

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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

**Decision on homeowners’ application: Property Factors (Scotland) Act 2011**  
**(“the 2011 Act”), Section 19(1)**

**Chamber Ref: FTS/HPC/LM/19/1850**

**Common Ground, Belvedere Village, Parkhead, Glasgow, G31 4QD**  
**(“The Property”)**

**The Parties:-**

**Mr Lewis Cole, 65 Springbank Gardens, Parkhead, Glasgow, G31 4QD**  
**(“the Applicant”)**

**SG Property Management Limited, 272 Bath Street, Glasgow, G2 4JR**  
**(“the Respondent”)**

**Tribunal Members:**  
**Susanne L M Tanner QC (Legal Member)**  
**Mary Lyden (Ordinary Member)**

### **DECISION**

- 1. The Property Factor has failed to comply with the Code of Conduct for Property Factors, Sections 1.1a and 2.4.**
- 2. The Property Factor has failed to carry out its property factor’s duties.**
- 3. The decision of the tribunal is unanimous.**

## STATEMENT OF REASONS

1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as “the 2011 Act”, the Code of Conduct for Property Factors as “the Code of Conduct” and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as “the 2017 Rules”.

### 2. Findings in fact

- 2.1. The Applicant became the registered proprietor of the property at 65 Springbank Gardens, Glasgow, G31 4QD on 18 December 2014, with a date of entry on 15 December 2014.
- 2.2. The Applicant’s property is a semi-detached house in a development known as Belvedere Village (“the Development”).
- 2.3. The developer of the Development was Kier Homes (“Kier”).
- 2.4. The Deed of Conditions for the Development was registered by Kier on 14 June 2007.
- 2.5. The Development was started in or about 2008 and completed in or about 2018.
- 2.6. A “Property” in the Development is defined in the Deed of Conditions as a Plot or a Flat or a Dwelling house or a Listed Building Dwellinghouse.
- 2.7. A “Proprietor” in the Development is defined in the Deed of Conditions as owner for the time being of any Property.
- 2.8. There are 418 Properties in the development.
- 2.9. The “Common Parts” of the Development are defined in the Deed of Conditions as the Access Routes, the Common Services, the Common Ground and the Common Parking spaces, under exception of Common Parking Spaces situated within Quadrangles 1, 2 and 3.
- 2.10. The “Common Ground” in the Development is defined as the areas coloured green on the plan attached to the Deed of Conditions and the footpath coloured dark blue on the plan.
- 2.11. The “Access Routes” in the Development are defined in the Deed of Conditions as the roads and footpaths shown coloured turquoise on the plan.

- 2.12. The legend in the plan attached to the Deed of Conditions describes the green areas of Common Ground as open space area to be adopted and maintained by the factor and the Access Routes to be managed and maintained by Glasgow City Council.
- 2.13. Said Common Ground is referred to hereafter as “the Property”.
- 2.14. The Respondent registered as a property factor on 1 November 2012 and renewed its registration on 17 May 2016.
- 2.15. “Property Manager” is defined in the Deed of Conditions as Spiers Gumley Property Management or such other organisation or person, firm or company who may be appointed a property manager in terms of Clause 1 to Schedule 1 of the Deed of Conditions.
- 2.16. Clause 1.1 in Schedule 1 to the Deed of Conditions provides that Kier may appoint some other person to be property manager and may delegate to any such Property manager such rights or powers as may be exercisable by a majority of the Proprietors in the Development with responsibility for instructing and administering repairs to and maintenance of the Common Parts.
- 2.17. Kier Homes appointed the Respondent’s predecessor, Spiers Gumley as the first Property Factor of the Development, in terms of the Deed of Conditions, for a period of three years from the date of completion of the first property on the Development and was renewed annually thereafter unless terminated by a vote of not less than 51 per cent of the Proprietors in the Development.
- 2.18. The handover from Kier Homes to Spiers Gumley took place in or about November 2008.
- 2.19. When the Respondent was formed, the management of the Development transferred from Spiers Gumley to the Respondent and the Respondent became the Property Factor.
- 2.20. The Respondent was entitled during the continuance of its appointment to exercise the whole rights and powers which may competently be exercised at or by a meeting of the Owners Association subject to any limit of expenditure which may be fixed by the Proprietors at any such meeting.

- 2.21. Each Proprietor is deemed to be a member of the Owners Association, the purpose of which is to implement the terms of the Deed of Conditions and to preserve the amenity of the Development.
- 2.22. The Owners Association has power amongst other things to execute any common or mutual operations, maintenance and repairs to the Common Parts, except to the extent that that the Access Routes are adopted for maintenance by the local authority.
- 2.23. The Respondent, as property factor had power to exercise the whole rights and powers which may competently be exercised at or by a meeting of Proprietors convened in terms of the Deed of Conditions.
- 2.24. In or about November 2018, the Owners Association, although automatically in existence without formalities, was effectively inactive and there had been no meetings of the Owners' Association for some time.
- 2.25. Amongst other things, the Respondent was entitled during the continuance of its appointment to collect from each Proprietor the relevant proportion of the expenses and charges incurred in maintenance of the common parts and all sums for which the Proprietors may become liable in terms of the Deed of Conditions.
- 2.26. No limit of expenditure had been agreed by the requisite number of Proprietors for maintenance to be instructed by the Property Factor on their behalf.
- 2.27. In relation to maintenance of the Common Parts, the Applicant had an obligation jointly with the other Proprietors to keep tidy, upholding and maintaining in good order and repair and from time to time where necessary renewing and restoring the common parts (except in so far as the Access Routes shall have been adopted by the Local Authority); and each Proprietor is obliged to pay the relevant proportion of all expenses and charges incurred in the foregoing obligation and of any other work done or services rendered in respect of the Common Parts.
- 2.28. Any ten Proprietors can call a meeting of the Owners' Association.
- 2.29. One third of the members present in person or by proxy shall form a quorum for a meeting of the Owners' Association, namely 139 Proprietors of separate Properties.

- 2.30. Decisions to be taken in relation to the community may be taken by a majority vote of those present at a quorate meeting of the Owners' Association, namely 70 Proprietors of separate Properties.
- 2.31. The Respondent's Written Statement of Services for the Development is undated.
- 2.32. The Respondent's Written Statement of Services is generic and since in or about 2014, it has been used for all properties managed by the Respondent, including the Development.
- 2.33. There is no schedule to the Written Statement of Services which is specific to the Development.
- 2.34. The Written Statement of Services contains three possible generic options for the Respondent's authority to act as property factor but does not state the basis of the Respondent's authority to act as property factor of the Development.
- 2.35. The Written Statement of Services does not contain a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which the property factor may act without further consultation.
- 2.36. The Written Statement of Services provides under the heading "Repairs", that excluding emergency and jobbing repairs the Respondent will contact homeowners in advance of instructing major repair work at their property.
- 2.37. There is no definition of emergency repairs, jobbing repairs, or major repair work in the Written Statement of Services.
- 2.38. No financial thresholds for authority to instruct works are specified in the Written Statement of Services.
- 2.39. The Written Statement of Services provides that where the Respondent requires authorisation and advance funding to proceed with major works it will write to homeowners providing details of estimates received and a specification of the work proposed; and refers to majority agreement for such works.
- 2.40. There is no provision in the Written Statement of Services for works at the Development which do not constitute "repairs".

- 2.41. There are two entrances from the main road to the Access Routes within the Development.
- 2.42. The Development is situated near Celtic Park football ground at Parkhead, Glasgow.
- 2.43. On football match days visitors come into Development and park vehicles on the roads and garden ground (“rogue parking”).
- 2.44. There is a significant rogue parking issue within the Development on match days.
- 2.45. Damage has been caused on a number of occasions to soft landscaping in the Development as a result of rogue parking on grassed areas, both prior to and subsequent to the Respondent’s appointment as property factor.
- 2.46. In or about November 2018, the management of the remaining Common Areas was handed over by Kier to the Respondent.
- 2.47. Prior to November 2018, Kier reinstated areas of damaged soft landscaping caused by parked vehicles.
- 2.48. Following handover to the Respondent in or about November 2018, further damage was caused to the soft landscaping as a result of rogue parking of vehicles on grassed areas of Common Ground on match days.
- 2.49. The Respondent made a proactive decision in or about November 2018 to install rocks in certain areas of Common Ground in the Development to deter parking of vehicles in those areas and to protect those areas of ground (“the rock works”).
- 2.50. The Respondent did not notify or seek the agreement of Proprietors in advance of instructing the rock works.
- 2.51. The Respondent instructed MacDonald Brothers Landscaping to place twenty large rocks on some areas of Common Ground at a cost of £1440.00 including VAT.
- 2.52. The Respondent instructed the contractor in relation to the locations in which the rocks were to be placed within the Common Ground in the Development.

- 2.53. The purpose of the rock works was to deter parking on the soft landscaped areas in the Development which would be likely to cause further damage to the grass and to limit additional maintenance or renewal expenditure to the Proprietors.
- 2.54. The rock works were instructed by the Respondent in good faith, with the interests of the Proprietors in mind.
- 2.55. The Respondent did not notify Proprietors of the intended rock works, or provide one or more quotations to them prior to instructing the rock works.
- 2.56. The Respondent did not consult with the Proprietors in the Development to seek majority approval of a quorate number of Proprietors at a meeting before instructing the rock works and incurring the consequent financial liability to the Proprietors.
- 2.57. The Respondent did not notify or consult with the Proprietors as to the areas in which the rocks would be placed or invite the views of Proprietors.
- 2.58. Each Proprietor's share of the rock works was charged on their quarterly invoice issue in March 2019.
- 2.59. The Applicant received an invoice dated 21 March 2019, which included the sum of £2.87 in respect of the rock works, described as "*Supply and Lay 20no. large rocks on grass areas as a preventative measure for rogue parking during matchdays at Celtic Park.*"
- 2.60. On 1 April 2019, the Applicant wrote to the Respondent complaining about the rock works stating that: the rock works had been carried out without consultation with Proprietors; the rocks had not been effectively placed; they were unnecessary as parking should be dealt with by the Council and/or Police Scotland; and the total cost of the twenty rocks was excessive. The Applicant refused to pay his share of the rock works.
- 2.61. In June 2019, following further correspondence between the parties, the Respondent offered to apply a credit to the Applicant's account in respect of his share of the cost of the rock works, as a gesture of goodwill to resolve the complaint.
- 2.62. The placing of the twenty rocks in the areas selected by the Respondent has not eliminated the problem of rogue parking in the Development or prevented damage to other soft landscaped areas in the Development on which no rocks have been placed.

- 2.63. The rock works were a preventative measure to discourage parking on some soft landscaped areas in the Development on match days which would be likely to cause damage to the Common Ground.
- 2.64. The rock works were not maintenance of the Common Ground in the Development.
- 2.65. The Respondent should have consulted the Proprietors in the Development before instructing works outwith the core maintenance services, which would expose the owners in the Development to financial liability.
- 2.66. The roads in the Development have not been adopted by the local authority.

### **3. Findings in fact and law**

- 3.1. The Written Statement of Services does not contain a statement of the Respondent's authority to act as property factor of the Development, or a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which the property factor may act without further consultation, which is a failure to comply with Section 1.1Aa of the Code of Conduct.
- 3.2. The Respondent's failure to consult with the Proprietors in the Development prior to instructing the rock works, which were works outwith the core services, is a failure to comply with Section 2.4 of the Code of Conduct.
- 3.3. The Respondent's failure to notify and obtain authorisation from the Proprietors in the Development prior to instructing the rock works is a failure to comply with its Property Factor's duties in terms of the Written Statement of Services.

### **4. The Application**

- 4.1. The Applicant lodged an application ("the Application") with the tribunal on 14 June 2019.
- 4.2. In Section 7 of the Application the Applicant alleged that the Respondent has failed to comply with the Code in the following respects:
- 4.2.1. Section 1.1a authority to Act A*
- 4.2.2. Section 2.4 consultation;*



4.3. In Section 7 of the Application the Applicant alleged that the Property Factor has failed to comply with its Property Factor's duties for the following reasons: *"In the factor's written statement there is no stated authority to carry out any additional works above their standard duties without consultation of homeowners. The factor has carried out un-necessary work that was not an emergency or for maintenance and without consulting the residents. They then tried to charge resident (sic) for the works claiming it was a management decision not to communicate with us"*.

4.4. The Applicant completed the following four parts of Section 7 as follows:

4.4.1. *What is your complaint? "The factor installed additional rocks to prevent rogue parking during match days at the near by Celtic Park. The rocks were installed in an area where no-one parks and are ineffective. No consultation occurred with residents prior to the factor's actions. The factor is aware the council will be adopting the roads by the end of the year."*

4.4.2. *What are your reasons for considering that the Property Factor has failed to resolve the complaint? "They have refused to move the rocks to where they would help. They acknowledged they were aware of the council adopting the roads by the end of the year and they enforce parking restrictions, not the factor. Making these works useless and they continue to try and charge us."*

4.4.3. *How has this affected you? "I have been asked to pay my share of something I had no say in, or idea was happening. They do nothing to prevent problem parking and are placed in a row in one area of the estate, making them ineffective"*.

4.4.4. *What would help to resolve the problem(s)? "I have asked the factor to consult with residents and move the rocks – they refused. I asked them to call a meeting of residents – they refused. I shouldn't be charged for extraneous additional ineffective works carried out without any authority to do so when an alternative existed for free"*.

4.5. The Applicant provided the following documents with his Application and in response to requests by the tribunal for further information:

4.5.1. Cover email dated 14 June 2019;

4.5.2. A Written Statement from the Respondent (3 pages, undated);

4.5.3. Copy correspondence between the Applicant and the Respondent from 1 April to 4 June 2019;

- 4.5.4. Notification by the Applicant to the Respondent dated 27 June 2019; with proof of delivery;
- 4.5.5. Further post-notification correspondence from the Respondent to the Applicant.
- 4.6. On 29 July 2019, the Application, comprising all documentation received in the period 14 June to 29 July 2019, was referred to the tribunal in terms of Sections 18 and 18A of the 2011 Act.
- 4.7. On 8 August 2019, the tribunal's administration wrote to the parties to advise that the Application had been referred to the tribunal.
- 4.8. A hearing was fixed for 25 September 2019 at 10.00am at Glasgow Tribunals Centre, Room 112, 20 York Street, Glasgow, G2 8GT.
- 4.9. The hearing date was intimated to parties and parties were invited to lodge any written representations by 29 August 2019 and to lodge any documents in accordance with Practice Direction number 3.

## **5. Directions**

- 5.1. The tribunal on its own initiative issued Directions to parties in terms of Rule 16 of the 2017 Rules in relation to the conduct and progress of the Application:
  - 5.1.1. Directions dated 10 September 2019; and
  - 5.1.2. Directions dated 25 September 2019,
- 5.2. Reference is made to the full terms of the Directions.

## **6. Written Representations and documents lodged by parties prior to the hearing**

- 6.1. On 17 September 2019, the Applicant wrote to the tribunal's administration stating that he and his wife were expecting their first child and that he would do his best to attend the hearing on 25 September 2019. He stated that he would not be calling any witnesses to attend the hearing. He attached a numbered and indexed List of Productions and asked that these be crossed over to the Respondent.

- 6.2. On 18 September 2019, Mr O'Hara of the Respondent submitted written representations and a List of Documents with documents numbered 2.1 to 2.6, also stating that he intended to refer to the Deed of Conditions and Written Statement of Services which had already been lodged.
- 6.3. On 24 September 2019, the Mr O'Hara of the Respondent submitted a book of photographs containing six photographs which were said to have been taken on 22 September 2019, together with an apology for the late submission on the basis that the Respondent had waited for a match day to take the photographs showing the areas affected by rogue parking.
- 6.4. On 25 September 2019, the Applicant produced a copy of the title sheet for his property at 65 Springbank Gardens, Glasgow, G31 4QD (Title number GLA216952), the Burdens section of which contains the Deed of Conditions registered 14 June 2007 by Kier Homes Limited.
- 6.5. On 25 September 2019, the Applicant produced a book of photographs containing eight photographs.
- 6.6. On 11 October 2019, Mr O'Hara from the Respondent sent an email to the tribunal's administration, attaching copy communications from three other proprietors in the Development.
- 6.6.1. Within his email Mr O'Hara stated that the Respondent now accepts that in accordance with its Written Statement of Services the Respondent should have sought the agreement of the owners in advance of instructing the rock works.
- 6.6.2. Further explanation was provided as to why the Respondent had proceeded with the works without consultation, stating that it was done to preserve the soft landscaped ground and that had they put the matter to a vote, then the requisite number of owners would be unlikely to respond, particularly given the high number of rental properties in the Development. He stated that in the view of the Respondent the placing of the rocks had been effective in those areas in terms of preserving the soft landscaping from further damage. The roads had not yet been adopted by the Council.
- 6.6.3. The attached letters were from three other owners in the Development who were retrospectively supportive of the rocks works which had been instructed by the Respondent.
- 6.6.4. In relation to the Written Statement of Services, the Respondent accepted that it is not specific when referring to its authority to act at the

Development and stated its intention to work with its legal advisers to improve the detail of the WSS in relation to authority to act.

6.6.5. Mr O'Hara stated that the Respondent had reached the decision to concede the case given the lack of precise wording in the WSS as regards authority to act and the actions of instructing the rock works without prior notice to the owners.

6.6.6. In relation to the rock works, Mr O'Hara asked that the tribunal take into consideration the Respondent's stated reasons for taking the management decision they did in the circumstances together with the three statement of owners which were said to support the actions taken. Mr O'Hara stated that it was the first time that the Respondent had been to the tribunal and that they would use the experience constructively to review their WSS in accordance with the spirit of the Code of Conduct, for the benefit of clients and to avoid any disputes arising in the future. The Respondent offered its sincere apologies to the Applicant and offered to meet him in person at the Development. The Respondent also apologised to the tribunal with regards to matters which in its opinion could have been resolved at an earlier stage had there been better communication between the parties from the outset.

6.6.7. Mr O'Hara stated that it was not the Respondent's intention to prolong the process any further and that they had decided not to attend the adjourned hearing to offer any further defence of their position, stating that the Respondent would await the outcome of the tribunals' consideration of all submissions from both parties.

## **7. Hearing – 25 September 2019 and 6 November 2019**

7.1. A hearing took place over two days on 25 September 2019 and 6 November 2019, at Glasgow Tribunals Centre.

7.2. The Applicant attended the hearing on both days.

7.3. Mr Joe O'Hara from the Respondent attended on the first hearing day. No representative of the Respondent attended on the second hearing day, for the reason stated in its email of 11 October 2019, in which the Respondent admitted its failures to comply with the Code of Conduct and Property Factors' duties and conceded the case.

## **8. Summary of submissions and evidence at hearing**

8.1. The tribunal heard evidence and oral submissions on behalf of both parties in relation to the alleged failures to comply with the Code and failures to comply with property factors' duties. The tribunal also took account of the Respondent's written submissions in advance of the second hearing day, in which the Respondent admitted the alleged breaches and conceded the case.

8.2. Given the Respondent's concession, the parties' evidence and submissions in relation to the two alleged failures to comply with the Code of Conduct and the alleged failure to comply with Property Factor's duties are summarised briefly below:

### **8.3. Section 1.1aA of the Code of Conduct**

#### **8.3.1. The Applicant**

8.3.1.1. The Applicant expanded on the submissions in his Application and referred to supporting documentation, in particular the WSS.

8.3.1.2. The Applicant's complaint was that the Respondent's authority to act at the Development was missing from the WSS which had been issued to him following his purchase of the property at 65 Springbank Gardens, Glasgow in December 2014.

#### **8.3.2. The Respondent**

8.3.2.1. On the first hearing day, the Respondent accepted that the WSS could be clearer in relation to the Respondent's authority to act, stating that the Respondent would implement any orders made by the tribunal and may make a specific schedule relating to the Development.

8.3.2.2. In his written submissions prior to the second hearing day, Mr O'Hara accepted on behalf of the Respondent that the WSS is deficient in that there no stated basis of the Respondent's authority to act at the Development. He further stated that the Respondent intended to consult with its legal advisers with a view to revising the document.

8.3.2.3. In oral submissions o the first hearing day, Mr O'Hara stated that the WSS is a generic document issued to all developments which

are managed by the Respondent. The Respondent's portfolio is 8000 units, with potential for management of some new developments.

8.3.2.4. In relation to the Respondent's appointment at the Development, he stated that there are 418 houses and flats in total at the Development in which the Property is situated. The Common Ground is the responsibility of all Proprietors with a split 418 ways. Kier Homes was the developer and they appointed the Respondent's predecessor, Spiers Gumley, as the first property factor. When SG Property Management was formed, the management of the Development was transferred over to the Respondent.

## **8.4. Section 2.4 of the Code of Conduct**

### **8.4.1. Applicant**

8.4.1.1. The Applicant expanded on the submissions in his Application and referred to supporting documentation. He stated that his complaint related to works which had been instructed by the Respondent in November 2018, without informing or consulting with the Proprietors at the Development; and the resultant charges sent to the 418 owners in their quarterly invoice in March 2019. The Applicant had been invoiced for £2.87 in respect of his share of the rock works.

8.4.1.2. The Applicant stated that the works involved 20 rocks being placed on the Common Ground in one area of the Development to deter rogue parking by people attending nearby Celtic Park on match days. He explained that it was not the cost of the works that was his primary concern but the fact that the works had been instructed without the Respondent informing the Proprietors or seeking their authorisation. He also said that views should have been sought as to the location of the rocks. The Applicant stated that the Access Routes into and out of the Development were his main area of concern as there were only two ways in and out and the rogue parking caused access problems for Proprietors in addition to the damage to soft landscaping. He stated that one access route is blocked entirely by the rogue parking when the football is on.

8.4.1.3. The Applicant referred to photographs taken by him and the Respondent showing the affected areas, which included areas in

which rocks had not been placed. He stated that Photograph 4, in his bundle, dated 22 September 2019, showed vehicles parked in two rows on the central verge on a match day. Other photographs showed the damage after the cars had left the Development.

8.4.1.4. He stated that his primary concern was the lack of communication by the Respondent before instruction of the works.

8.4.1.5. The Applicant stated that at the time of his Application he thought that the Council would adopt the roads but there is still no date for adoption.

8.4.1.6. The Applicant noted that more rocks or other measures would be required in the Development if the intention was to prevent all rogue parking on grassed areas with the consequent issues of restricted access and damage to the grass.

8.4.1.7. The Applicant stated that there has been no active Owners' Association since he purchased his property but that he would be willing to work with the Respondent to try to re-establish an active one. At the second hearing day he stated that following discussions with Mr O'Hara they share a common goal to work together going forward and advised that a meeting had been arranged to take place shortly thereafter.

8.4.1.8. The Applicant stated that he appreciated that the Respondent instructed the rock works with best intentions. He stated that Mr O'Hara has been very pleasant to deal with and that he is not complaining about the overall cost of the rock works.

#### **8.4.2. Remedies**

8.4.2.1. The Applicant stated that he accepted the Respondent's apology in paragraph 12 of the Respondent's written submissions and stated that in general the Respondent has been a good property factor.

8.4.2.2. In relation to the WSS he stated that the Proprietors need a clear definition of where parties stand and he would wish this to be revised specifically for the Development so that it complies with the Deed of Conditions and the Code of Conduct.

8.4.2.3. He stated that he wished to have a dialogue with the Respondent and he understands that Mr O'Hara wants that as well. He advised the tribunal that they had planned a meeting on 12th November. He intends to seek Mr O'Hara's advice on how to set up a more structured Owners' Association and to discuss possible additional preventative measures. He will also discuss with the Respondent getting tenants on the Development involved in discussions, even though they are unable to vote.

8.4.2.4. He stated that he is not asking the tribunal to order the Respondent to move the rocks which have already been placed.

8.4.2.5. He wishes a meeting of Proprietors to be called by the Respondent.

8.4.2.6. He is prepared to pay for the rock works and he is not requesting any refund or credit.

8.4.2.7. He wishes an acknowledgement to be sent to all of the Proprietors by the Respondent that there have been mistakes in the way that the Respondent has acted.

8.4.2.8. He is not seeking any financial payment from the Respondent.

8.4.2.9. He does not wish anything detrimental towards the Respondent in terms of reputational damage, if it can be avoided, as he accepts that they were acting with good intentions.

### **8.4.3. Respondent**

8.4.3.1. In its written submissions prior to the second day of the hearing, the Respondent conceded that it should have consulted with the Proprietors and sought their authority prior to instructing the rock works.

8.4.3.2. By way of background, at the first day of the oral hearing, Mr O'Hara stated that there is no active Owners' Association at the Development although the Deed of Conditions provides that one will exist automatically without any formalities. In the Respondent's experience there has been a bit of apathy amongst the owners. A lot of the properties are rented out and the Proprietors do not engage.



8.4.3.3. Mr O'Hara had accepted in the oral hearing that the rock works could not be described as maintenance but stated that it was a preventative measure to prevent damage to grassed areas. He stated that the 417 other owners have accepted the rock works and paid their share. No-one else has disputed the works or the cost. The cost was £2.87 per property. Attached to its written representations were three letters from owners which retrospectively supported the action that the Respondent had taken in instructing the rock works. The Respondent had offered to credit the Applicant's account with the £2.87.

8.4.3.4. Mr O'Hara accepted at the hearing that undeniably more rocks , bollards or other preventative measures would be required in the Development in addition to the twenty rocks already placed, in order to prevent rogue parking on all grassed areas in the Development.

8.4.3.5. Mr O'Hara stated that there is as yet no date for adoption of the roads in the Development. He added that following adoption the Council may impose parking measures such as double yellow lines.

8.4.3.6. Mr O'Hara offered to consult with the Applicant about the possible placement of additional rocks or other preventative measures in the Development.

## **8.5. Property Factor's duties**

8.5.1. Both parties referred to submissions already made in relation to the Respondent's failure to consult with the Proprietors prior to instructing the rock works, stating that the Deed of Conditions and Written Statement of Services did not entitle the Respondent to instruct the rock works without first seeking the requisite authority of the Proprietors.

8.5.2. The Respondent conceded that in acting in the way which it did it had breached its property factors' duties by failing to comply with the Written Statement of Services for the Development.

## **9. Discussion**

9.1. The tribunal's reasons for its decision are summarised as follows, with reference to each alleged failure to comply with the Code and alleged breach of property factor's duties:

## 9.2. Section 1.1aA

### 9.2.1. Section 1.1A provides:

*“You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner.*

*...*

*1.1a For situations where the land is owned by the group of homeowners The written statement should set out:*

#### *A. Authority to Act*

*a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;*

*b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation; ...”*

### **9.3. Having considered the Respondent’s WSS, which was provided to the Applicant after his purchase of his property, and parties evidence and submissions, including the Respondent’s concession, the tribunal determined that the Property Factor has failed to comply with Section 1.1aA of the Code of Conduct.**

9.4. The Respondent did not provide the Applicant with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between the Respondent and the Applicant. The Property Factor’s WSS does not comply with the requirements of Section 1.1aA of the Code of Conduct.

9.5. The WSS does not set out a statement of the basis of any authority to act on behalf of all the homeowners in the group.

9.6. The Respondent has accepted that the WSS is deficient in this respect and has stated that it intends to consult with its legal advisers to improve the content of the document.

9.7. The tribunal observes that a generic WSS with no development specific schedule is unlikely to comply with the Code of Conduct, Section 1. The tribunal also observes that the WSS provided was undated and that it would be preferable for a WSS for the Development to be dated.

## 10. Section 2.4

10.1.1. Section 2.4 provides:

*“You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).”*

**10.2. Having considered parties’ evidence and submissions, including the Respondent’s concession, the tribunal determined that the Respondent failed to comply with Section 2.4 of the Code of Conduct.**

10.3. In Mr O’Hara’s written submissions, he conceded the case, accepting that it had failed to comply with Section 2.4 of the Code of Conduct. Mr O’Hara accepted that the Property Factor should have consulted with the Proprietors in the Development prior to instructing the rock works and it had not done so.

10.4. The tribunal took the view that despite the intended purpose of protecting the areas of Common Ground on which they were placed, the rock works were not “maintenance” but, rather, were a preventative measure which was works or services which incurred charges or fees in addition to those relating to the core service.

10.5. The tribunal observed that it would also have been beneficial for the Respondent to consult with owners about the intended locations of the rocks, as the placement which had been undertaken had only been partially successful as it had done nothing to protect other areas in which rogue parking was still taking place following the rock works.

10.6. The tribunal observed that the Respondent has since agreed to meet with the Applicant to discuss the possible placement of further rocks or other preventative measures in other affected areas.

10.7. The tribunal observed that a number of terms within the generic WSS, such as “major repairs” were not further defined and that the issue of consultation with owners was not referred to at all. As noted above in relation to Section 1.1aA of the Code of Conduct, the tribunal observed that a generic WSS would be unlikely to provide owners with the required specification of

their contractual relationship, which would in turn depend upon the terms of the Deed of Conditions.

## **11. Property Factor's Duties**

11.1. The Respondent conceded that it had failed to comply with its property factor's duties in relation to a failure to notify the Proprietors of the rock works prior to instructing the same, referring to the provisions in its Written Statement of Services.

11.2. The tribunal was satisfied that the concession was well made, given that it found that the rock works were not "repairs" or "maintenance" works, for the reasons outlined above.

**11.3. The tribunal determined that the Property Factor had a duty in terms of its appointment under the Written Statement of Services to notify and obtain authorisation from the requisite number of Proprietors prior to instruction of the works.**

## **12. Property Factor Enforcement Order**

12.1. The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Notice in terms of Section 19(2) of the 2011 Act.

12.2. In relation to the WSS, the tribunal is ordering the Respondent to revise the WSS to ensure that it complies with Section 1.1aA of the Code of Conduct in relation to its authority to act at the Development and to provide, if applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which the property factor may act without further consultation, in accordance with the Deed of Conditions for the Development.

12.3. In relation to the failure to consult with Proprietors prior to instructing the rock works, and the consequent failures to comply with Section 2.4 of the Code of Conduct and property factor's duties, the tribunal accepted that although there were failures, the works were carried out in good faith with the purpose of protecting the Common Ground thereby avoiding additional expenditure to Proprietors; the amount charged to the Applicant was £2.87; the Respondent has already apologised to the Applicant and credited his account with the amount of £2.87; the Applicant stated that he was not seeking any financial compensation from the Respondent; and the parties are

liaising over possible further preventative measures in respect of rogue parking at the Development and the formation of a more active Owners' Association at the Development.

12.4. The tribunal decided to order the Respondent to produce a written procedure to consult with Proprietors at the Development to seek their written approval before providing work or services which will incur charges or fees in addition to those in the core service, unless the Respondent can show an agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies); in accordance with Section 2.4 of the Code of Conduct and the Deed of Conditions for the Development.

12.5. The tribunal also decided to order the Respondent to convene a meeting with the Proprietors (or their proxies) in the Development to take place within 30 days of the date of the PFEO, with an agenda which includes measures to put in place an active Owners' Association in accordance with the Deed of Conditions for the Development; and proposals for possible additional measures to prevent rogue parking in other areas of Common Ground in the Development. The tribunal also proposes to order the Respondent to write to all of the Proprietors in the Development and provide a copy of the letter to the tribunal and the Applicant, to notify the Proprietors in the terms outlined in the PFEO.

12.6. The tribunal did not consider that any financial payments by the Respondent to the Applicant should be ordered.

12.7. The parties will be allowed to make representations on the proposed PFEO.

### 13. Appeals

**13.1. 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.**

Susanne L M Tanner QC  
Legal Member  
14 January 2020