Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1954

19 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Nancy Beatt, 19 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 13 May 2016.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the

Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts

being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied

(based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been

established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1954

19 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Nancy Beatt, 19 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1955

20 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Susan Beatt, 20 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 20 September 2019.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The deed of conditions for the property does not require a live-in warden to be employed at the development.

66. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor, before the Homeowner purchased the property**.**

67. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

68. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

69. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

70. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

71. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in

relation to the warden issues do not include or refer to the other residents. Furthermore, some of the correspondence predates Mrs Beatt's ownership. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

72. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

73. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

74. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take

adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

75. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

76. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

77. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

78. Mrs Beatt did not purchase the property until September 2019 and was not a homeowner when the contractor was instructed, the gutters installed or subsequently, when Mr Parks made complaints and the contractor returned to carry out remedial work. She did not make any enquiries or complaints about

the gutters, following her purchase. The Tribunal was therefore only able to consider alleged failures by the Property Factor which occurred between 20 September and 31 December 2019.

79. It appears that there was a failure by the Property Factor, in the last few months of their contract with the Homeowners, to progress matters in relation to complaints received about the gutters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He (and the other Homeowners) should have been provided with better information about the options available. There is no doubt that Mr Parks expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

80. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged. Furthermore, they largely predate the Homeowner's purchase and therefore could not be considered.

81. In the absence of clear evidence that the Homeowners instructed the Property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

82. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence

lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. In any event, Mrs Beatt did not become a homeowner until September 2019 and was therefore not entitled to the protection of the 2011 Act in relation to the property when the decision was made, and the homeowners notified of it. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

83. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

84. Mrs Beatt was not a homeowner when the Abby contract started or when the Property Factor confirmed the annual contract price of £23,000 in August 2018. The Tribunal is not persuaded that Abby overcharged the development for the warden service, as the invoices issued are consistent with the stated contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established.

Property Factor duties – Council Tax complaint

85. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

86. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the

Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards**.** As with some of the other complaints, these issues largely predate the homeowner's purchase of the property. Furthermore, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1955

20 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Susan Beatt, 20 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1956

21 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Sheila Neilson, 21 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 25 May 2010.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not

comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the

information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1956

21 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Sheila Neilson, 21 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1957

22 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Susan Duffy, 22 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 21 November 2014.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The

Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems

between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the

contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this

contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1957

22 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Susan Duffy, 22 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1958

14 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Sheila Sharp, 14 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 22 June 2018.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The

Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems

between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the

contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the other Homeowners believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether they had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. However, Ms Sharp did not purchase the property until June 2018, when the Abby contract had already been running for several months. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices

issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1958

14 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Sheila Sharp, 14 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1959

13 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Carolyn McGeoghegan, 13 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 24 May 2013.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints

prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of

hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1959

13 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Carolyn McGeoghegan, 13 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1960

12 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

David Fletcher, 12 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 3 November 1995.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative**.**

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not

comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the

information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1960

12 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

David Fletcher, 12 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for his time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1961

11 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Ian Buchanan, 11 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 2.5 and 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 12 February 2015.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner made enquires and lodged complaints with the Property Factor regarding the warden provision at the development. The Property Factor did not respond to these enquires and complaints within reasonable timescales**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Tribunal is satisfied that the Property Factor failed to comply with section 2.5 in relation to some of the emails sent to them by Mr Buchanan. While there may have been a meeting following the emails of 25 March 2019 and 6 April 2019, a written enquiry requires a written response where one is expected. Mr

Buchanan clearly expected a reply by email. The Tribunal is also satisfied that the time taken to reply to the requests for a copy of the Abby contract dated 27 June and 5 July 2019 was excessive. These requests could have been better worded, but there is no reference to the employee's terms and conditions or contract and (whether or not the Property Factor thought that the service level agreement was what they were looking for) the contract ought to have been supplied more quickly. The delay between the 15 November 2019 email and the provision of the copy agreement on 10 December 2019 was not excessive, albeit outwith the timescales in the WSS.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1961

11 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Ian Buchanan, 11 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £250 for his time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts and failure to reply to enquiries and complaints within prompt timescales, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1962

10 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

James Cloughley, 10 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 19 June 2015**.**

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not

comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the

information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1962

10 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

James Cloughley, 10 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for his time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1964

8 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Margaret McLean, 8 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 31 August 2011.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints

prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of

hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1964

8 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Margaret McLean, 8 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1969

6 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Mary Massey, 6 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 12 April 2007**.**

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The

Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems

between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the

contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this

contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1969

6 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Mary Massey, 6 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1970

5 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Jean McFarlane, 5 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 4 July 2017.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative**.**

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not

comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the

information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1970

5 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Jean McFarlane, 5 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1971

4 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Shira Kirkhope, 4 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 15 August 2003.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The

Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems

between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the

contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this

contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1971

4 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Shira Kirkhope, 4 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1973

2 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Barbara McGivern, 2 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 1 November 2011**.**

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints

prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of

hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1973

2 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Barbara McGivern, 2 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1974

1 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Jennifer McMillen, 1 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 8 December 2016**.**

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints

prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of

hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1974

1 Mitre Court, Glasgow, G11 7AZ ("the Property")

The Parties:

Jennifer McMillen, 1 Mitre Court, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1975

7 Mitre Road, Glasgow, G11 7AZ ("the Property")

The Parties:

Elizabeth Gordon, 7 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the

development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which

said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may

now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not

specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 6 February 2015**.**

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by

the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints

prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of

hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1975

7 Mitre Road, Glasgow, G11 7AZ ("the Property")

The Parties:

Elizabeth Gordon, 7 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1977

5 Mitre Road, Glasgow, G11 7AZ ("the Property")

The Parties:

Patricia Barr, 5 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 6 March 2015.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The

Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems

between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the

contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this

contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1977

5 Mitre Road, Glasgow, G11 7AZ ("the Property")

The Parties:

Patricia Barr, 5 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1979

1 Mitre Road, Glasgow, G11 7AZ ("the Property")

The Parties:

Kieran Burns, 1 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the

Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicants had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letters, it states that they are on behalf of "myself and the owners at 1,3 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the

Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018,

homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way. However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan’s enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to

discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this

statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of

any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden

services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and said that a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that “I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this”. This was in response to an enquiry about the “rate per hour being paid to Abby”. He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr

Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the

Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 31 August 2017**.**

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the new gutters at the development.

62. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden provision at the development**.**

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live-in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The

Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. This being the case, the Tribunal is satisfied that the Property Factor has not breached section 2.5 of the Code in relation to the gutter complaints, as the Homeowner did not send any complaints or enquiries to the Property Factor about the gutters**.**

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems

between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a “good reason” for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states “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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the

contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowners) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that the Homeowner believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this

contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1979

1 Mitre Road, Glasgow, G11 7AZ ("the Property")

The Parties:

Kieran Burns, 1 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for his time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

[redacted]

Josephine Bonnar, Legal Member 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

Reference number: FTS/HPC/PF/20/1981

3 Mitre Road, Broomhill, Glasgow, G11 7AZ ("the Property")

The Parties:

Alison Tait, 3 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 3.1 of the Code of Conduct for Property Factors.

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 07/12/2012 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 on 14 September 2020. Eighteen other applications were also lodged by other residents in the development. The applications are in identical terms and state that the Property Factor has breached Sections 2.5, 3.1 and 6.9 of the Property Factor's Code of Conduct ("the Code") and had also failed to carry out its property factor duties in breach of Section 17 of the Property Factor (Scotland) Act 2011 ("the Act"). Documents were lodged in support of the applications including letters to the Property Factor notifying them of their complaints. On 24 November 2020, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. A case management discussion ("CMD") was assigned for 29 January 2021 at 10am by telephone conference call in relation to all 19 applications.

2. Prior to the CMD both parties lodged a bundle of documents. The Property Factor also lodged written submissions in response to the application. In response to a direction issued by the Tribunal the Homeowners also lodged copies of their title deeds incorporating the deed of conditions for the development.

3. The CMD took place by telephone conference call on 29 January 2021 at 10am before the Legal Member of the Tribunal. Two of the Applicants (Mrs Beatt and Mr Burns) and Mr Parks who resides at 3 Mitre Road ("the Representatives") participated and represented the other Homeowners. The Property Factor was represented by Mr Reid, Managing Director. Ms Stead, Operations Director, Mr Wallace, Operations Manager and Ms Borthwick, Financial Controller for the Property Factor also participated in the call.

CMD

4. The Legal Member noted that the copy title deeds submitted by the Homeowners had only been circulated to the Property Factor and the Legal Member at 6pm the previous evening. Mr Reid advised the Legal Member that he had not yet had time to review the documents and compare them with their own records but would arrange to do so.

5. Mr Burns advised the Legal Member that it was unlikely that that the other Homeowners would participate in the hearing on the applications but would be represented by himself, Mrs Beatt and Mr Parks.

6. Mr Reid referred to the first paragraph of the Property Factor's written submissions which state that the Property Factor wanted to know how the 19 Homeowners collectively decided to make the applications, whether there was a residents' meeting to discuss/decide this and whether they were all made aware of the correspondence sent to the representatives regarding the subject

matters of the complaints. Mrs Beatt confirmed that the residents were all aware of the relevant correspondence. The Legal Member advised Mr Reid that the Homeowners had all appointed one of the representatives in their signed application forms and that the Homeowners were not obliged to disclose the context or content of any discussions which had taken place regarding their application with their representative. Mr Reid was also advised that although the applications were being heard together, each application was a separate case before the Tribunal. Mr Reid indicated that he intended to take legal advice on this issue.

7. The Legal Member noted that one set of title deeds had not been received by the Tribunal, the deed for Mr Burns property. He indicated that he thought these had been submitted but could arrange to re-send them. The Legal Member also noted that the deeds for 14 Mitre Court appeared to indicate that the property is owned by Sheila Sharp, not the Applicant named on the application form. Mrs Beatt confirmed that this would be investigated with a view to seeking to amend the application, or to withdraw same if the current owner does not wish to pursue the application. It was also noted that some of the alleged breaches of the Code and failures to carry out property factor duties may have occurred before some of the Applicant's had become homeowners and that this would require to be addressed at the hearing.

8. The Legal Member noted that the Homeowners had lodged a copy of an email from Mr Parks to the Property Factor dated 9 August 2020. Letters are referred to in the email and appear to be attached. Also lodged are two letters, signed by Mr Buchanan. The letters state at the top that they are "on behalf of owners at Mitre Court/Road". At the bottom of the letter, it states that they are on behalf of "myself and the owners at 1, 3, 5 & 7 Mitre Road and 1,2,4,5,6,8,10,11,12,13,14,19,20,21 & 22 Mitre Court (19 owners in total)." One of the letters specifies the alleged breaches of the Code of Conduct. The other, the basis for the complaint that there has been a failure to carry out property factor duties. The representatives confirmed that the letters had been attached to the email and were the notifications to the Property Factor of the complaints which were to be made to the Tribunal. The Legal Member noted that an acknowledgement email from the Property Factor dated 11 August 2020 had also been lodged. Mr Reid confirmed that the Property Factor had been notified and was fully aware of the Homeowners' complaints.

9. The representatives confirmed that the complaints are as follows –

(i) Section 2.5 of the Code – failure to provide a timely response to complaints/enquiries regarding the accounts, the warden billing/charges and the new gutters.

(ii) Section 3.1 of the Code – Failure to finalise accounts until 8 months after the contract terminated.

(iii) Section 6.9 of the Code - Failure to pursue the contractor who installed the new gutters in relation to defective work/ failure to install as per correct

specifications.

(iv) Property Factor duties – subcontracting warden duties instead of employing a live-in warden/no proper contract in relation to warden provision.

(v) Property Factor duties – failing to obtain proper VAT invoices from the contractor who supplied warden services.

(vi) Property Factor duties - Allowing Homeowners to be overcharged for warden services and not pursuing recovery of the additional charges.

(vii) Property Factor duties - failure to ensure that the gutters were installed to the correct specification.

10. The representatives referred to the application form which mentioned a complaint in relation to additional council tax liability which arose from the warden's flat being unoccupied. The Legal Member noted that this was not referred to in the letters notifying the Property Factor of the complaints. ("the notification letters"). It was also noted that this issue was associated with the complaint regarding the warden provision. The Legal Member advised the representatives that if the Homeowners sought a decision from the Tribunal on this issue as a separate complaint, they would require to demonstrate that it has been notified to the Property Factor.

11. The Legal Member noted that although the deed of conditions refers to warden services, wardens flat and warden's salary, there does not appear to be a specific provision which requires a live-in warden to be employed. It was noted that all parties would consider this and investigate whether the obligations regarding warden/warden services are in the deed of conditions or contained within another document or agreement which relates to the development or the contract between the parties.

12. Mr Reid advised the Legal Member that the Property Factor's position is as stated in their written submissions. The Property Factor disputes the claim that it has breached the Code or failed to carry out its property factor duties.

13. At the conclusion of the CMD the Legal Member advised parties that a hearing would be arranged by the Tribunal to consider all the applications at the same time.

The Hearing on 27 April 2021

14. The Tribunal dealt with several preliminary matters at the start of the hearing.

(a) Mr Reid confirmed that the Property Factor had no issues with the copies of the title deeds lodged by the Homeowners.

(b) The Tribunal allowed application 1958 to be amended to the correct name of the current proprietor.

(c) The Tribunal advised the representatives that they would review the applications at the end of the hearing to establish whether any breaches related to periods when some of the Applicants were not yet Homeowners and therefore not entitled to the protection of the Code or the Act.

(d) The Tribunal noted that, as no new information had been provided to establish that the Council Tax issue had been notified as a separate complaint, the information concerning this matter would only be considered in connection with the warden complaint.

(e) The Tribunal asked the parties to clarify the position regarding the Glassford Sheltered Housing Trust ("the Trustees") who appear to own the property identified in the deed of conditions as the wardens flat and are entitled to vote in relation to decisions made about the flat. The parties advised that the Trust still exists and still owns the wardens flat, but that the Trustees had declined to have any continuing involvement in the development or the flat. They no longer hold charitable status.

(f) The Tribunal noted that the correspondence submitted by the Homeowners in support of the applications appears to be between Mr Buchanan and the Property Factor and Mr Parks and the Property Factor. The Homeowners were advised that this correspondence may not support a complaint by the others as they had not participated in the correspondence.

15. The Tribunal then intended to hear from the parties about the application. However, during the initial discussion, it emerged that neither the Tribunal nor the Property Factor had all the documents lodged by the Homeowners in support of the applications. The Tribunal adjourned the hearing to investigate. The Tribunal established that the Homeowners had submitted documents and submissions over eight emails on 13 January 2021. Some of these documents had been forwarded to the Legal Member of the Tribunal but some had not. The Ordinary Member had received none of the documents and it also appeared that none had been sent on to the Property Factor. The Tribunal also noted that some documents referred to in the original submission lodged by the Homeowners with the applications had not been received or circulated. Following discussion, the Tribunal determined that the hearing should be adjourned for re-submission of missing documents and to allow the Tribunal to issue copies of all documents to the Property Factor and the Tribunal Members.

Further Procedure

16. Prior to the adjourned hearing, the representatives submitted further copies of their documents together with a list of documents and dates when they had been submitted. The Tribunal noted that, in addition to the written submissions, five appendices of documents had been lodged with the applications ("the application appendices) and five further appendices (also numbered 1 to 5) had been lodged prior to the hearing ("the hearing appendices"). The Property

Factor also lodged a list of their documents ("PF appendices" 1 and 3 to 7") and on 11 June 2021, lodged further documents and submissions.

17. Prior to the hearing the representatives also lodged copies of emails with Glassford Sheltered Housing Trust. They also submitted a request to amend the applications to include the Council Tax dispute as a separate complaint in terms of regulations 13 and 14 of the Procedure Rules. They provided details of the complaint. The Property Factor submitted a response.

The parties' written submissions

18. **2.5 of the Code**. The representatives lodged a list of correspondence with the applications, some of which related to the replacement gutters at the development and some to the warden dispute. The lists indicate the time taken by the Property Factor to reply to enquiries and complaints as follows; Gutters - email 6 July 2019, reply 16 July 2019 (10 days); email 30 July 2019, reply 20 August 2019 (21 days); email 4 August 2019, reply 20 August 2019 (16 days); email 21 August 2019, reply 12 September (22 days); email 20 September 2019, reply 8 October 2019 (18 days); email 29 November 2019, no response, email 10 December 2019, reply 12 December 2019 (13 days since 29 November 2019); email 10 February 2020, reply 22 April 2020 (72 days). Warden - email 25 March 2019, reply 26 June 2019 (94 days); email 6 April 2019, reply 26 June 2019 (82 days); emails 27 June, 5 July, and 15 November 2019, reply 10 December 2019 (166 days).

19. The Property Factors state that they agree with the timescales specified for most of the correspondence although their response times are based on working days. 30 July and 4 August 2019 were due to annual leave and an auto response would have confirmed this. 21 August 2019 - an apology was sent for the late response. 20 September was due to office move following merger and a holiday weekend. 29 November – a response was sent on 12 December. 10 February – there had been previous communications about the subject of this email. 25 March 2019 – a response was sent on 4 April 2019. 6 April 2019 – holding response on 23 April and site meeting on 25 April instead of a response. 27 June – previous correspondence had addressed the subject of this email. 5 July 2019 – some of the matters raised were not responded to (request for tender information and scope of work for warden, latter had been addressed in previous correspondence). 15 November – holding response on 26 and 29 November, response on 10 December 2019. It is accepted that timescales were not always met due to the volume of correspondence, but apologies were offered for this. Breach of 2.5 is denied.

20. **3.1 of the Code**. The representatives state that the Property Factor was notified in September 2019 that their contract was being terminated at the end of December 2019. The maintenance fund was not transferred to the new factor until June/July 2020 and final accounts were still not received until November 2020.

21. The Property Factor accepts that the fund was not transferred until June 2020. This was due to a delay in finalising the accounts. This was caused by the Property Factor's merger, the long running dispute with the local authority regarding the council tax liability for the warden flat, the dispute with the Homeowners regarding the warden's hours/salary and the impact of the pandemic. Final accounts were issued on 5 November 2020. Breach of the Code is denied.

22. **6.9 of the Code and Property Factor duties – defective gutters.** New gutters and downpipes were installed in November 2018 by C Hanlon. The applications state that there have been problems with both since completion of the work. The Property Factor was notified in early 2019, repairs were carried out, but the problems were not resolved. Further repairs in May 2019 were unsuccessful. The Property Factor was notified on 31 May 2019 and met with contractor on site on 27 June. On 16 July they advised that repairs to joints will be carried out but said that installation of the gutters did not require to be to manufacturers specification. Communications were sent to Property Factor on 16 and 30 July and 4 August 2019. A response received on 4 August states a reply from contractor is still awaited. Further complaint sent on 12 September. Site meeting with contractor, warden and Mr Parks takes place. The contractor agreed to carry out repairs but disputed the manufacturers specification is an issue. On 8 October 2019, the Property Factor states that the Homeowners did not instruct a specific fitting specification, and this could not be insisted upon retrospectively. Contractor subsequently states that all work now completed. Property Factor suggested an independent assessment of the gutters on 31 October 2019. On 28 November, a site meeting takes place with Property Factor representative, contractor, and Mr Parks. Contractor continues to refuse to fit the gutters to manufacturers specification. Information is obtained from the manufacturer and sent to Property Factor on 29 November. They respond on 12 December to say independent inspection by manufacturer is awaited. No further communication from Property Factor on the issue.

23. The Property Factor states that the Homeowners did not stipulate a specific specification when they instructed the work. The contractor confirmed that they were replacing like for like. Following the complaints about the manufacturer's specification, the contractor refused to retro fit to a specification which had not been previously instructed. They would carry out any necessary repairs within the warranty period. They have returned on several occasions to carry out remedial work.

24. **Property Factor duties – subcontracting warden duties instead of employing a warden with financial consequences, namely an increase in the cost of the warden provision and an increase in the Council Tax for the warden's flat, not obtaining VAT invoices, and allowing homeowners to be overcharged by the provider of the warden services**. On 1 October 2017, the live-in warden handed in her notice. A meeting was arranged for 26 October 2017 when it was agreed to sub-contract the warden duties to Abby Cleaning on a temporary basis at £11 per hour. The employee of Abby started on 11 December 2017 with agreed hours of 9 to 1 and 2 to 5 with an hour for lunch. At a meeting on 22 February 2018, the homeowners advised the

Property Factor that a full-time live-in warden was required. The Property Factor had not advertised but stated that the current Abby employee wanted to be considered for the post. It was noted that the flat required to be renovated and quotes would be obtained, and a further meeting arranged. On 14 May 2018, homeowners were notified that the Property Factor had decided not to employ a live-in warden and that Abby had stated that the warden could carry out additional tasks to offset the additional expense. These tasks did not materialise. At a meeting on 31 May 2018 the Property Factor asked homeowners to agree to make the Abby employee permanent. Homeowners agreed to keep the contract as they had no alternative option available. The unilateral decision by the Property Factor regarding the warden provision is not consistent with the deed of conditions and resulted in additional cost to the development of over £10,000 as well as increased Council tax liability because empty flats incur a double charge, although this was not disclosed to the Homeowners by the Property Factor. At the budget meeting on 9 August 2018, it was agreed to keep the sub-contracted warden arrangement but hours to be changed to 8–12 and 1–4 with an hour for lunch. This contract remained in place until 31 December 2019. In March 2019, the homeowners discovered that they were being overcharged as they were paying for 8 hours although the warden only worked 7. The Property Factor did not respond to enquiry about this until 26 June 2019 and then stated that this was the agreed contract price, and they would not pursue recovery of the overcharge. Since termination of the Property Factor's contract, the Homeowners have discovered that Abby is VAT registered and should have been submitting VAT invoices but did not. This could result in the Homeowners being liable for the VAT.

25. The Property Factor states that they decided not to employ a live-in warden and were entitled to make this decision. They had concerns about the condition of the warden's flat. The Homeowners were not willing to incur the cost required to bring it up to an acceptable and safe standard. At the meeting in October 2017, warden provision by Abby was agreed. Hours were also agreed. Minutes of various meetings are produced including the budget meeting when the hours were changed. They have no record of a complaint in March 2019. Abby timesheets are also produced. These indicate that there is a lunch hour, but the warden remained on site during this hour and was therefore always available to the residents. Abby paid for this hour and this charge was therefore passed onto the residents.

26. In their later submissions the Property Factor states that it was the Homeowner's decision to change from a live-in warden to an external contractor, taken at a quorate meeting. The reason was that they did not want to incur the costs of refurbishing the wardens flat.

27. **Property Factor duties - Council Tax.** In addition to the increased cost to the Homeowners of the Council tax for the warden's flat which arises out of the warden related complaints the Homeowners state that the Property Factor mishandled the Council Tax situation in relation to the warden's flat, did not exercise reasonable care and skill and did not comply with the WSS. Specifically, they withheld information from the Homeowners about the empty property charge for properties and incurred financial penalties as a result of

their dealings with the Local Authority, which only came to light when their own submissions and documents were lodged with the Tribunal. Their actions led to the current factor also incurring financial penalties.

28. The Property Factor responded stating that the empty property scenario could not have been anticipated, that the obligation is on the homeowners to make themselves aware of their liabilities and that the empty property charge was introduced on 1 April 2018. The empty property charge was not concealed from Homeowners. The Property Factor challenged the charge.

The Hearing on 16 June 2021

29. The hearing took place by telephone conference call on 16 June 2021 at 10am. The Homeowners were represented by Mr Parks and Mrs Beatt. The Property Factor was represented by Mr Reid, Ms Borthwick, Mr Wallace, and Ms Stead.

30. As a preliminary matter the Tribunal advised the parties that they would allow the applications to be amended to include the complaint about the Council Tax to be considered. However, the Tribunal would still have to be satisfied that the complaint had been notified to the Property Factor prior to the applications being lodged with the Tribunal.

2.5 of the Code (Warden complaints)

31. The Tribunal noted that all the correspondence lodged by the Homeowners in support of this complaint is between Mr Buchanan and the Property Factor. The representatives were asked to clarify whether this correspondence could be relied upon by the other Homeowners in connection with the complaint under Section 2.5. Mr Parks advised the Tribunal that the Property Factor was aware that Mr Buchanan had been corresponding with them on behalf of all the Homeowners. He referred to two emails. The first is from Ms Borthwick to Mr Buchanan dated 7 February 2018 (Homeowner Appendix 4 (HOApp4), page 84(p84). This refers to the budget reconciliation and reserve fund and mentions getting “sign off” on both. The second is from Lynsey Divers to Mr Buchanan dated 20 October 2017 (HOApp4, p132) and asks him to look over the budget reconciliation and confirm he is happy with it, before it is issued to the other Homeowners.

32. Mr Reid advised the Tribunal that this is disputed. The correspondence in question was from one individual. It would have been different if it had been with the committee or a group of Homeowners. He went on to say that over the years one or two of the Homeowners became the “voice of the development or “point of contact”. This was because the others did not engage in the same way.

However, he denied that this meant that they were corresponding on behalf of the whole, development. Mr Buchanan's enquiries were only in relation to his own concerns.

33. The Tribunal proceeded to discuss the warden enquiries and responses as outlined in the submissions summarised in paragraph 18. Mr Wallace advised that although there was no written response to the emails of 25 March 2019 and 6 April 2019 until 26 June 2019, he met with Mr Parks at the end of April to discuss the issues raised in the emails. No minute was taken of the meeting. Mr Reid also advised that the response time had to be considered in context. There was a large volume of correspondence from the Homeowners during this period. He conceded that the response time did not comply with the 14 days specified in the WSS. Regarding the emails of 27 June, 5 July and 15 November 2019, Mr Reid advised that Mr Buchanan made numerous requests for a copy of the warden's contract of employment which the contractor (Abby) was not prepared to provide, for data protection reasons. He confirmed that a copy of the contract between Abby and the Property Factor was provided on 10 December 2019 but that this did not provide Mr Buchanan with the information he was seeking as he wanted a breakdown of the costs, rather than the contract price.

34. Mr Parks referred the Tribunal to the terms of the emails. The email of 27 June 2019 (HOApp4, p13) asks for "the original enquiry document and the written quotation from Abby and, of course, the written order to Abby". The email of 5 July 2019 (HOApp4, p12) asks for "documents to show the tendering process that are necessary to confirm the scope of the work that is being quoted for". The email of 15 November 2019 (HOApp1) which says that there is no contract, only an arrangement, and asks for the "terms and conditions that relate to the quoted contract price of £22880". Mr Parks stated that these emails clearly ask for information and documents relative to the contract with Abby and not the warden's personal contract of employment. He added that the contract was only provided when a complaint was made.

35. In response Mr Reid said that he assumes that the person dealing with the enquiries had not appreciated that the requests in these emails were different from the others which had specifically asked for the warden's own terms and conditions, and Abby's share of the contract price, which the Homeowners were not entitled to see. The service level agreement (SLA) was provided in December 2019, presumably when they realised that this was what was being requested. He conceded that the Homeowners had been entitled to see this document. In response to questions from the Tribunal regarding the volume of emails received by the Property Factor during this period from the Homeowners, Mr Reid said that he could not be sure but at least 20 or 30 had been received in relation to the warden issues.

2.5 of the Code (Gutter complaints)

36. The Tribunal noted that all the correspondence sent to the Property Factor in connection with the gutters had come from Mr Parks. Mr Parks advised the

Tribunal that he had made these enquiries and complaints on behalf of the owner of 3 Mitre Road and had not been acting on behalf of the other Homeowners. The Tribunal noted that one of the emails relied upon was sent in February 2020. As the Property Factor had ceased to manage the development in December 2019, it appeared that the complaint regarding this email could not be considered.

37. The Tribunal asked if Mr Reid had anything to add to the written submissions about the timescales for the responses to the various emails. He advised that both the 30 July and 4 August 2019 emails had been received during Mr Wallace's annual leave and were dealt with on his return. An apology was provided regarding the email of 21 August 2019, due to the late response.

38. Mr Parks advised the Tribunal that he accepted that the 10 days taken to respond to the email of 6 July 2019 was within the timescales specified in the WSS. However, the information referred to in the email had been outstanding for some time before this email was sent. He referred the Tribunal to the email of 12 September 2019 which Mr Reid said had come with an apology and said that there is no reference to an apology in the email. (HOApp1, p31). He also stated that he did not believe that the number of emails sent justified late responses.

3.1 of the Code.

39. The parties confirmed that it was agreed that the reserve funds had been transferred to the current factor in June 2020 and the accounts finalised in November 2020.

40. Mr Reid advised the Tribunal that the company had merged with James Gibb in August 2019. This was followed by an office move in September 2019 and the integration of the two computer systems between December 2019 and February 2020. This was followed by the first lockdown. They were still receiving correspondence about the warden's hours and were not sure if this would impact on the final accounts although he conceded that their position throughout that dispute had been that there was no overcharge, so the final position was unlikely to change. The main issue was the Council Tax dispute. Ms Borthwick advised the Tribunal that the accounts could not be finalised until after 22 September 2020, when she received confirmation from Walker Love of the final sum due to the Local Authority for the Council Tax. She referred to the copy of the Walker Love email. She advised that she had asked the Local Authority for a statement of the sums due, but this had not been received. However, the figures specified by Walker Love were less than had previously been requested so she assumed that there had been an adjustment to reflect the change of Factor in December 2019, so that the final sum paid only related to that part of the financial year when they managed the property. Ms Borthwick advised that the correspondence with the Council regarding the empty property charge had started in March 2019, when they were notified of it. Correspondence with the Council was difficult as it had to be via an online portal and often there was no response. There was no facility for telephone enquiries.

41. Mr Parks advised the Tribunal that the Council Tax issues were not a "serious" explanation for the late accounts. He said that the Property Factor caused the problems by failing to pay the invoice although a letter had been issued which said the account had to be paid even if there was to be a challenge. Failure to do so led to a surcharge. Mr Parks also said that the Council provided a statement on 13 July 2020. In response Ms Borthwick advised that this statement related to Council Tax due up to April 2020. She asked for one for the period up to December 2019. They did not get the final figure until 22 September 2020, from Walker Love. Although she did not get a breakdown, this figure was lower than previously requested by the Council and (she assumed) it related to the period up to December 2019. Mr Parks confirmed that the Homeowners had wanted the Property Factor to challenge the Council Tax double charge but that they had exhausted their appeal in December 2019 so this should not have delayed the accounts.

6.9 of the Code/Property Factor Duties – Gutters.

42. The Tribunal noted that the new gutters were installed in November 2018 and that the complaints from Mr Parks started in May 2019. The contractor returned on a few occasions and remedial work was carried out but the complaints about the gutters had not resolved by the time the Property Factor contract ended in December 2019. The Tribunal was referred to an email from Mr Wallace in which he said that an independent report on the gutters was required. Mr Wallace also confirmed that he did not arrange this and that he did not follow up on the contractor's undertaking to contact the manufacturer. Mr Wallace and Mr Reid advised the Tribunal that, as far as they were concerned, the defects with the gutters had resolved by the time their contract came to an end.

43. Mr Parks advised that the gutter contractor came back in May and July 2020 and reconnected disconnected outlets. These defects had occurred due to the contactor not fitting the gutters to the manufacturer's specification. There are ongoing issues with discolouration. The Property Factor said that an independent report would be obtained but did not do so. The current property factor has arranged for a different contractor to carry out some remedial work since they were appointed in January 2020. In response to questions from the Tribunal as to what action he thought should have been taken by the Property Factor in terms of Section 6.9 of the Code, he initially seemed unsure and then said that another contractor ought to have been instructed to fix or replace the defective gutters and the original contractor charged for the work.

44. Mr Reid said that the Property Factors only manage the development for the Homeowners. They chose the contractor and the Property Factor only passed on the instruction given by the Homeowners. If they were unhappy with the outcome, the Homeowners as a group had to instruct the Factor to pursue the contractor or instruct another one. The Property Factor is not responsible for work which is defective. Mr Reid also advised that they were still dealing with emails and complaints when their contract with the Homeowners came to an

end and their entitlement to take any further action ceased. He added that if another contractor has carried out work on the gutters since the new Factor was appointed, this could compromise any assessment of the work which may now be carried out.

45. Mr Parks concluded by advising the Tribunal that the contractor had given a quote for replacement of the gutters and downpipes and that, in the absence of any alternative instruction, the manufacturers specification should have been applied. He also advised the Tribunal that the WSS requires the Property Factor to carry out monthly inspections of the development and that they failed to identify any of the defects in the work at any of these inspections. Furthermore, the Property Factor did not comply with the WSS in relation to turnaround times for repairs being reported to them. They were notified on 21 August 2019 about an issue and did not act upon the complaint until 22 September 2019.

46. Mr Reid stated that regular inspections relate to core services and routine maintenance. The staff who inspect are not surveyors and are not expected to identify issues which require specialist knowledge. He added that response times are frequently dependant on the contractors and the Property Factor cannot be responsible for a delay in the contractor taking the required action.

Property Factor Duties – warden complaints

47. Mr Reid advised the Tribunal that he and his colleagues had raised concerns about the condition of the warden's flat on numerous occasions. The office and flat are interlinked and there were health and safety issues. There were discussions with the Homeowners about getting quotes so that essential work could be carried out, but no progress was made. When the warden retired or resigned in 2017 the Property Factor was concerned about Employment Law issues and the potential exposure to action against them due to the flat not being fit for purpose. When the matter was discussed at a meeting only one or two of the residents objected to the service being subcontracted. Consideration was given by the Property Factor to their obligations in terms of the deed of conditions and advice was taken. Initially the decision to subcontract was a temporary one.

48. The Tribunal noted that there appeared to be a conflict between the submissions initially lodged by the Property Factor and the submissions lodged in advance of the hearing. In the initial submissions lodged the Property Factor stated, "Following the resignation of the warden, the decision was taken by Life Property Management not to employ the warden." In the more recent submissions, they state, "It was the homeowners, and not the factors, decision not to employ a live-in warden. This decision was taken at a quorate meeting and was to avoid the renovation costs…". The former position appears to be supported by the documents lodged by the Homeowners which include a letter addressed to Mr Parks dated 14 May 2018, which states, "Further to internal discussions, lpm has taken the decision not to directly employ any new staff to carry out concierge or Housing Manager positions on any of our developments". (HO App 5, P47). In addition, a minute of a budget meeting on 9 August 2018 was lodged which states. "AW stated that since the AGM lpm have made a

business decision to not directly employ any further house managers or concierge staff. AW confirmed that this was a companywide decision and not specific to Mitre Court."

49. Mr Reid advised that the issue about the employment of a warden developed over a period of time. The initial decision related to the condition of the flat, but the situation developed, and the company started to contract out the warden services on any development where an employed warden resigned. Legal advice had been taken and the legal implications of employing a warden have been a factor in the decision. However, at the time decisions were being made about Mitre Court the main issue was the concern about the flat. When asked, Mr Reid denied that the decision which was made had been irreversible and a commitment to the refurbishment of the flat could have changed their position.

50. In response to questions from the Tribunal about whether a ballot was ever taken in relation to refurbishing the flat, Mr Wallace advised that he could not recall if there was actually a vote on the issue, but it was discussed. The costs of refurbishment were likely to be about £6000. The Homeowners indicated that they would subcontract to Abby initially and then explore possible options. There was a vote taken on the appointment of Abby. Mr Reid said that the initial decision was taken because of the flat. Things then moved on and, having considered the terms of the deed of conditions, they decided not to employ a warden again.

51. Mr Parks advised the Tribunal that there was no vote taken about refurbishing the wardens flat and they were not advised about the costs. He said there was a discussion at one meeting, but no vote. He also advised that money had been spent on the flat in the past, when required, and £6000 would not have been considered excessive. He referred the Tribunal to a letter from the Property Factor dated 29 November 2017 (HO App 4, p46) which provides a list of the work to be carried out at the flat and states that they are waiting for estimates which would then be discussed at the AGM in 2018. These costs were not provided and instead a decision was taken by the Property Factor not to recruit a warden.

52. In relation to the VAT complaint Mr Reid said that Abby is made up of several companies and not all are VAT registered. The company which supplied the warden to Mitre Court was not VAT registered and therefore did not require to issue VAT invoices. Mr Parks disputed this and advised that when the current Factor took over, they were issued with a VAT invoice by Abby. He is concerned that they may have incurred a liability for unpaid VAT, although is not aware of any correspondence from HMRC about this.

53. With regard to the overcharge complaint Mr Reid said that the reference at early meetings about the cost of subcontracting to Abby being £11 per hour was only an indicative cost. Initially the arrangement was a temporary one, following the resignation of the warden. The annual contract price was stipulated at the budget meeting in August 2018 (HO APP 5, page 49) when Mr Wallace advised the Homeowners that the contract price was £23000.

54. Mr Parks referred the Tribunal to several emails. In an email from Ms Borthwick to Mr Buchanan on 7 February 2018 (HO App4, p83) she states that "I believe the rate for the temporary warden is £11 per hour. Alasdair, please can you confirm this". This was in response to an enquiry about the "rate per hour being paid to Abby". He also referred to an email from Mr Buchanan, dated 21 July 2018 which refers to the hourly rate of £11. (HO App 4. P9). An email from Mr Wallace dated 19 December 2017 (HO App 4, p112) refers to the cost being "around £11 per hour". Mr Parks advised the Tribunal that the Homeowners were advised that they would be paying £11 per hour based on a 35 hour week. They only realised much later that they were paying £88 per day, eight hours and not seven, although the warden took a lunch break. This is confirmed by the invoices. At the meeting in August 2018, the contract price was mentioned but not the hourly rate. In response to questions from the Tribunal, Mr Parks said that their current factor (Bield) employs a warden to carry out admin tasks, but the cleaning is subcontracted. The flat remains unoccupied. Bield are in discussions with the Trustees to see if they will transfer the flat to Bield as they are a registered charity. Mr Reid responded to this stating that he approached the Trustees about the flat to discuss the condition and they advised that they did not intend to take an active part or contribute to the cost of any refurbishment.

55. The Tribunal asked Mr Parks whether the warden costs issue was due to a lack of communication by the Property Factor rather than a failure to recover an overcharge. He denied this saying that the Homeowners had only agreed to pay £11 per hour for seven hours. Mr Reid said that the relevant information had been communicated and referred the Tribunal to the minutes of the August 2018 meeting when the contract price of £23000 had been specified. The costs prior to this date had been less as it was a temporary arrangement.

Property Factor Duties – Council Tax

56. The Tribunal asked Mr Reid to clarify how the liability for Council Tax for the warden's flat arose. There is no specific reference to Council Tax in the deed of conditions and most of the references to the warden simply state that the Homeowners are liable for the warden's remuneration/salary, that the flat is to be used in all time coming as a warden's flat and that the Homeowners are responsible for the maintenance and repair of the flat. Clause Ninth states that it is "intended to convey one of the said flatted dwellinghouses to the Trustees of Glassford Sheltered Housing trust…. which last mentioned flatted house shall be used in all time coming as a warden's flat." Clause Thirteen deals with the powers of the property managers and states that "the remuneration of the warden and the Property Managers, **payment of all rates, taxes and assessments other than those eligible in respect of individual flatted houses** and the costs of supply heat, light and power to all interior areas of the scheme, excluding individual flatted houses….shall be payable by the respective proprietors (under exception of the proprietor of the warden's flat) in equal shares….". In the absence of a contract of employment (or other agreement) which provides for the Council Tax to be paid by the Homeowners the Tribunal asked Mr Reid to explain where the liability arose, since liability for Council Tax normally rests with the owner or occupier. Mr Reid advised that the

Homeowners were liable for the Council Tax when the Property Factor was appointed and that they continued to operate on this basis. It was not challenged.

57. Mr Parks advised the Tribunal that the complaint in relation to Council Tax was that there had been late payment charges because of mismanagement by the Property Factor. He referred the Tribunal to a Council Tax statement lodged by the Property Factor which include a 10% surcharge. He also said that the Property Factor must have known in April 2018 that the Council had introduced a double Council Tax charge from that month for empty properties but did not notify the Homeowners until the following year.

58. Ms Borthwick advised the Tribunal that the Property Factor did not become aware of the double charge until the March 2019 Council Tax notice. They challenged this and the Assessor attended to inspect. They subsequently confirmed the charge for the empty property and the Homeowners were notified at the budget meeting in July 2019. When asked about the 10% surcharge Ms Borthwick advised that she did not know if this was charged or paid. The final balance confirmed by Walker Love in September 2020 was less than the previous statement figure. She was not given a breakdown so does not know how this figure was reached. She conceded that when comparing the statement figure with the Walker Love figure, the latter appeared to be three quarters of the annual charge plus a 10% surcharge. This suggests that the final figure related to the 9 months when the Property Factors managed the development (1 April 2019 to 31 December 2019) and that a late payment charge had been applied.

The Tribunal make the following findings in fact-:

59. The Homeowner has been the heritable proprietor of the property since 22 September 2015.

60. The Property Factor was the property factor for the property until 31 December 2019.

61. The Homeowner did not make enquiries or lodge complaints with the Property Factor regarding the warden arrangements at the development.

62. The Homeowner's representative, who resides at the property, made enquires and lodged complaints with the Property Factor regarding the new gutters and downpipes installed in November 2018. The Property Factor responded to these enquires and complaints within reasonable timescales.

63. The Property Factor did not issue final accounts to the Homeowners following termination of their contract until November 2020.

64. The Property Factor did not have good reason for the late accounts.

65. The Homeowners did not instruct the Property Factor to ensure that the new gutters and downpipes were installed to a particular specification.

66. The deed of conditions for the property does not require a live-in warden to be employed at the development.

67. The decision to subcontract warden services, rather than employ a live in warden, was made by the Property Factor.

68. The Homeowners were not overcharged by the contractor who provided a warden for the development.

Reasons for Decision

69. The Tribunal proceeded to consider the application, the documents lodged in support of the application and the evidence provided and submissions made at the hearing.

70. The Homeowner invited the Tribunal to conclude that there had been breaches of Sections 2.5, 3.1 and 6.9 of the Code. The Homeowner also stated that the Property Factor had failed to carry out its property factor duties. Property Factor duties are defined in Section 17(5) of the 2011 Act as, in relation to a homeowner, "(a) duties in relation to the management of the common parts of land owned by the homeowner, or (b) duties in relation to the management or maintenance of land – (i) adjoining or neighbouring residential property owned by the homeowner, and (ii) available for use by the homeowner." These duties are generally to be found in the deed of conditions for the property in question.

71. Section 17 of the 2011 Act makes provision for Homeowners to apply to the Tribunal where a Property Factor has failed to comply with the Code or carry out its property factor duties. Section 17(3) states **" No such application may be made unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties, or, as the case may be, to comply with the section 14 duty** and (b) the property factor has refused to resolve or unreasonably delayed in attempting to resolve, the homeowners concern". The Tribunal is satisfied (and the Property Factor conceded at the CMD) that most of the complaints in the application were notified in advance of the application being lodged and that the Property Factor was aware of them. Those which were not, are identified in the relevant sections of this decision.

2.5 of the Code states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

Warden Complaints

72. The Homeowner states that the correspondence sent by Mr Buchanan to the Property Factor was on behalf of all the Applicants and therefore any complaints under this section should be upheld in all 19 applications. The Tribunal is not persuaded by this argument. Although the letters notifying the Property Factor of the complaints sent immediately prior to the lodging of the applications refer to all the Homeowners, the emails sent by Mr Buchanan in relation to the warden issues do not include or refer to the other residents. The Tribunal also notes that the Property Factor disputes the claim, although their reference to Mr Buchanan as the "voice" of the development, the "point of contact", and the language used in some emails, does suggest that they often corresponded with him in relation to financial matters before writing out to the rest of the development. Their reason for so doing was not properly explained. However, there is nothing to substantiate the claim that the emails in relation to the warden issues were from anyone other than Mr Buchanan himself and while the other residents may have agreed with his complaints and supported his enquiries, there is no evidence that they had appointed him to act on their behalf. The Tribunal therefore determines that this complaint cannot be upheld in relation to this application, since the correspondence in question was not sent by the Homeowner or the Homeowner's representative.

Gutter complaints.

73. Mr Parks confirmed to the Tribunal he had not been acting on behalf of the other Homeowners when he sent emails to the Property Factor about the gutters. The Tribunal notes that responses to three of the emails (6 July 2019, 29 November, and 10 December 2019) were received within the 14 day period specified in the WSS. Responses were received to the emails of 4 August 2019, 21 August 2019, and 20th September 2019 within a few days of the stipulated timescale. Although not compliant with the target set in the WSS, it does not appear to the Tribunal that a response sent 14 to 22 days after receipt of an enquiry or complaint is unreasonable, given the volume of correspondence between the parties at the relevant time. The delay between the email of 10 February 2020 and the response of 22 April 2020 is certainly unacceptable. However, the Respondents were no longer the Property Factors for the development in 2020 and their obligations to the Homeowners (with some limited exceptions) no longer applied. The Tribunal is satisfied that no breach of Section 2.5 has been established.

3.1 of the Code states "If a Homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the

arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

74. The Tribunal notes that the final accounts were not issued until 11 months after the Respondent ceased to be the Property Factor for the development. The Property Factor does not dispute that this is outwith the 3 months specified in Section 3.1 of the Code but argues that they had valid reasons for the late production of the final accounts.

75. The Tribunal considered the explanations put forward by the Property Factor. Although it is recognised that COVID 19 has had an impact on businesses, the first lockdown did not start until 23 March 2020 and the accounts were due by the end of that month (in terms of the Code). Furthermore, no specific explanation related to the pandemic was offered. The Tribunal was also not persuaded by the office move/merger explanation. The office move took place in September 2019 and was presumably anticipated. The Property Factor ought to have put arrangements in place to ensure that Homeowners were not adversely affected by internal changes. If the merger and integration of systems between December 2019 and February 2020 did contribute to the accounts being delayed to November 2020, then clearly the Property Factor did not take adequate steps to avoid this. They should also have notified the Homeowners prior to the end of their contract that there could be a delay and discussed options with them, to minimise inconvenience.

76. The Property Factor conceded at the hearing that the warden dispute ought not to have delayed the final accounts, From the correspondence it is clear that the Property Factor rejected the claim that the Homeowners had been overcharged long before their factoring contract came to an end in December 2019 There may have been further complaints received, but the Property Factor had already rejected the premise and should have been able to finalise the accounts based on the contract price and the invoices paid.

77. The Tribunal had some difficulty with the Council Tax explanation. It is conceded that the Homeowners wanted the Property Factor to challenge the empty property charge. However, it appears that the appeal to the Local Authority was rejected in December 2019. This being the case, why was the final account not paid until September 2020? The Property Factor provided the Tribunal with copies of numerous emails with Walker Love and the Local Authority, although most are from 2019. Walker Love provided figures in emails on 12 and 13 May 2020. The Local Authority also sent a letter in July 2020 which provides a breakdown of the Council Tax due for the previous 5 years. However, Council Tax bills are usually issued by Local Authorities in advance. In March of each year a statement is issued showing the Council Tax due for the period 1 April of that year to 31 March of the following year. The breakdowns produced in the letter of July 2020 are not the original demands for payment. The Property Factor may have been endeavouring to have the account for 2019/2020 apportioned, but it would have been more logical to pay the account for the whole year, assuming the funds were available, and reimburse the Homeowners with any sums refunded to them at a later point. This would have allowed the accounts to be finalised within reasonable

timescales.

78. The Tribunal is therefore satisfied that the Property Factor has failed to establish a "good reason" for the final accounts being issued eight months later that stipulated in Section 3.1 of the Code. The Homeowners had also referred to the late transfer of the reserve funds. However, the application does not include a complaint under section 3.2, which relates to the return of funds, and therefore this complaint was not considered. The Tribunal is satisfied that a breach of section 3.1 of the Code has been established.

Property Factor duties and Section 6.9 of the Code – gutter complaints

Section 6.9 of the Code states "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.

79. The Tribunal had some difficulty with the Homeowners complaints regarding the gutters and the alleged failures by the Property Factor to comply with their duties and section 6.9 of the Code. The following facts were noted; -

(a) The contractor was selected by the Homeowners following estimates being obtained by the Property Factor.

(b) The estimate from the chosen contractor related to the replacement of gutters and downpipes for a specified price.

(c) The Homeowners did not instruct the Property Factor to ensure that the gutters and downpipes were installed to a specific manufacturer's specification.

(d) No report from a surveyor or independent contractor has been obtained or submitted which confirms that the installation of the gutters was defective.

80. Notwithstanding the points made above, the Tribunal notes that Mr Parks has been raising issues with the Property Factor since May 2019. Some action was taken, and the contractor returned on several occasions to carry out remedial work. In the absence of an independent report, it is impossible to establish whether this was minor snagging or a more serious issue with the installation. Mr Parks appears to have made his own assessment, namely that it was a failure to adhere to the manufacturers specification which was the problem. However, in the absence of an independent assessment it is impossible to determine whether this is relevant or not. There certainly seems to have been a failure by the Property Factor in the last few months of their contract with the Homeowners to progress matters. When asked, Mr Parks seemed unsure about what exactly he had expected the Property Factor to do about the defects. He should have been provided with better information about the options available. There is no doubt that he expected some further action would be taken, following the statements by Mr Wallace on 31 October 2019 that they could arrange an independent report and on 12 December 2019 that the contractor was arranging for the manufacturer to inspect. That said, this was shortly before the termination of the Property Factor's contract and although Mr

Wallace conceded that he failed to follow up on these matters, there is no evidence that he was specifically instructed by the homeowners to do so. A new Property Factor was appointed in December 2019, and it is not clear why the parties continued to correspond with each other when the Property Factor no longer had any authority to act on behalf of the Homeowners.

81. The Homeowners raised two further issues in connection with the gutters. The first is that the Property Factor's routine monthly inspections ought to have flagged up defects with the gutters. Secondly, they complain that the turnaround times for repair work being instructed in connection with the gutters did not comply with the WSS. These complaints do not appear to be specified in the application form or in the letters notifying the Property Factor of the complaints prior to the application being lodged, and as a result could not be considered.

82. In the absence of clear evidence that the installation of the gutters was defective, or that the Homeowners instructed the property Factor to pursue the contractor for the alleged defective work, the Tribunal is not satisfied that there has been a breach of Section 6.9 of the Code. The Tribunal is also not satisfied (based on the information and evidence) that there has been a failure to carry out property factor duties.

Property Factor duties – warden complaints

83. The Tribunal agrees with the Property Factor's statement that there is no specific requirement in the deed of conditions that a warden must be employed and live in the warden's flat. This is strange given the stipulation that the wardens flat be used for this purpose in "all time coming". However, the Tribunal found a distinct lack of candour in the submissions and the evidence of the Property Factor representatives in relation to the decision to subcontract the warden provision. No reasonable explanation was offered for the statement that it was the Homeowners who had decided to move away from a live-in warden when the Property Factor's previous submission (and the evidence lodged by the Homeowner) clearly demonstrated that this was not the case. Furthermore, the Property Factor appears to claim both that the decision to subcontract was solely related to the condition of the flat at Mitre Court and that it was a companywide decision affecting all their managed developments. From the evidence, the latter seems to be the real reason. What is also clear is that there was inadequate consultation and communication about the matter and that the Property Factor failed to fully investigate and consult on the financial consequences. The Tribunal is also not satisfied that the Homeowners were unwilling to upgrade the wardens flat. There may have been some discussions, but no estimates were provided, and no vote taken. However, the decision taken by the Property Factor was not a breach of the deed of conditions and had the Homeowners been dissatisfied with the new arrangements, they could have elected to appoint a new Property Factor at that time. The Tribunal is not satisfied that the decision to subcontract warden services was a failure to carry out property factor duties.

84. The Tribunal is also not satisfied that the Homeowner has established that VAT invoices from Abby were required. Furthermore, the responsibility for issuing a VAT invoice (where this is required) presumably rests with the VAT registered contractor. The Tribunal also notes that there is no evidence that the Homeowners suffered any financial loss. No failure to carry out property factor duties has been established.

85. The Tribunal is satisfied that Mr Parks believed that the Abby contract was based on a charge of £11 per hour for a 7 hour day. Whether he had reasonable grounds for this belief is less clear. Until August 2018, the information provided by the Property Factor was somewhat limited. There are emails to Mr Buchanan which refer to the hourly rate but not the number of hours or the full contract price. At the August 2018 meeting, the Property Factor confirmed the contract price of £23000 per year. This was not broken down, but the overall cost was established. The Tribunal is not persuaded that Abby overcharged the development, as the invoices issued are consistent with this contract price. As a result, there was no obligation on the Property Factor to recover any overcharge. No failure to carry out property factor duties has been established although the Tribunal is of the view that better and clearer information ought to have been provided to the Homeowners from the outset.

Property Factor duties – Council Tax complaint

86. The Tribunal notes that the warden's flat is wholly owned by the Glassford Trustees and that the deed of conditions specifies that the other homeowners in the development are responsible for its maintenance and repair and the salary or remuneration of the warden. There is no provision for the Council Tax to be paid by the Homeowners. The only reference to taxes or rates is in clause thirteen and it excludes the taxes and rates which relate to any individual flat. While it might have been part of previous wardens' contracts that the Council Tax would be paid by the Homeowners, the Tribunal is of the view that the liability for the Council tax ought to have reverted to the owner of the property when the last live-in warden moved out. This does not appear to have been considered by the Factor, even though the invoices from the local authority for Council Tax are addressed to the Trustees.

87. The question of liability for the Council Tax is not specifically mentioned in the application or the request to amend. The Homeowners complaint is that the Property Factor mismanaged the Council Tax, giving rise to surcharges, and misled the Homeowners about the empty property charge which arose from April 2018 onwards. However, having reviewed the letters to the Property Factor sent prior to submission of the application, and the statement attached to the application forms, the Tribunal is satisfied that no mention is made of these complaints. In the Homeowners submission about Council Tax (lodged shortly before the hearing) they state that the surcharges or penalties only came to light when the Property Factor lodged documents with the Tribunal. The Tribunal cannot entertain any complaint which has not been previously notified to the Property Factor and therefore this complaint cannot be considered by the Tribunal.

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 14 July 2021

Housing and Property Chamber
First-tier Tribunal for Scotland

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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Reference number: FTS/HPC/PF/20/1981

3 Mitre Road, Broomhill, Glasgow, G11 7AZ ("the Property")

The Parties:

Alison Tait, 3 Mitre Road, Broomhill, Glasgow, G11 7AZ, ("the Homeowner")

Life Property Management (now known as James Gibb Residential Factors) Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ ("the Property Factor")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Godfrey (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Property Factor to pay to the Homeowner the sum of £100 for her time, effort, and inconvenience, within 28 days of intimation of the PFEO.

(2) The Tribunal order the Property Factor to issue a letter of apology to the Homeowner for the delay in issuing the final accounts, within 28 days of intimation of the PFEO.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

Josephine Bonnar, Legal Member 14 July 2021