

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011  
Section 19(1)(a)**

**Chamber Ref: FTS/HPC/PF/21/2375**

**103 Linksfield Court, Aberdeen, AB24 1GU ("the Property")**

**Parties:**

**Federico Garcia Lopez de la Torre, 103 Linksfield Court, Aberdeen, AB24 1GU  
("the Homeowner")**

**Aberdeen City Council, Marischal College, Business Hub 6, First Floor South,  
Aberdeen, AB10 1 AB ("the Property Factor")**

**Tribunal Members:**

**Josephine Bonnar (Legal Member)  
Elizabeth Dickson (Ordinary Member)**

### **DECISION**

The Property Factor has failed to comply with Sections 1, 2.1, 2.3 and 2.5 of the 2012 Code and OSP 4 of the 2021 Code. The Property Factor has also failed to carry out its property factor duties.

The decision is unanimous

### **Introduction**

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

The Property Factor became a Registered Property Factor on 12 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

## Background

1. The Homeowner lodged an application with the Tribunal in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application comprises documents received by the Tribunal between 1 and 27 October 2021. The application states that the Property Factor had breached Sections 1.1a, A, B, C and D, 2.1, 2.3, 2.5, 3.3, 6.1, 6.9 and 7.1 of the Property Factors Code of Conduct (“the Code”). The application also stated that the Property Factor had failed to carry out its property factor duties. Documents were lodged in support of the application including a copy of the written statement of services (“WSS”) and letters to the Property Factor dated 28 May and 29 September 2021, notifying them of the complaints.
2. On 3 November 2021, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. Parties were notified that a case management discussion (“CMD”) would take place on 12 January 2022. Both parties lodged written submissions and the Homeowner lodged a large bundle of documents in advance of the CMD. He also lodged two requests to amend the application dated 2 January 2022 and received by the Tribunal on 5 January 2022, after the New Year holiday break.
3. The CMD took place by telephone conference call on 12 January 2022. The Homeowner participated. The Property Factor was represented by Mr Donald, Solicitor, and Mr Stoddart, Property Factoring Officer. During the CMD, the Homeowner was allowed to amend his application to reflect the fact that complaints number 4 to 8 related to the 2021 Code, and not the 2012 Code. This was not opposed by the Property Factor.
4. The Tribunal was advised the property is one of 111 flats in a multi storey block of flats. Most are still within the Respondent’s ownership. (Mr Stoddart advised that only 6 have been sold). The property is located on the 17<sup>th</sup> floor. Each floor has 2 drying rooms, one for every group of three flats. Each occupier has a key for their drying room. Mr Garcia purchased the property in November 2014. From the outset he was unaware that there was a Property Factor (and did not know what a property factor was). He knew that he had to pay a share of maintenance and repair costs. He did not receive a WSS. It was not until March 2021, when he did some research, that he became aware of the 2011 Act and asked for a copy of the WSS. A further request was made on 18 May 2021. Mr Garcia advised that he does not know when the drying room lock was changed. He attempted to enter the drying room on 25 November 2019 but could not get in. He contacted the Property Factor. They provided him with the wrong key before putting the correct key through the letterbox. His neighbour told him that the keys are not unique and some open several drying rooms and showed him that this was the case. He does not know if he was charged for the lock change as he has not been provided with a detailed breakdown of repairs. He owns the drying room in common with the Council, who is the

owner of the other 2 flats. Work was carried out to the roof of the building in 2018. He was notified in advance and told that he would have to pay his share. He has not received an invoice. He has recently been told that the problems he has experienced with water ingress may be due to the water tank and not the roof upgrade work. Mr Garcia confirmed that he pays a management fee to the Property Factor.

5. Following the CMD, the Tribunal determined that the application should proceed to a hearing by video conference. A note on the outcome was issued to the parties. However, following receipt of a number of direction requests from the Homeowner, a further CMD was arranged and took place on 23 March 2022. A note on the outcome of this CMD was also issued.
6. The hearing took place by WEBEX on 5 May and 6 July 2022. The Homeowner participated. The Property Factor was represented by Mr Donald. The Tribunal also heard evidence from Mr Stoddart and Ms Barclay. Prior to the hearing, both parties lodged further written submissions and documents.

#### **The Homeowner's complaints and Property Factor's responses noted at the CMD on 12 January 2022**

7. The Tribunal noted the Code complaints and the Property Factor's responses to be as follows-
  - (a) **Complaint 1. Section 1 of the Code – Failure to provide a copy of the WSS within 4 weeks of purchase of the property and failure to provide WSS in response to a request for same on 14 March 2021.** *Written response from Property Factor states that they were unaware that Mr Garcia had not received the welcome pack with WSS and believed it had been issued to him following his purchase of the property. The request on 14 March 2021 was sent to the Housing service and not the Property Factor team (PFT). At the CMD, Mr Donald said that the Council has no record of the welcome pack being issued and therefore cannot provide evidence that it was sent. As a result, they accept Mr Garcia's statement. The request of 14 March 2021 was sent to the wrong department and not passed on. Mr Garcia referred the Tribunal to document 1.2e, an email dated of 14 March 2021, addressed to [propertyfactor@aberdeencity.gov.uk](mailto:propertyfactor@aberdeencity.gov.uk). Mr Donald said that he would require to take instructions and investigate as he had been told that the email was sent to Housing.*
  - (b) **Complaint 2. Section 2.1 of the Code – information in correspondence dated 17,18,20,21 May, and 3 June 2021 is misleading when it distinguishes between the Council acting as owner and as Property Factor in relation to the lock change to the drying room.** *Written response states that the Council is also an owner and landlord, not every act is carried out by them in their capacity as property factor and the PFT is not always aware of action taken by the Council in other capacities. Reference was made to the case of *Re Proven (Properties) Scotland Ltd 2020 CSIH*. At the CMD, Mr Donald conceded that this case may not be directly relevant to his argument*

but insisted the broader point is arguable, namely that it is possible that certain activities can be carried out by ACC outwith its role as property factor. He confirmed that he would expand upon his submissions on this point in advance of and at the hearing.

- (c) **Complaint 3 – withdrawn.**
- (d) **Complaint 4. OSP 4, 2021 Code – it was misleading/false to state in the letter of 22 September 2021, that the roof works were carried out by the Council as an owner of some of the properties, rather than as property factor.** *Written response as in paragraph (b). The Respondent’s design team organised the work with the other owners.* At the CMD, Mr Donald stated that further information, and possibly evidence from witnesses, would be provided at the hearing.
- (e) **Complaint 5. OSP 4, 2021 Code – letter of 22 September 2021 was misleading/false when it failed to address the complaint.** *Written response – complaint denied, all complaints were investigated, and a response provided.* At the CMD, Mr Garcia referred to page 2 of the letter, the heading “Complaint 1; your complaint is that the Council failed to carry out its duties as property factor” and pointed out that the letter goes on to respond to that complaint by reference to various sections of the Code. When asked about the terms of the letter, Mr Donald confirmed he would require to take instructions.
- (f) **Complaint 6. OSP 4, 2021 Code – letter of 22 September 2021 was misleading/false when it stated that the Homeowners email of 14 March 2021 was not directed to the PFT, and the email of 18 May 2021 was sent to the Housing team.** *Written response – this is factually accurate.* At the CMD, Mr Garcia had directed the Tribunal to the copy email of 14 March 2021 (paragraph (a)). He also referred to the May 2021 email, also addressed to the Property Factor email address. Mr Donald advised that he would require to investigate/take instructions.
- (g) **Complaint 7. OSP 4, 2021 Code – letter of 22 September 2021 was misleading/false when it distinguished between the Council as property factor and services carried out by “Housing and Building Services” in relation to the lock change at the drying room (Page 3, para 5).** *Written response states the lock change was carried out by Building Services on the instruction of Housing, as part of the service provided to tenants. PFS was not involved.*
- (h) **Complaint 8. OSP 4, 2021 Code – letter of 22 September 2021 was misleading/false by only responding in relation to complaints made since May 2021 and failing to comment on the complaints made from May 2016 onwards.** *Written response – denied. Roof work was arranged by design team and ought to have been dealt with by them.* At the CMD, Mr Garcia said that he phoned on many occasions to complain about water ingress. He was unable to get through to PFS so contacted the Housing department. He made a FOISA request, but the records provided do not show his calls. Other occupiers also reported the water ingress. Mr Stoddart advised the Tribunal that PFS did not

receive any complaints from Mr Garcia about water ingress until May 2021.

- (i) **Complaint 9. Section 2.3 of the Code - the Property Factor failed to provide details for out of hours emergencies between November 2014 and May 2021 by not providing the WSS.** *Written response refers to earlier submission re issuing the WSS and states that, as Mr Garcia reported repairs issues, he was aware of the process.*
- (j) **Complaint 10. Section 2.5 of the Code – failure to respond to complaints and enquiries within reasonable timescales by failing to provide WSS in response to email of 14 March 2021.** *Written response – as per previous submission.*
- (k) **Complaint 11. Section 2.5 of the Code – failure to respond to enquires in emails of 14 March and 18,19 and 21 May 2021 about the dates of the lock change.** *Written response – responses to the May 2021 emails were sent in compliance with the code. At the CMD, Mr Donald confirmed that he would make enquiries to see if copies of the response(s) could be provided.*
- (l) **Complaint 12. Section 2.5 of the Code – failure to respond to requests on 4 March and 18 May 2021 for detailed invoices for jobs carried out at the property from May 2017 onwards. Not provided until a FOISA application was made.** *Written response – information now provided in response to FOISA request which was received before the response to the emails was issued. At the CMD, Mr Garcia advised the Tribunal that he is insisting on this complaint even though information has now been provided. The Tribunal noted that the information was not provided until the FOISA request was received. This was not submitted until November 2021 and therefore the issue of “prompt timescales” specified in section 2.5 requires to be addressed.*
- (m) **Complaint 13 – withdrawn.**
- (n) **Complaint 14. Section 3.3 of the Code – failure from May 2017 onwards to provide a detailed financial breakdown once a year.** *Written response – annual statements are issued every year. At the CMD, Mr Donald said that he would endeavour to lodge copies of the statements but may not be able to provide any which are specifically addressed to Mr Garcia.*
- (o) **Complaint 15. Section 6.1 of the Code – failure to inform the Homeowner of the procedure for reporting repairs prior to May 2021 by not providing WSS.** *Written response – as per previous submission.*
- (p) **Complaint 16. Section 6.9 of the Code – failure to pursue contractors in relation to defective roof work.** *Written response – the work was improvement work, outwith the PFS authority to act and was administered by the respondent’s design team. At the CMD, Mr Donald advised that he cannot comment on the roof improvement work and whether it was defective as PFS were not involved. He indicated that he should be able to make enquiries and obtain information about it.*

(q) **Complaint 17. Section 7.1 of the Code – there is no complaints procedure relating to complaints about contractors.** *Written response - the water ingress issues are not the responsibility of the PFS.* At the CMD, Mr Stoddart said that the complaints procedure is in the WSS. It does not specifically mention contractors but covers all complaints including those about contractors.

8. The Tribunal noted that the property factor duties complaints and the Property Factor's responses are as follows; -

(a) **Changing the locks on the drying room door without notifying the Homeowner,**

(b) **Installing a lock which does not have a unique key and thereby allowing access by unauthorised persons,**

(c) **Denying the Homeowner access by failing to provide him with a key, then giving him the wrong key,**

(d) **Depositing the new key through the letterbox of his property with no record of delivery, and**

(e) **Failing to communicate effectively between departments of the Council**

(f) **Failing to address/provide an appropriate response to various complaints which were made.**

9. *In the written response, the Property Factor denies (a) to (d) stating that PFS only provides a repairs service for the drying room and (in exceptional circumstances) will remove and dispose of hazardous material. They do not arrange lock changes without owners' consent. It is conceded that better communication is required, and this is being addressed. In relation to (f) the Respondent states that the roof work was instructed by the Respondent as an owner, not a property factor, so the WSS did not apply; that information about making complaints is on the website; that the Respondent issued an apology stating it could not confirm if a WSS had been issued and the situation had been rectified quickly and that the Respondent has complied with Section 14 of the 2011 Act.*

## **The Hearing**

### **The Homeowner's evidence**

### **Code Complaints**

- 10.** Complaint 1 - Conceded by Property Factor. Mr Garcia told the Tribunal that the Property Factor's failure to provide him with a WSS when he purchased the property deprived him of assistance as he did not know how to raise concerns. Although he cannot prove it, he does not believe that there was a WSS at that time.
- 11.** Complaint 2. Mr Garcia said that he has no issue with the dates provided by the Property Factor for the lock changes. However, he said that only the first related to his drying room. He had requested this as the lock was broken. The other lock change related to the other drying room on his floor, following a fire. It was following this lock change that he discovered that the same key opened both rooms. Mr Garcia referred the Tribunal to page 1 of Applicant production 1.2c (p1 of AP1.2c), an email from Mr Stoddart dated 21 May 2021. This referred to the second lock change stating "to renew the lock on a 17<sup>th</sup> floor drying room door...Both of these new locks should have worked with your existing key and were replaced by building services." Mr Garcia said that it was not clear whether Mr Stoddart understood that this was a different drying room. He also said that same key should not open both locks and that the Council did not appreciate that some drying rooms were common, and some were not. Mr Garcia told the Tribunal that it was after his bike was removed or stolen from his drying room that Charlie from Flat 100 showed him that the same key opened both rooms. He then referred to p2 of AP1.2a, an email to Luke Elton of ACC dated 25 November 2019. In the email he said that the lock had been changed and he had not been provided with a key. Mr Garcia explained that he did not use the drying room very often and did not know when the lock change had occurred. He did not store a bike in the room until much later. In response to a question from the Tribunal he denied that the drying room should not be used for storage as only combustible items should not be placed there. Mr Garcia said that, following his email, he was provided with the wrong key and later the correct key was put through his letterbox. Mr Garcia said that the Property Factor's attempt to distinguish between ACC as owner and property factor is irrational and not valid.
- 12.** Complaint 4. The Tribunal referred Mr Garcia to letters lodged by Mr Donald (RP 7-10). 7 to 9 relate to work at the property, including work to the roof. Mr Garcia said that he could not confirm that he had received the letters lodged, but he had certainly received similar letters. When asked about RP7, a letter dated 19 June 2014, which provides a schedule of proposed work and a voting form, Mr Garcia said that he thinks that he received this letter as he did receive a voting form which he completed and returned, agreeing to the work. However, he did not know that ACC was his factor and did not become aware of this until 2021. The letter only states that ACC is the joint owner. (Mr Stoddart interrupted at this point to say that, as Mr Garcia did not purchase his property until November 2014, he would not have received this letter). Following further questions from the Tribunal, Mr Garcia said that he had purchased the property under Right to Buy and has lived at the property since December 2000. He confirmed that he may have applied to buy the property in early 2014 and may have been issued with the June 2014 letter because of that application. In any event, he was asked to vote on the work. Mr Garcia also confirmed that he thinks he received the other letters lodged about the roof, RP 8 and 9. He also recalls

receiving a letter about “missing shares” which was a paper apart on a letter from ACC but cannot recall which department sent that letter. He explained that he did not believe that to be relevant, the letter was from the Council. When asked whether he understood the roof work to be a repair or an improvement, Mr Garcia said that he thought that ACC had decided that it was necessary to do the work. It was an improvement, but necessary. He does not recall any problem with the roof before. There was room for improvement but no defects. ACC decided it needed a new surface – it was a necessary improvement. Mr Garcia advised the Tribunal that the work carried out was consistent with property factor services and it was a scheme decision. Furthermore, renewal of the roof is covered by the WSS. He has not received an invoice for the roof work. It was finished in 2018 but there was water ingress, so it appears that the invoices are on hold.

- 13.** Mr Garcia referred the Tribunal to AP4, a copy of the WSS sent to him in May 2021. On page 2, there is a reference to “replacement of roof covering”. Page 6 deals with “non-core services”, such as “Arranging planned maintenance works”. Section 4 (page 6) deals with “Decision making”. The procedure detailed in this section was what happened in relation to the roof – he was asked to vote. Page 1 of the WSS defines a “scheme decision”. Section 7.3 (page 8) deals with planned maintenance, which includes replacement and renewal of common parts. Mr Garcia advised the Tribunal that the WSS is undated, but he received it in May 2021. The last page of the document (headed “Addendum to Schedule issued March 2013) was attached to the WSS when he received it.
- 14.** Complaint 5. Mr Garcia referred the Tribunal to AP 2, ACC’s response to his complaint dated 22 September 2021. He said that his complaint is outlined in AP 1.1 to 1.3. 1.1 is a letter dated 28 May 2021 which outlined the complaint. 1.2 is a further letter dated 8 June 2021 which provides further information about his complaint. 1.3 is a further letter dated 14 July 2021 which explains the relationship between the previous 2 letters. In response to questions from the Tribunal, Mr Garcia confirmed that, although 1.1 refers to the Code and property factor duties, 1.2 does not. However, he advised the Tribunal that the references in 1.2 to “law and procedure” can be read as a reference to property factor duties which were not addressed in the response on 22 September 2021. No response was provided to his complaints relating to the drying room lock change and being given the wrong key. The response only referred to the Code.
- 15.** Complaint 6. Conceded by the Property Factor.
- 16.** Complaint 7. The Tribunal noted that this complaint also relates to information provided about the drying room (Complaint 2, paragraph 13) but concerns the letter of 22 September 2021.
- 17.** Complaint 8. Mr Garcia told the Tribunal that he had made a number of complaints about water ingress from 2016 onwards. He said that the documents he has lodged show that he made complaints which have not been recorded by ACC. He referred to AP 19, his phone bill dated 25 October 2016. This shows calls on 15, 16 and 22 October to the Housing Repairs number. The Freedom of Information (Scotland) Act 2002 (FOISA) response and the Property Factor’s



direction response indicate that none of the complaints were from his property. Mr Garcia said that he could not be sure that all three of the calls on the FOISA response and direction response were from him but that he did call (as shown on his phone records) and he can recall phoning to complain about water ingress around that time. Mr Garcia also told the Tribunal that although he has a call record for the same number on 22 October 2016, there is no record of a call on this date in the FOISA response. Again, he believes his call related to water ingress.

**18.** Mr Garcia referred the Tribunal to AP 6.2, 6.2a and b, an email and attached documents sent to DAC Beachcroft by him on 10 February 2020. 6.2a is a timeline of events compiled by Mr Garcia. On page 2 there is an entry for 22 October 2016 which states that he contacted ACC to report water ingress. He had a name and call reference but there is no record of this report in the FOISA response. His call was ignored. Mr Garcia then referred the Tribunal to AP20, his phone bill dated 25 November 2018. This shows a call to the Housing Repairs number on 20 November 2018 for which there is no corresponding entry on the FOISA response. His phone bill also shows that he called the insurance company on the same day. They rejected the claim because of ongoing works. He then referred to AP21, his bill dated 25 January 2019 which shows calls to the repairs number on 26 December 2018 and to the insurance company. Mr Garcia said that there were several incidents of water ingress between 2016 and 2018. These caused damage to his property – the partition wall between kitchen and living room, the ceiling, the bathroom. The problems were not fully resolved until November 2021. Although one of his calls to ACC was about the drying room lock and another related to the back door of the block, all other calls were about water ingress and there is no record of these in the documents which have been produced. He referred to AP25, phone bill dated 25 March 2021. This shows a call to the repairs number on 24 February 2021 at 12.14. He also tried to call the Property Factor number, but they did not answer. As the Property Factor's direction response did not provide the date of the report which led to Mr Cooper's (plumber) attendance, he cannot confirm that this was linked to his call on 24 February but thinks that they may be connected. His neighbour on the top floor reported water ingress and told Mr Garcia that Mr Cooper was there. He referred to AP9.6, photographs of the damage to his property taken on the day that Mr Cooper was present. Although Mr Cooper suspected water penetration from the roof he was unable to investigate due to the snow. Mr Garcia then referred to AP26, phone bill dated 25 July 2021 which shows several calls to the repairs number on 7 July 2021. These were the first calls which were actually logged on the system. He then referred to AP26.1 – an email to the Property Factor email address dated 7 July 2021. The email indicates (at point 7) that he had called the repairs number at 15.15 to report water ingress. The staff member who answered refused to provide her name and terminated the call. He phoned again and was given a name (Shona) and job number which match the FOISA information. Lastly, Mr Garcia referred to AP 27, phone bill dated 25 November 2021, which shows calls to the repairs number on 26 October 2021 which correspond with the FOISA response.

**19.** Mr Garcia told the Tribunal that between November 2016 and July 2021 his calls were ignored. No action was taken to address the water ingress during this

period. The direction response states that the cause of water ingress was a defective stack pipe, but it's not clear whether this has been the cause since 2016 or is more recent. Mr Garcia understands that the stack pipe issue was fixed last year but he didn't know about the stack pipe until he received the direction response. He said that he was told by Mr Stoddart in an email dated 12 November 2021 (not lodged) that the repair was carried out following his request in October 2021. In response to a question about when he first contacted the property factor team, Mr Garcia confirmed that this was in 2021 but that the fault/repairs number is the same one for both tenants and homeowners. Prior to 2021, he didn't know what a factor was or that there were different procedures for homeowners.

**20.** Complaint 9. Conceded by the Property Factor. Mr Garcia referred the Tribunal to the Property Factor's amended submissions in response to the application and said this confirms that he had the right number for reporting faults or repairs prior to 2021. However, had he received the WSS he could have contacted the property factor team as well. The lack of the WSS had an impact as he did not know he could report concerns as well as repairs.

**21.** Complaint 10. Conceded by the Property Factor.

**22.** Complaint 11. This was partially conceded by the Property Factor in relation to the failure to respond to the email of 14 March 2021. In relation to the emails of 18, 19 and 21 May 2021 Mr Garcia referred to AP 1.2 c to e. He said that on 18 May 2021 he asked Mr Stoddart for information about the drying rooms and whether locks had been changed since the installation of new security doors. In response he was told (on 19 May 2021) that "we do not hold information on when the doors and locks were changed as it was the council as an owner that undertook this." However, Mr Garcia said that they should have held the information. He sent a further email, also on the 19<sup>th</sup>, again asking for the same information, stating "since you are responsible for management of the drying room, please find the information your client is requesting." He received a response on 20 May 2021, but it did not include the requested information. The information was finally provided on 21 May 2021 in response to a further email from Mr Garcia when he mentioned the Code of Conduct.

**23.** Complaint 12. Conceded by the Property Factor.

**24.** Complaint 14. Mr Garcia advised the Tribunal that he receives an annual statement but does not believe that the statements currently issued comply with section 3.3 of the Code. He said that section 3.3 requires "a detailed financial breakdown". Furthermore, page 7 of the WSS (AP 4) indicates that the Property Factor will "carry out a financial reconciliation at year end to ensure that the annual service charge, including the actual cost of any additional response repairs works carried out, are accurately recorded and reported." The statements provided do not contain enough information about specific jobs. Mr Garcia referred to AP 28, the letter and statement issued to him on 6 September 2017. This gives full details of each individual job. All the statements issued since that date do not provide this information. The Tribunal noted that this letter and statement are from Mr Stoddart, Property Factoring Officer and the letter is

headed "Property Factoring Service at 103 Linksfield Court". When asked whether this had not alerted him to the fact that ACC was a property factor, Mr Garcia said that he had not known this to be the case. He knew he had to contribute to common repairs and the letters and invoices related to this contribution. He just paid the invoices when they were received. When asked whether he had requested more details following receipt of the later statements he said that he would probably not have been given the information even if he had asked for it. He referred to complaint 12 and said that it took 6 months for ACC to provide him with the invoices requested, and only once he had submitted a FOISA request. Mr Garcia said that the statements do not comply with the Code or the WSS and it is not possible to check a specific job because the details are not provided. In response to a question from the Tribunal Mr Garcia said that he had never queried the "property factor fee" which is the first charge on the statements issued, he said that he had just assumed that it was part of his contribution, he did not know he was paying for a service and said that the property factor registration number is on the letters as "our reference" which is confusing. He had not been aware that ACC were also his factors. His solicitor did not tell him when he purchased the flat.

25. Complaint 15. Conceded by the Property Factor. Mr Garcia told the Tribunal that section 6.1 requires the Property Factor to have procedures for reporting repairs. He had been deprived of that because of the failure to provide him with the WSS.
26. Complaint 16. Mr Garcia advised the Tribunal that it is not clear whether the roof work was defective or whether the damaged stack pipe was the cause of all the water ingress.
27. Complaint 17. Mr Garcia said that there is no provision in the WSS for complaining about contactors and disputed that this is covered by the reference in the WSS to "the service provided by us or on our behalf".

### **Property Factor Duties**

28. Mr Garcia referred to the WSS. On page 1 there is a reference to the rights and obligations contained in the title deeds. Mr Garcia explained that the title deeds make it clear that the drying rooms are common. Page 1 also defines "Property Factor" as "A local authority which manages the common parts.". On page 2 it states that the "property factoring scheme is for all property owners with a heritable interest in the above property and with a liability for repair and maintenance of the common parts and areas.". There is a further reference to the terms of the title deeds on page 9. The drying rooms are common areas in terms of the title deeds. Pages 4 to 5 list core services and cyclical maintenance. Mr Garcia conceded that the drying rooms are not specifically mentioned but said that the WSS applies to all common areas. He referred to the more recent WSS (AP 30). On page 3 in the section "Authority to Act as Property Factor". It states that ACC will "manage the common part of your building, provide a repairs service and recover any costs associated with the repair, maintenance and general upkeep of said building as set out in your title

deeds". The drying rooms are not excluded and are therefore covered.

- 29.** Mr Garcia referred the Tribunal to page 5 of AP 1.2c, an email from Mr Stoddart dated 19 May 2022 which states that the factoring service "manages the common parts of the building owned by all owners along with those where there are two or more owners such as drying rooms. If the council is the sole owner of a drying room the factor has no authority to act". He said that this confirms that the drying rooms are included where these are jointly owned. Mr Garcia then referred to RP 10, a letter from the Property Factor dated 29 October 2019. This letter does not mention the property factor legislation, but other legislation. This letter does not establish that the drying rooms are excluded.

### **Cross examination by Mr Donald**

- 30.** When asked about page 6 of AP 1.2c, an email from Mr Garcia to Mr Stoddart dated 18 May 2021 in which he says "drying rooms are clearly not common property of all owners and therefore are beyond your responsibility", Mr Garcia said that he had not been sure what a property factor was at that point and was making an argument about who was responsible for the rooms and the removal of his bike. He said that he had just been repeating something Mr Stoddart had said in an email to him, it had to be taken in context. He accepted that the owners are responsible for the drying rooms but within the framework of the property factor service. He accepted that the owners of common property should consult and reach agreement but said that this had been delegated and he was paying for a service. He said that changing the locks could be part of property factor services. Mr Garcia confirmed that Housing Services did not contact him about the drying room but disagreed with the statement that the property factor service did not manage the drying rooms or change the locks. He said that he accepted that ACC had different roles but denied that the actions taken by it in relation to the drying rooms was only as owner as there are overlaps between the roles. He did not accept that the failure to consult with him about the drying rooms was nothing to do with ACC as a property factor. Mr Garcia said that as soon as work was instructed in relation to a common area, ACC as property factor became involved. Mr Garcia confirmed that he had no contact from the property factor team about the roof work. He was referred to AP 28 and confirmed that this came from the property factor team and had the relevant contact details and was signed by Mr Stoddart. He also confirmed that RP 7 (page 23) and RP 9 did not have the words property factor on them but denied that it was clear that these were not from the "Property Factor" since he didn't know what that was at that point.
- 31.** When asked if the roof work was an improvement, Mr Garcia said that it was a necessary improvement. He said that he was not in a position to say whether the roof was in need of repair, he did not have the relevant knowledge. He was told that the improvement was needed. In relation to AP 2, page 3, section 6.9 Mr Garcia denied that this was just a "factual analysis" as the work was carried out following a vote. He denied that his complaint letter only referred to the Code as duties were referred to in his letter and that the words "law and procedure" could be a reference to property factor duties. He said that ACC

did not respond to his complaint as they did not address the issues with the drying room. In relation to complaints 9 and 15 it was put to Mr Garcia that he did have the relevant contact details to report matters, for example in the letters from the property factor section. Mr Garcia said that he did not know that the property factor existed and did not know that they had to address his concerns in that capacity, just thought the team issued invoices. It did not occur to him to contact the section. It was put to Mr Garcia that Mr Stoddart did respond to his enquiries (emails between 18 and 21 May 2021). He said that they were not answered properly and on 20 May 2021 he did not address the request which had been sent, instead he explained the role of ACC as a Property Factor. It was put to Mr Garcia that his demands for the “right signature” on the emails from Mr Stoddart were unreasonable. He responded stating that he did not know if Mr Stoddart’s emails were “official” or whether he was just providing his personal view. Mr Garcia also denied that the more recent annual statements actually provide more detailed information. When asked about the management fee he said that he did not have a proper understanding previously, it took 5 years before he understood. He just thought he was paying toward the running costs. In relation to the roof work, he said that he does not have the expertise or knowledge to say if the work was defective. He accepted that Mr Stoddart did provide him with assistance in getting access to the roof and that in November 2021, Mr Stoddart told him who to contact about the standard of the work. He also accepted that a contractor was someone who did work on behalf of the Council.

## **The Property Factor’s evidence**

### **Evidence of Kelly Marie Barclay**

- 32.** Ms Barclay stated that she is the Private Sector Housing Officer at ACC. She started that post in May 2022. For 15 years prior to this she was the Owner Liaison officer, in which role she liaised between private owners and ACC as owner of properties. When the Property Factor team was being set up, she was involved, then took a step back from that team. Local Authorities were new to factoring. She looked at how private property factors worked and was involved in the decisions about which properties would be factored. Details were then sent out to the affected owners. There are three threads to ACC’s activities – property factor, owner occupier and public sector landlord. Each role is independent of the other. All Scottish Councils were told that they required to differentiate between services provided as owner, as landlord and as property factor. In order to achieve this, there were 2 teams. One to liaise with owners, as an owner. The other to provide property factor services. Those arrangements are continuing.
- 33.** In response to questions about works carried out at Linksfield Court in 2015/16, Ms Barclay said that improvement works were carried out. Linksfield Court was the third of the multi storeys to have works carried out. There was over cladding and other work. When asked how these works were “classified”, Ms Barclay said that the work was nothing to do with ACC as Property Factor but was carried

out by ACC as a fellow owner. ACC wrote to all owners. The PFT did not. The work was dealt with by the in-house design team, and they issued all correspondence. The letters were sent by Jenny Wright who works in the design team. Ms Barclay was not involved. The PFT's only involvement may have been to provide a list of the owners and their contact details. Everything was dealt with on an owner-to-owner basis.

- 34.** In response to questions from Mr Garcia, Ms Barclay said that there was a vote taken in relation to the work. ACC did not unilaterally decide, they sought agreement and a vote was taken. She confirmed that over cladding is about energy saving. The work to the multi storeys involved insulation/cladding, windows and some had new heating installed. Linksfield Court got a new roof, not done in all high-rise blocks. The sum to be paid by the owners was capped at £5000. In response to a question about the departments involved in the PF service, Ms Barclay said that there are quite a few. Lots of services are involved but there is only one PF team. Other departments provide services to the PFT. They also provide services to ACC as owner and landlord. She denied that there was an overlap between the work carried out for ACC as owner and the work to the common areas. There is one large repairs team, but a specific section of the team deals with PF repairs. Within Building Services there is a repairs team for factored properties, one for sheltered housing and one for public buildings. There is one database for repairs, the PFT get reports from it. In response to questions from the Tribunal, Ms Barclay advised that the system belongs to Building Services, but other people, including the PFT have access. A lift engineer is attached to the PF repairs team. This is unique to the multi storeys. The PF repair team will also include more general repair staff. Of the 52 multi storey blocks, 48 or 49 have some which are privately owned. The owner liaison officer's role is to deal with all non-factored mixed tenure properties. Also, in response to questions from the Tribunal, Ms Barclay said that the PFT sits under Derek McGowan, Director of Early Intervention and Community Empowerment, which includes Housing Services. She said that she had been involved in setting up the PFT. Once it was set up, she went back to dealing with non-factored properties. All but one of the factored blocks are multi storeys. When asked about communication with the homeowners about the factoring services, Ms Barclay said that the owners in the factored blocks only were issued with information and the WSS. She said that she could not recall if it was explained that ACC had different roles but thought that the owners in the factored blocks were told that the PFT would be there first port of call.

### **Mr Stoddart's evidence**

- 35.** Mr Stoddart said that he is the Property Factor Officer with ACC. His role involves providing a management service to the owners of the 38 factored properties. He has been in post since December 2015. Currently he is the only member of staff, but a new officer is due to start in August. Mr Stoddart said that the Code and legislation relating to duties are the bedrock of how ACC conducts itself in relation to factoring. The PFT is part of the Council and piggyback onto the repairs telephone number and account enquiries line. There is a PF repairs team in Building Services. The repairs team is the contractor used by the PFT in the same way that private factors have a pool of

contractors that they use. When asked about how the PFT deal with a report of an issue, he explained that they have delegated authority up to £5 per property. At Linksfield Court that means £500. If the work involved is less than that they don't need a scheme decision. An owner of the Council can report a common repair issue by phoning the switchboard. The report is logged. If under £500, the work is arranged. Otherwise, they carry out a scheme decision and there will be a three week voting process. When asked what he understands to be the meaning of the expression "The Council as owner", Mr Stoddart said that it means the Council as owner of flats in the building and the shared common areas. The "Corporate Landlord Department" of the Council has delegated authority to act as "owner", not the Housing department or Building Services. The Housing team is the letting agent for the Council as owner. Building Services are the contractor, responsible for carrying out the work.

- 36.** In response to questions about responsibility for the drying rooms in the blocks, Mr Stoddart said that he inspects all of them, including those wholly owned by the Council. He checks the communal lights, switches, smoke alarms, windows, doors, skirtings and makes sure that there are no holes in the wall or damage to the floors. However, the PFT does not provide a full management repairs service for the drying rooms. They also have the authority to arrange for the removal of rubbish and hazardous material. Mr Stoddart was referred to a letter of 29 October 2019 from himself to Mr Garcia (RP 10). He said it was issued following Grenfell. The Council, as owner. Was looking for ways to make the multis safer. Legal advice was taken, and he issued the letter seeking approval from the owners for the removal of items which had been dumped in common areas. The letter states that the proposal did not include the drying rooms which would be the "responsibility of the mutual owners to agree how they are used" and that a separate letter would be issued by Mr Stoddart with regards the drying rooms. Further legal advice indicated that a separate letter was not required. Mr Stoddart said that the WSS does not mention the drying rooms but that it is covered by "common parts" in relation to 2 or more owners. When asked about other departments dealings with the drying rooms, he said that Housing (as letting agent) are involved as the tenants have access to the drying rooms. Housing Officers might arrange for clothes lines to be put up or to or for doors to be replaced for security or fire safety. Sometimes they get the locks changed when a tenant vacates without returning keys. However, they should not do so without speaking to the mutual owners. Sometimes the PFT is notified about a lock change in the financial statement, and it will be included in response repairs. For example, if Building Services cannot get access, they might change the locks. However, there is no reason for passing this cost onto the owners and Housing will be notified accordingly. However, if it is a legitimate reason for the lock change, he would allow it to be included. When Housing requests a lock change, they contact Building Services directly and he would not be aware until afterwards. The PFT has no control over the actions of Housing and can only advise on the legislation and title deeds. Sometimes he has also advised homeowners to get their own advice about situations. Mr Stoddart stated that he had no involvement in lock changes to Mr Garcia's drying room. His only involvement was to include one lock change requested by Mr Garcia in the response repairs.

- 37.** Mr Stoddart was referred to a series of emails (AP 1.2c). On 18 May 2021 he sent an email to Mr Garcia which said that Ms Will, the Housing officer, was not responsible for the maintenance and management of the drying room and that the owners, including Mr Garcia, were responsible for it. On 19 May 2021, he sent a further email which stated that he was corresponding as property factoring officer providing a “factoring service which manages the common parts of the building owned by all owners along with those where there are two or more owners such as drying rooms”. However, the factor had no authority to act where a drying room was owned solely by ACC. The email also states that “We do not hold information on when the doors and locks were changed as it was the council as an owner that undertook this”. The WSS was attached to the email. Mr Stoddart said that the main purpose of this email was to provide the WSS which had been requested and to explain that he did not hold information about the lock change(s). The reason for this is that some works carried out, for example by the Design team, do not appear on response repairs. On 19 May 2021, a further email was sent which sets out the role of the Property Factor and provide details of the relevant documents and legislation. The email states that the factor has no authority to change the locks on the drying rooms unless the lock was broken. On 21 May 2021, Mr Stoddart sent a further email in response to one from Mr Garcia which provided 2 dates. The email apologised for not providing the information before but said that a lock change was carried out on 12 March 2020, following a report from Mr Garcia, and on 7 July 2020 as part of other work. When asked again about the email of 19 May 2021, Mr Stoddart said that his comments about the common areas and drying rooms had been a “poor choice of phrasing” and that he had been responding to comments from Mr Garcia. He did not mean that they managed the drying room, only that they dealt with repairs.
- 38.** Mr Stoddart was then asked about page 3/4 of the letter of 22 September 2021. He said that he provided information to the complaints team for the response. He thought that the information was accurate and did not “knowingly” provide false information, nor had he been careless. He was setting out the difference between the Council as owner and as factor. There was no attempt to avoid accountability. Section 9 of the WSS explains that ACC is an owner. When asked about the section of the letter “Complaint 4” Mr Stoddart said that the PFT had not been involved in the roof and over cladding work. The Design team did the work, instructed by the Council as owner. The work involved new insulation, fire stopping, and they modified and renewed the roof. As far as he can recall, the roof did not need to be repaired or replaced. It was an improvement although some patch repairs had been done. The WSS refers to planned maintenance, but this is when a replacement is needed. The work which was carried out was not planned maintenance, it was part of the improvement works.
- 39.** Mr Stoddart was referred to a letter dated 19 June 2014. (RP 7). He said it was sent to all the owners in Linksfield Court, but Mr Garcia would not have received it as he did not purchase the property until later that year. The letter included a schedule of the work to be carried out which included the removal and replacement of the roof covering. This letter was not issued by the PFT. It did not include the PF registration number. The author was the chief officer of



the “Corporate landlord” department. The letter states that he is writing to the owners as “joint owner”. The work started before Mr Stoddart came to ACC and he has no knowledge of the condition of the roof before the work. He was then asked about other letters (RP8 and 9), sent by Jenni Wright and providing details of the over cladding and related work. He said that the PFT had not issued the letters and were not involved. A scheme decision was not taken but all owners were asked to vote. As a result, the statement made in the letter of 22 September 2021 (page 3 in relation to section 6.9 of the code). was accurate because it was the Council as owner who carried out the work. Mr Stoddart was then asked about the response in this letter to the issue of property factor duties and whether he had addressed this. He said that he thought that he had provided an accurate and factual response to the complaint and that although the WSS had not been issued, the PFT had acted in accordance with the Code. He had not been attempting to conceal anything or avoid answering the complaint. He thought the reference to “law and procedure” in the letter meant the Code, it did not specifically mention PF duties.

- 40.** Mr Stoddart was then asked about Complaint 8, which relates to complaint 3, page 2 of the letter of 22 September. He said that Building Services dealt with the complaint about water ingress and provided the response to complaint 3 in the letter. No complaints were received from Mr Garcia prior to May 2021, and he had no involvement in this issue. In relation to complaints 9 and 15 Mr Stoddart said that, although Mr Garcia had not been sent the WSS prior to 2021, Housing have notices up in the blocks with information about how to report repairs. He then referred to AP 5.2, a letter from ACC PFT addressed to Mr Garcia dated 4 June 2015. It includes the PF registration number, advises that ACC provides a PF service and provides information about his statement for the period from his purchase in November 2014. This letter was lodged by Mr Garcia – Mr Stoddart does not have it in his records. Mr Stoddart then told the Tribunal that an annual statement is issued every year and his name has appeared on those since 2016. The statements also have the PF registration number and contact details. In relation to complaint 11, Mr Stoddart said that the requested information was provided, the PFT had not carried out lock changes. Sometimes information about these is held as response repairs. When the response was issued, he did not have the information about lock changes which was later received from Building Services. This resulted in the information being inaccurate, but it was because he didn't have it at the time of the email. However, he had the information when the FOISA response was being prepared. In relation to complaint 14, Mr Stoddart said that an annual statement is issued each year with the estimated costs for the year for cyclical maintenance including dry riser checks, lift servicing etc. it is issued prior to 1 April for the costs to 31 March of the following year. He referred to RP 1 to 5, annual statements for 2015 to 2019. When asked about the statement for 2019 he said that complied with section 3.3 of the Code. He added that they do try to provide a more detailed breakdown of response repairs such as the number of lighting jobs or how often the lift was repaired if they can. Until 2017 these were issued but they don't currently have enough staff. Mr Garcia requested a list of response repairs which was only issued with the FOISA response because of staffing issues. Its time consuming to put together because when

the PFT receives the information they need to redact it to remove personal details and check it to make sure nothing has been double counted. However, Mr Stoddart is of the view that the current format of the statement provides a more complete picture as response repairs do not cover everything.

- 41.** In relation to complaint 16, Mr Stoddart said that if Mr Garcia had reported complaints he would have been told to contact the Design Team. However, he had recently arranged for Mr Garcia to get access to the roof. In relation to complaint 17 Mr Stoddart said that there are 2 extra steps in the complaints process for factoring. The complaint should be sent to the PFT first. He referred to section 10 of the WSS. This lists what the owner can complain about. The word “contractors” is not there but the words “someone working on our behalf” covers this. The complaints process is complaint with the Code. Most work is carried out by Building Services. If a complaint is received about the work, he contacts them to get it sorted out. However, the over cladding and roof work was not overseen by the PFT, so he was not involved in dealing with any complaints.
- 42.** In response to questions from Mr Garcia, Mr Stoddart said that one of ACC’s “hats”, is the property factor provider and that on a day to day basis it was a mutual owner, property factor and housing provider. The chief officer is Derek McGowan, responsible for the provision of PF services. The VAT number of the factoring invoices is the Council’s VAT number. The Council is paid by the owners. The services are provided to itself, as owner, as well as to the other owners. When asked whether the last roof repair was due to wear and tear, he said that he understood that the problem related to a stack pipe. It broke due to its age, there wasn’t an external cause. He said he didn’t know if the leak was in any way related to the work carried out in 2016 by the design team and he has no information about any repairs to the roof covering. There are various teams within the design team. Architects oversee projects and they are also responsible for mixed tenure repairs and Council owned properties. They carry out surveys and manage the tendering process for external contractors. They oversee “big ticket jobs” such as structural work or lift replacement. When asked about AP 33.2, he said that this relates to the repair to seal off the stack pipe. The black structure shown on the photograph is the box where the pipe comes up from the risers. The function of the stack pipe is to remove excess water from the roof and to take wastewater out to the sewerage mains. The stack pipes are scheme property, covered by the PF service agreement. The recent repair was carried out following Mr Garcia’s request/report on 27 October 2021.
- 43.** In relation to complaint 1 Mr Stoddart said that the statement in the WSS that it is not intended to be a binding contract was put in by the senior Private Sector Housing Officer to ensure its not a contractual or binding obligation. He confirmed that the PF must comply with the Code and the WSS. Mr Stoddart accepted that the drying room is a common area for the purposes of repairs. The PFT carried out work to keep the building secure. An issue with the main door entry would be an emergency repair. They deal with hazardous and flammable materials but only insofar as they have authority to act. The PFT

should know about matters relating to the common areas. For example, if either Housing or an owner wanted to redecorate the landing. They should know and should advise. When asked if lock changes were a management issue, he said that if the lock was removed or damaged, the repair would be a factoring issue. If Housing just wanted to change the locks, they would be told to speak to the mutual owners. When asked about how response repairs are processed, Mr Stoddart said that an owner, resident, or employee of ACC identifies a repair issue. They report it to the Contact Centre who raise the repair. The repair is instructed if it's within the level of delegated authority otherwise a scheme decision is carried out. When asked whether the housing officer had overstepped by getting locks changed without consultation Mr Stoddart said that they may have overstepped but might have been doing the right thing for the wrong reason. They wanted to keep the place secure but didn't follow the process. He confirmed that a housing officer can initiate a repair in the same way that an owner can. He confirmed that several departments are involved in the repair process. However, he denied that homeowners were paying for these departments. They don't pay for Housing. It is funded by rental income which goes into the housing revenue account. Housing do not carry out any factoring services, but they can report and initiate repairs. Where repairs are above a certain amount, Building Services will contact the PFT.

- 44.** When asked if failure in communication is a failure to provide a property factor service, Mr Stoddart said that there is a gap in the procedures which need to be more robust. Housing should knock on doors to ask for access to the drying rooms before deciding to change the locks and should speak to owners before they do that. When asked about the role of the housing officer he said that they let, manage, and end tenancies. They can report repairs. When asked about email AP 1.2c, page 7 he said that housing officers are not responsible for and do not manage the drying rooms. If work is required which is to be arranged by the Property Factor, Stephen Booth signs the scheme decision as corporate landlord. In relation to complaint 4, Mr Stoddart was asked whether the recent repair was required due to a failure to carry out cyclical maintenance. He said that they do inspect but there is a limit to what they can see. When asked about the reference in the WSS to "planned maintenance" including "replacement of roof covering" he said that the only records available relate to the work which was carried out in 2015/16. He said that the references in the WSS to replacement roof covering and replacement of lifts are examples of planned maintenance. These would be arranged if they were needed and could not be repaired. If the Capital team said that the roof needed replaced, they would check the response repairs and see how many repairs had been needed before deciding if it was needed. If it's not a repair issue, the PFT is not involved. When asked whether the process of consulting and voting is a PF process Mr Stoddart said it was not. The voting in the WSS is for scheme decisions for repair and renewal. Improvements are not part of that, they require all owners to consent. In relation to complaint 5 Mr Stoddart was referred to AP 15.2j. He said that this is a copy of the draft response to his complaint. As the PF officer, he was asked to provide a response to complaint 7. It was put to him that he was instructed to address all aspects of chapter one of the complaint and did not do so. He said that he thought that his response addressed the issues. He confirmed that AP 15.2b, page 2, is an

email from Derek McGowan dated 9 September which says that the draft response does not answer all of the points. In relation to complaint 8, Mr Stoddart confirmed that the repairs hotline is part of the PF service. In relation to the calls on Mr Garcia's bills which do not have corresponding ACC records of reports, Mr Stoddart said that he could not offer an explanation. The PFT was not told of any other calls, and it is not known what the calls were about. If he was phoning about the roof, he should have contacted the PFT. Sometimes it can be a while before the Contact Centre answers because they are busy, Mr Garcia may have given up waiting. In relation to complaint 9, he said that they had conceded that the WSS had not been issued but that contact information was on the correspondence which had been issued and the title deeds set out the obligations of the mutual owners. In relation to complaint 11, Mr Stoddart said that before COVID 19 the PFT had access to Building Services database. There is a spreadsheet which contains the date that the repair issue is logged/raised, the date that it is completed and the date it is invoiced. They have only recently got access again to the database. In between they had to contact Building services for information, and they don't have full access rights. When asked about AP 1.2c, he said that he had not held the information at the time but got it shortly after. He didn't have access so requested the information. In relation to complaint 12 Mr Stoddart said that they were obliged to provide information as PF. In relation to complaint 14 he said that lack of staffing was an issue. They get the information but have to collate and check it. They took advice and were told that the statement does meet their obligations. It was put to him that the statement is supposed to provide actual, not estimated costs, he said that they check, and the information is accurate. He said that if the Tribunal decides that the statements don't comply, they will adjust them. In relation to complaint 16 it was put to him that if Mr Garcia had been able to contact him, they would have raised the issues with the contractor and resolved the water ingress more quickly. Mr Stoddart said that he would have told Mr Garcia to contact the Design Team.

45. In relation to the PF duties complaints, Mr Stoddart said that if another department of the Council wants to do anything they should come to the PFT in the first instance and would be given advice about speaking to mutual owners.
46. In response to questions from the Tribunal, Mr Stoddart said that the Design Team sits between the corporate landlord and the Capital Team. The PFT piggyback onto Council wide services. He confirmed that ACC only factors the multi storeys plus one other block of flats which they now factor following a previous Tribunal case. He confirmed that his inspections include electrical switch cupboards, master switches, lighting and fire alarms. He said that the solicitors for purchasers of properties are told of the factoring arrangements. Response repairs are removed if outwith delegated authority and no scheme decision. Mr Stoddart advised the Tribunal that he would not be notified of repairs which were within delegated authority on a day to day basis, although he should be.

**The Tribunal make the following findings in fact**

- 47.** The Homeowner is the heritable proprietor of the property.
- 48.** Aberdeen City Council is the property factor for the property.
- 49.** The Property Factor did not provide the Homeowner with a copy of the WSS within 4 weeks of his purchase of the property in November 2014 or within 4 weeks of his request on 14 March 2021.
- 50.** The Homeowner received correspondence from the Property Factor in 2015 which stated that the Council was providing a property factoring service. The correspondence included contact details for the Property Factor team.
- 51.** The Homeowner did not know about the 2011 Act or the Code of Conduct until 2021.
- 52.** The Homeowner was aware of the process for reporting repairs when he purchased the property in November 2014, as the repairs telephone number is the same one used by tenants, and he had resided at the property as a tenant since 2000.
- 53.** Mr Stoddart told the Homeowner that the Property Factor did not hold information about lock changes in an email dated 19 May 2021. This statement was not true.
- 54.** The Homeowner owns a drying room in common with the Property Factor. The drying room forms part of the common parts and is managed by the Property Factor.
- 55.** A member of the Property Factor's staff changed the lock on the drying room without notifying the Homeowner or providing him with a key. He was subsequently provided with a key which did not open the lock before the correct key was put through the letterbox of his property.
- 56.** The Property Factor carried out extensive work to Linksfield Court. This work included over cladding and the replacement of roof covering.
- 57.** The WSS stipulates that replacement of roof covering is part of "Planned maintenance" and that improvement works require all owners to consent.
- 58.** The Property Factor's response dated 22 September 2021 addressed the Homeowner's complaints outlined in his letter of 28 May 2021.
- 59.** The Property Factor stated in the letter of 22 September 2021 that the work carried out at Linksfield Court did "not fall within the scope of the Property Factoring Code of Conduct". This was untrue.
- 60.** Following completion of the roof replacement work, the Homeowner experienced episodes of water ingress at the property.

61. The Homeowner telephoned the repairs hotline and reported episodes of water ingress. These calls were not recorded or actioned. The Property Factor has no record of reports about water ingress by the Homeowner until 2021.
62. A repair to a stack pipe was carried out in November 2021. Since that date, the Homeowner has not experienced water ingress at the property.
63. The Property Factor issues a detailed financial breakdown of factoring costs to Homeowners each year. Since 2017, this has not included a full list of response repairs.
64. The Property Factor's complaints procedure includes information about making complaints about contractors.

### **Reasons for Decision**

65. Section 2 of the 2011 Act defines "property factor" for the purposes of the Act and the Code. This definition includes "(b) a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned – (i) by two or more other persons, or (ii) by the local authority or housing association and one or more other person." The Property Factor's WSS states "Aberdeen City Council is appointed as the property factor by a decision of the majority of owners...".
66. The Tribunal heard extensive evidence from both Ms Barclay and Mr Stoddart about the role of the PFT and how it interacts with other Council departments. These witnesses also explained in detail how ACC distinguishes between its various roles in its dealings with other homeowners. In particular, it was stated that ACC is not just a property factor. It is an owner and a landlord. However, although Mr Donald was advised by the Tribunal that his final submissions should specifically address the doctrine of legal personality, they do not do so. This doctrine establishes that organisations, such as Local Authorities, are legal entities with legal rights and duties, the ability to own property, the power to enter contracts, to raise court actions and have court proceedings taken against them. When ACC take court action or enter contracts, it is not the specific department of the Council who is a party to that action or contract, it is the Council itself. Similarly, the present application is not made against Mr Stoddart (the only current member of staff in the PFT) or the PFT, but the Council. In terms of both the legislation and the WSS, ACC is the Property Factor for Mr Garcia's property. This issue is further considered in Tribunal's consideration of the complaints relating to the drying room and the roof replacement work.

### **Code complaints**

**Complaint 1 - Section 1 of the 2012 Code. A WSS must be provided to "any new homeowner within four weeks of you being made aware of a change of**

**ownership” and “if you are requested to do so by a homeowner (within four weeks of the request”.**

**67.** This complaint is conceded by the Property Factor as they have no record of issuing the WSS to Mr Garcia within 4 weeks of his purchase of the property in November 2014. It is also conceded that they did not send him the WSS within 4 weeks of his request dated 14 March 2021. The WSS was not sent out until May 2021, following a further request. The Tribunal is satisfied that the Property Factor has failed to comply with Section 1 of the 2012 Code.

**Complaint 2 - Section 2.1 of the 2012 Code. You must not provide information which is misleading or false.**

**68.** This complaint relates to statements made by Mr Stoddart in emails to Mr Garcia which assert that the Property Factor does not manage the drying rooms in Linksfield Court and that any actions taken by ACC in relation to the drying rooms are carried out in their capacity as mutual owner or landlord.

**69.** The Tribunal heard extensive evidence on this issue and, although they did not address the doctrine of legal personality, both parties also lodged detailed final submissions. It was clearly established that lock changes are not always directly instructed by the PFT. Usually, these are arranged by a housing officer, when a former tenant fails to return the keys, or by Building Services, when they need access for a repair and don't have a key. Mr Stoddart indicated that some lock changes are unnecessary. He also confirmed that not all lock changes will be charged to the homeowners, where this would be inappropriate. However, the Tribunal had some difficulty with the argument that the Council, as factor, do not “manage” the drying rooms, with the result that any actions are effectively excluded from the Code and the legislation. The Tribunal noted the following: -

- (a) Lock changes are sometimes included in the property factor response repairs.
- (b) The title deeds state that the drying rooms are common property.
- (c) Mr Stoddart inspects the drying rooms to check if repairs are required and instructs repair work when necessary.
- (d) The drying rooms are not specifically referred to in the WSS, but neither are they excluded.
- (e) Staff members from several departments within the Council instruct drying room repairs.

**70.** The Tribunal had some difficulty with the evidence about poor communication between different departments of the Council, or those departments and other homeowners. It was suggested that this demonstrated that the Council, as property factor, is not responsible for managing the drying rooms. Similarly, it is hard to see the relevance of the statement that the PFT has no authority or

power over the Housing Department. The internal workings of the Council are of no interest to Mr Garcia. He is entitled to expect that staff employed by his Property Factor can access relevant information about common property within the block and that all will act in accordance with the 2011 Act and the Code, when their actions relate to the management, maintenance and repair of that common property.

- 71.** The Property Factor relies on a decision of the HOHP, the predecessor to the FTT, in the case of Janice Leary and Falkirk Council (HOHP/PF/13/0250). In this case the Council argued that they were not the property factor for the property because they did not “manage” it in terms of the legislation. The Council did not charge a management fee. They did arrange repairs from time to time, but there was no contract or agreement for the provision of services. In their written decision with statement of reasons, the Panel concluded that “where a person carries out repairs to common parts merely on a one-off ad hoc basis, he or it does not “manage” those parts in terms of the Act. This being the case, a person, such as contractor, who has carried out a number of ad hoc repairs at a property is not obliged to register as a property factor.” The Panel concluded that the legislation only applied if there was an “agreement with the service provider (which may or may not be contained within the title deeds) giving a power or duty to provide a range of activities for the upkeep of the common parts”. In the circumstances of the case, the Panel determined that the Council was not the factor for the property and that the Panel did not have jurisdiction to consider the complaint.
- 72.** Setting aside the fact that this is a decision at first instance (and not binding on the Tribunal) it can, in any event, be distinguished. In the present application the Council accept that they are the Property Factor for the property. They led evidence that they currently factor all multi storey properties with mixed tenure. This is evidently not a case where they are only providing “ad hoc” repairs. They provide a full management service for the common areas in the blocks but, for some reason, claim that their role in relation to common drying rooms is more limited and therefore not “management”. Even if it is arguable that this distinction can be made, the Council’s own evidence does not support it. The drying rooms are routinely inspected by Mr Stoddart. He instructs repairs when these are reported to him or identified during an inspection, as do other employees of the PF who work in other teams. He can, and does, arrange lock changes if the lock is damaged. Lock changes are charged to homeowners in those circumstances. And, although it is claimed that this is done under other legislation, he will arrange for the removal of hazardous material. The Tribunal therefore concludes that the drying rooms, which are mutually owned, are common parts which are managed by the Council as Property Factor for the block.
- 73.** The Tribunal then considered the email correspondence and whether the statements made by Mr Stoddart were “misleading or false”. As the Tribunal is satisfied that the drying rooms are common parts which are factored, and that ACC is the Property Factor, the statement “We do not hold information on when the doors and locks were changed as it was the council as an owner that undertook this” (email of 19 May 2021) is misleading and false. Firstly, the



information was held by the Council, if not by the PFT, as was later established. Secondly, as the drying rooms are factored, to distinguish between the Council as owner and as factor is misleading, even if the member of staff who instructed the work is employed by a different team. The distinction is completely artificial. The Tribunal notes that in the same email Mr Stoddart actually refers to the drying rooms as being part of the common parts which are managed. He also stated that the PFT should be the first port of call if Mr Garcia wished to discuss the drying rooms, lift landing or corridor. The Tribunal is satisfied that Mr Stoddart did not set out to give false information to Mr Garcia. From his evidence, it appears that he does believe that there is some distinction between the drying rooms and the other common parts. However, the Tribunal is of the view that he ought to have known that no such distinction could legitimately be made. The Tribunal is satisfied that a breach of section 2.1 is established.

**Complaint 4 - OSP 4 of 2021 Code. You must not provide information which is deliberately or negligently misleading or false.**

74. This complaint relates to the following statement in the Property Factor's letter to the Homeowner dated 22 September 2021. "The works you refer to were instigated and carried out by the Council as an owner and regrettably does not fall within the scope of the Property Factoring Code of Conduct."
75. The Tribunal's findings in previous paragraphs of this decision also apply to this complaint. The evidence led by the Property Factor established that it was not the PFT that initiated the work which was carried out to the block. It was carried out and supervised by other departments. However, the work in question, including over cladding and roof replacement, related to common property in a block which is factored by the Council.
76. The Property Factor relies on the distinction between repairs and improvements and refers to the decision of the Upper Tribunal in the case of Hannover (Scotland) Housing Association Ltd v Ann Morrison 2019 UT 25. Hannover appealed against the decision of the First tier Tribunal that they had failed to carry out their property factor duties by failing to replace some external lighting outside a sun lounge in a sheltered complex. The Upper Tribunal determined that the sun lounge and external lighting were common parts. They noted that the management agreement allowed Hannover to carry out emergency works, or repair works up to the value of £100 per homeowner, if required. Otherwise, the authority of the homeowners was required. The Factor did not have the authority of the homeowners for the work stipulated by Ms Morrison. The Upper Tribunal considered whether the proposed work was an improvement or a repair. They noted that Ms Morrison had been looking for "something better and different, not simply a replacement of like for like" There was no "want of repair or maintenance, only of performance". They concluded that the work in question was an improvement not a repair. This being the case, the consent of the homeowners was required.
77. The Property Factor argues that the roof replacement work was an improvement, not a repair and state that the Property Factor had no authority

to instruct the work. Furthermore, it is clear from the correspondence that ACC as “owner” instigated and were responsible for the work. This argument is flawed for several reasons.

- (a) It was not established in the evidence that the replacement roof was exclusively an “improvement”. Mr Garcia conceded that he did not have the knowledge or expertise to comment on the matter. He said that his understanding was that the new roof might well be an “improvement” on the previous one, but that it had been necessary. He pointed out that the programme of works carried out by ACC involved a number of multi storeys. However, not all of them got a new roof. Mr Stoddart and Ms Barclay both said that they understood it to be an improvement but neither have the qualifications to provide expert evidence on the matter. It was conceded that “patch repairs” were carried out. Furthermore, both say that they were not directly involved. No evidence was led from any of the professional staff of the Council involved in the work and no documents were lodged which establish the position.
- (b) Even if the roof work was an improvement, it is not clear why this would establish that the Council, as property factor, had no role to play. There is no doubt the Hannover case is binding on the Tribunal, but it does not appear to be relevant to the present application. The Upper Tribunal did not conclude that Hannover was unable to carry out the proposed work, only that they could not do so unless they obtained the consent of the owners. In terms of the deed of conditions for Linksfield Court and the WSS, ACC (as factor) can carry out work without consent up to the limit of their delegated authority. Beyond this, they need to consult and obtain consent. This is the usual arrangement between homeowners and their factor. Consent was required whether the new roof replaced a defective one or simply an inferior one regardless of its classification as a repair, an improvement or planned maintenance.
- (c) The work was carried out to common property in a block which is factored. The Council consulted with the other homeowners and a vote was taken.
- (d) The WSS specifically mentions replacement roof coverings in its section on planned maintenance. Furthermore, in the section on decision making (page 6) the WSS states “Any works classed as “improvement” will, in most cases, require a unanimous decision.”

**78.** The Tribunal is therefore satisfied that, although the work may have been carried out by other departments of the Council, with little or no input from the PFT, the Council is the property factor and is bound by their own WSS, the title deeds, the 2011 Act and the Code, in relation to common property which is managed by them.

**79.** The Tribunal then considered the information which is the subject of the complaint. Had the letter simply indicated that the work had not been instructed by the property factor team, there would be no issue. It is the blanket claim that the Code does not apply which is inaccurate. The work was instructed and carried out by ACC. ACC is a mutual owner, but it is also the property factor. As Property Factor, they are subject to the Code and the 2011 Act. The

information is therefore misleading and false. Unlike section 2.1 of the 2012 Code, OSP 4 requires the information to be “deliberately or negligently” misleading or false. The letter was issued by Derek McGowan, not Mr Stoddart or the PFT. However, Mr McGowan is the Chief Officer for the service which includes the PFT. There may have been no deliberate intention to provide wrong information, but Mr McGowan (and the other staff members who contributed to the letter) ought to have known that it is the Council who has been appointed as property factor and that the Council has legal personality. Their failure to inform themselves about this before issuing a statement on behalf of the Council, shows a lack of care and attention. The statement was incorrect and could mislead the recipient about his rights. The Tribunal is therefore satisfied that the Property Factor “negligently” provided information which was misleading or false.

### **Complaint 5 - OSP 4.**

- 80.** This complaint again relates to the letter of 22 September 2021. Specifically, it relates to the response to “Your complaint is that the Council failed to carry out its duties as a property factor”. Mr Garcia said that the response is “misleading or false” because the response refers to sections of the Code and not to property factor duties.
- 81.** The Tribunal heard evidence from both Mr Garcia and Mr Stoddart on this issue. The letter is in response to a complaint from Mr Garcia. The correspondence from Mr Garcia which makes up the complaint appears to involve several documents dated 2 August 2021, 20 July 2021, 14 July 2021, 8 June 2021, and 28 May 2021. The May and June letters seem to be the principal documents. The letter of 28 May 2021 states that there has been a failure to carry out property factor duties and a failure to comply with the Code. However, although there are details of the Code complaints there are no specifics given of the property factor duty complaints. The letter of 8 June is supposed to complement (and not replace) the May letter. However, it does not mention the Code or property factor duties.
- 82.** Mr Garcia stated that the references to sections of the Code was deliberate, and that Mr Stoddart was avoiding addressing his complaints. Mr Stoddart said that he thought that he had addressed the complaints. The Tribunal has some sympathy with Mr Stoddart. The two letters do not complement each other particularly well. In the response, it appears that Mr Stoddart simply repeats Mr Garcia’s statement (in the May letter) that his complaint is about property factor duties. He goes on to address the specific Code complaints which were listed. It is not clear that the references to “law and procedure” in the June letter were about the Code or the 2011 Act. It therefore appears that the Property Factor has provided a response to the complaints specified in the May letter. However, even if they did not do so, the Tribunal is not persuaded that OSP 4 applies. Mr Garcia’s complaint seems to be about a failure to provide information, not about the accuracy of the information provided. The Tribunal is not satisfied that a breach of this section has been established.

### **Complaint 6 – OSP 4**

**83.** This complaint was conceded by the Property Factor. The Tribunal notes that both emails were addressed and sent to the PFT. The statement in the letter of 22 September 2021 was clearly incorrect and the Property Factor ought to have checked before providing the response. The Tribunal is satisfied that the Property Factor negligently provided information which was false.

### **Complaint 7 – OSP 4**

**84.** This is similar to complaint 2 but relates to a statement made in the letter of 22 September 2022. If the letter had only indicated that the PFT had not instructed the lock changes, it may have been factually accurate. However, the statement “The factor did not carry out any lock changes...” is false, since ACC is the Property Factor, and the lock changes were carried out by Council staff. As the writer of the letter ought to have known that the Council is a single legal entity, the Tribunal is satisfied that they negligently provided information which was both misleading and false.

### **Complaint 8 – OSP 4**

**85.** This complaint relates to the statement in the letter of 22 September 2021 that “we received a report that a roof leak had been experienced in a property in Linkfield Court initially on 5 May 2021.” Mr Garcia says that this is misleading and false because he had reported water ingress on numerous occasions from 2016 onwards. In his evidence, Mr Garcia referred to the Tribunal to his phone bills which show calls to the Council repairs hotline. He cross referenced this with the response he received from the Council to a FOISA request for records of calls to the hotline. These documents show that there were calls made by him with no corresponding entry in the Council’s records. Mr Garcia told the Tribunal that his calls had been ignored. Mr Stoddart told the Tribunal that he had no explanation for the discrepancy. He suggested that Mr Garcia might have called the number but given up when it took too long to get through. However, this was speculation and could not account for the entries on the phone bills where the calls were clearly connected. However, Mr Garcia was unable to tell the Tribunal which of the calls related to water ingress. On one occasion, there was a call to the insurance company shortly after the call to repairs line. He said that this was almost certainly about water ingress. He also stated that, although there were calls to the repairs line about other matters, most were about the water ingress.

**86.** The Tribunal found Mr Garcia to be both credible and reliable. He provided evidence of the water ingress in the form of photographs. The phone bills show that he made calls to the hotline which do not appear on the Council’s records. However, there are fewer calls than might be expected and he does not seem to have followed these up with written reports or complaints. Furthermore, the Tribunal also found Mr Stoddart to be credible and reliable when he stated that the first complaint of water ingress at Linkfield Court that he has knowledge of, was in May 2021. It appears to the Tribunal that, if the

records are incomplete, the fault or error lies with the staff who took the calls or those responsible for ensuring that each report is recorded, actioned, and notified to the PFT. The Tribunal is therefore satisfied that, although leaks and/or water ingress were reported prior to May 2021, the provision of the information about the reports in September 2021, was not “deliberately or negligently” misleading or false because the Property Factor was relying on the records when drafting the response.

**Complaint 9 – Section 2.3 of the 2012 Code. You must provide homeowners with your contact details, including telephone number. If it is part of the service agreed with homeowners, you must also provide details of arrangements for dealing with out of hours emergencies including how to contact out of hours contractors.**

87. Although conceded by the Property Factor that a WSS was not issued until 2021, it is argued that this failure had no adverse impact on Mr Garcia as he was aware of how to report repairs, including emergency repairs. There is some merit to this claim. Mr Garcia purchased his property under the Right to Buy legislation as a sitting tenant. The repairs hotline number the same for both tenants and homeowners. Furthermore, the Tribunal heard evidence from both parties about correspondence issued to Mr Garcia by the PFT. Annual statements were issued each year from March 2015, with a covering letter. These provide the PF registration number, email address, telephone number and address. This same information was provided in a letter dated 4 June 2015, which states that ACC provide a property factoring service for the building. Mr Stoddart also told the Tribunal that there are usually notices up in the multi story blocks which explain how to report repairs.

88. Section 2.3 does not specifically refer to the WSS. However, it appears from the evidence that no documentation was sent to Mr Garcia with specific information about how to report repairs until 2021 and the PFT contact information was not provided until March 2015. The Tribunal therefore concludes that the Property Factor has failed to comply with Section 2.3 of the 2012 Code.

**Complaint 10 – Section 2.5 of the 2012 Code. You must respond to enquiries and complaints 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.**

89. This complaint is also conceded by the Property Factor, in relation to the email from Mr Garcia on 14 March 2021 requesting a copy of the WSS, a detailed breakdown of charges and information about lock changes and new security doors. As the Property Factor did not respond to this email until 19 May 2021, following a further request on 18 May 2021, the Tribunal is satisfied that a breach of this section has been established.

### **Complaint 11 – Section 2.5 of the 2012 Code**

- 90.** This is partially conceded in relation to the email of 14 March 2021. However, this complaint is essentially a duplicate of complaint 10. Although Mr Garcia has listed it as a separate complaint (relating to the lock change information rather than the WSS) it concerns the same email and lack of response.
- 91.** The Property Factor disputes the complaint in relation to the emails of 18, 19 and 21 May 2021. They state that the correct information about the lock changes was provided by 21 May 2021. It is perhaps unfortunate that Mr Garcia was initially given incorrect information. However, it is not a breach of section 2.5, which is about timescales for responses. The Tribunal is therefore satisfied that there has been no breach of Section 2.5 in relation to the May emails

### **Complaint 12 – Section 2.5 of the 2012 Code.**

- 92.** This is conceded by the Property Factor. The Tribunal is satisfied that Mr Garcia requested “Statements with detailed breakdown expenses with a list of individual jobs carried out” “from May 2017 onwards” in both his emails of 14 March and 18 May 2021. This information was not provided until 17 July 2021, as part of the FOISA response. The information should have been provided more quickly or Mr Garcia should have been notified that there would be a delay and given a reason for this. The Tribunal is satisfied that a breach of this section has been established.

**Complaint 14 – Section 3.3 of the 2012 Code. 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 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 and copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.**

- 93.** The Tribunal heard evidence from Mr Garcia and Mr Stoddart on this complaint. Mr Garcia said that the current statements do not comply with this section of the Code, or the WSS. This is because they do not provide the required level of detail and are based on estimated rather than actual expenditure. He also said that the statements issued up to 2017 were more detailed and were Code compliant. Mr Stoddart told the Tribunal that the current statements provide more detail and do comply with this section of the Code.
- 94.** The Tribunal notes that the statements lodged provide the total charges for the year and the homeowner’s share of the factors fee, each of the cyclical maintenance services (such as lift servicing) and common areas services

(such as electricity and cleaning). The statement indicates that response repairs are based on an estimate and are provided on a separate sheet. This list was provided between 2015 and 2017. Every repair and the cost of same for the year is listed. It was conceded that this list is no longer provided, although the Tribunal notes that the letters and statements for 2018 and 2019 are in the same format and still indicate that this information will be issued.

**95.** The Tribunal is satisfied that the annual statements, without the list of response repairs, does meet the first part of Section 3.3. They provide enough information to qualify as “a detailed financial breakdown”. Mr Garcia’s expectation is perhaps understandable in the circumstances, as he had previously received more detailed information. It also appears that the decision to stop issuing a list of response repairs was due to staff shortages, rather than because it is unnecessary. However, the Code does not define “detailed financial breakdown” other than it must have a description of the activities and work carried out which are charged for. The description of work provides adequate information to allow the Homeowner to query or request supporting documentation which the Homeowner did. The Tribunal is satisfied that the current format provides enough information to comply with that section.

**96.** The Tribunal is also satisfied that the Property Factor has complied with the second part of section 3.3. The list of individual jobs was not provided until the FOISA response was issued, but Mr Stoddart told the Tribunal that he was in the process of compiling the information when the FOISA request was received. It also appears that it was provided without a charge being applied, although Mr Stoddart stated that it is a very time-consuming job, which might justify a fee being charged.

**Complaint 15 – Section 6.9 of the 2012 Code. You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of the work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job specific progress reports are not required.**

**97.** The Tribunal is satisfied that the Property Factor does have procedures for reporting repairs which are detailed in the WSS. They may not have notified Mr Garcia of these procedures by failing to issue the WSS to him, but that is not a breach of this section of the Code.

**Complaint 16 – Section 6.9 of the Code. You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.**

**98.** Mr Garcia gave evidence to the Tribunal about episodes of water ingress at his property following the replacement of the roof in 2015/16. He also told the Tribunal that although the work was completed several years ago, he has not been issued with an invoice. Mr Stoddart and Mr Donald insisted that the PFT

had nothing to do with the work and offered no explanation for the delay in requesting payment. The Tribunal noted the following.

- (a) The evidence did not establish that the roof replacement work was defective.
- (b) Since the repair to the stack pipe in November 2021, there have been no further episodes of water ingress.
- (c) The evidence did not establish that the stack pipe issue was connected to the roof replacement work

**99.** For a breach of this section to be established, it would have to be shown that work had been carried out which was potentially defective, that ACC knew that it was potentially defective and that no steps were taken to pursue the contractor to have the defects rectified. As the Tribunal is satisfied that ACC (and not the PFT) is the Property Factor, the contact with the contractor could have been by any relevant department within the Council. However, the Tribunal is not satisfied that Mr Garcia has established a direct link between the water ingress and the new roof, or that the Council was aware that the roof might be defective. The Tribunal accepted Mr Garcia's evidence that he telephoned and reported water ingress on a few occasions which were not recorded or actioned by Council staff. However, that is not enough to establish that a breach of this section has occurred.

**Complaint 17 – Section 7,1 of the Code. 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.**

**100.** The Tribunal is satisfied that the Property Factor has a clear written complaints procedure, a summary of which is included in the WSS. The word "contractors" does not appear. However, there are two relevant references in the WSS. On page 9 it states that complaints can be about "the standard of service provided by us or on our behalf". In the section headed "What can I complain about" the WSS says "Your complaint may involve more than one Council service or be about someone working on our behalf". While it might be better practice for the procedure to make a specific reference to contractors, these provisions appear to meet the requirements of Section 7.1. In the context of factoring, it is hard to see what other interpretation is open to the expression "someone working on our behalf". Indeed, it might be suggested that the language used is easier to understand. In the circumstances, the Tribunal is not satisfied that a breach of this section has been established.

### **Property Factor Duties**

**101.** As previously stated, the Tribunal is satisfied that ACC as an organisation and legal entity, is the Property Factor. It is therefore irrelevant



that some of the matters complained of were carried out by a housing officer or staff member from another department. The Tribunal is also satisfied that the drying rooms are common property and therefore within the remit of the Council as property factor.

**102.** Mr Garcia told the Tribunal that the locks on his drying room were changed without his knowledge or consent. His evidence was credible and reliable and, in any event, not disputed by the Property Factor. The Tribunal is satisfied that the Council was entitled to change the lock, if this was necessary to ensure the room was secure, without notifying Mr Garcia in advance. However, their failure to notify him afterwards and provide him with a replacement key which could be used to open the drying room, does appear to be a failure to carry out property factor duties to a reasonable standard. The Tribunal is therefore satisfied that a failure to carry out property factor duties has been established in relation to these complaints.

**103.** The Tribunal is less convinced by the other complaints. The fact that the key also opened one other drying room on the same floor might not be an ideal arrangement. However, Mr. Garcia could simply have raised his concerns with ACC and asked for it to be addressed. Simple human error could have been the cause. Had he done so, and the matter was not rectified, his complaint might have been established. The Tribunal is also not persuaded by the complaint about the new key being posted through his letterbox. Had the key been left for collection, unattended and in a public area, then the complaint might be justified. However, this was not the case. The Tribunal also concludes that poor communication between departments, and failing to provide responses to enquiries and complaints, are matters covered by the Code rather than property factor duties which derive from the title deeds and the WSS.

**104.** The Tribunal therefore determines that the Property Factor has failed to comply with Sections 1, 2.1, 2.3 and 2.5 of the 2012 Code and OSP 4 of the 2021 Code. The Property Factor has also failed to carry out its property factor duties by changing the lock of the drying room without notifying Mr Garcia or providing him with a replacement key.

### **Proposed PFEO**

**105.** In terms of Section 19(2) of the 2011 Act, a proposed Property Factor Enforcement Order (PFEO) accompanies the decision.

### **Proposed Property Factor Enforcement Order**

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

### **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.**

Josephine Bonnar, Legal Member  
29 August 2022