they had discussed her complaints with her.

43. Against that background, the tribunal considered that the factors by their actions had, at least implicitly, refused to resolve Mrs Loy's first and second complaints. Further and in any event, there was a genuine issue between the parties, on

which the tribunal had to make to a decision. Therefore, the tribunal does not accept the argument made by Mr Smart in relation to section 17(3)(b).

Disposal under section 19, appeal, etc

44. The tribunal decided that, given the factors' failure to comply with the paragraph 3.3 of the Code of Conduct, and clause (TWENTY-FIFTH) of the Deed of Conditions in respect of accounting to proprietors at Shepherds Court, notwithstanding the fact that their fees appear to include "book-keeping and accountancy services", the factors should make a deduction from future fees to the Residents Association totalling £400, which equates to £100 for each of the years 2013 to 2016. The factors' fee is invoiced six-monthly. The tribunal's proposed order envisages a deduction of £200 being made from each of the next two fees.
45. The tribunal has not made any specific order to the effect that the factors must comply with paragraph 3.3 of the Code of Conduct, as they are obliged to do so, under the 2011 Act, in any event.
46. The tribunal's decision was unanimous.
47. The tribunal has accordingly issued a separate Proposed Property Factor Enforcement Order, to which reference is made.
48. **In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**
49. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

A. Stalker

Signed

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Date

02/06/17.....

Chairperson