

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)**

Chamber Ref: HPC/PF/23/0063

5 Hillpark Grove, Edinburgh, EH4 7AP (" the Property")

The Parties:

Aylmer Millen, 5 Hillpark Grove, Edinburgh, EH4 7AP ("the Homeowner")

**Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD
("the Property Factor")**

Tribunal Members:

Josephine Bonnar (Legal Member)

David Godfrey (Ordinary Member)

DECISION

The Tribunal determined that the Property Factor has failed to comply with OSP 2, 3, 4, 6 and 11 of the Property Factor Code of Conduct as required by Section 14(5) of the Act. The Property Factor has also failed to carry out its property factor duties to a reasonable standard.

The decision of the Tribunal is unanimous.

Background

1. The Homeowner lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application comprises documents received by the Tribunal on 9 January 2023. The application states that the Property Factor has failed to comply with Overarching Standards of Practice (OSPs) 1 to 6, 8 and 11, and Sections 1.1 and 7.1 of the 2021 Code. In relation to section 1.1 the application indicates that the complaint relates to sections 18.1 and 18.4 of the written statement of services ("WSS"). The application also states that the Property Factor has failed to carry out its property factor duties in that they have failed to carry out their duties to a reasonable standard. Documents were lodged in support of the application including copies of emails between the parties, the WSS and a

copy of the Homeowner's title deeds.

2. On 26 January 2023, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. The parties were notified that a case management discussion ("CMD") would take place on 5 April 2023 at 2pm by telephone conference call. The Homeowner lodged written submissions. The CMD was postponed at the request of the Property Factor.
3. The CMD took place by telephone conference call on 24 May 2023 by telephone conference call. The Homeowner participated. The Property Factor was represented by Ms Borthwick, the client relations manager for the development.

Summary of discussion at the CMD and further procedure.

4. Mr Millen told the Tribunal that the substance of his complaints is outlined in the application covering letter together with the written submissions and documents lodged. He said that Ms Borthwick was appointed in October 2021, and was new to factoring. The senior management team of the Property Factor failed to provide her with mentoring and guidance and there is no institutional memory. This has led to problems in several areas. She has begun to find her feet and a successful, quorate meeting took place on 23 May 2023. However, for 18 months a less than optimal service was provided.
5. Ms Borthwick told the Tribunal that the Property Factor accepts that there have been delays in responding to correspondence from Mr Millen and in relation to work at the development. However, the latter was due to delays by contractors and therefore outwith the control of the Property Factor. It is denied that there have been breaches of the Code or a failure to carry out duties.
6. The Tribunal advised parties that they would need to consider three issues, before the application could proceed to a determination. Firstly, has the Property Factor had been notified of the complaints prior to the application being lodged and given the opportunity to resolve them? Secondly, what exactly are the complaints? The application form and covering letter are very general in their terms and there is no specification of the issues. Thirdly, the Tribunal requires to consider whether any of the complaints have already been determined by the Tribunal in relation to a previous application, particularly in case reference LM/22/0360. The Tribunal advised parties that the legal doctrine of res judicata would apply if this was the case. Mr Millen told the Tribunal that the previous application had focused on the appointment of Ms Borthwick, rather than the failures in service delivery by the Property Factor. The Tribunal also advised parties that, as the application had been submitted in terms of the 2021 Code, they could only consider events which had occurred since that date, in relation to the Code complaints.

7. Mr Millen referred the Tribunal to copies of emails lodged by him dated 17 and 29 August 2023, and to the responses received in relation to those emails. He said that his application was in 2 parts – unresolved issues and completion of Area 1 Storm drainage maintenance. Section 4 of his application paperwork contains the correspondence for part 1, including an email of 29 August 2022 (“29”). Section 5 related to part 2 and included the email of 17 August 2022 (“17”). The Tribunal noted that 29 specifies OSP 2, 3, 5, 6, 8 and 11. 17 refers to OSP 1, 2, 3, 4, 5, 6 and 11. It also refers to a failure to carry out property factor duties to a reasonable standard and to comply with section 18.1 of the WSS, which appears to be a reference to section 1 of the Code. There is no reference in either email to section 7 of the Code.
8. In response to questions from the Tribunal, Mr Millen said that the breach of OSP 1 is that the Property Factor has not complied with the Code and the 2011 Act. This is the “relevant legislation” in question. In 17, the breach of OSP 2 relates to repeated claims that the Area 1 work is complete, the unannounced visits by contractors and failure to consult the drainage steering committee. Mr Millen said that the contractor visits were at the heart of his complaint as the manager of the development should know when the contractor is due to attend and notify people accordingly. The Tribunal noted that there was no detail of when the visits took place and how this issue related to OSP 2. Mr Millen referred the Tribunal to an email from Ms Borthwick dated 8 June which refers to and provides a copy of the drainage specification. He said that the work as specified had not been completed as the specification required there to be planned preventative maintenance. Ms Borthwick told the Tribunal that the Property Factor had to trust the contractors. TG Industrial said that the work was complete. The Property Factor carried out an independent inspection and a review of the area 1 work is to be conducted by the new contractor instructed in relation to Areas 2 and 3. She also stated that the Property Factor has always liaised with the steering group since the hearing on the previous application, when they discovered that it had not been disbanded.
9. In 29, Mr Millen said that the breach of OSP related to the 12 items listed in his email of 26 July 2022. The Tribunal noted that this email, and the Property Factor’s response had been lodged. However, the 12 points again lack detail and clarity.
10. Ms Borthwick again told the Tribunal that they accept that there have been delays by contractors. It is also accepted that meetings were cancelled. However, this was because accurate drainage maps had not been provided. Mr Millen said that the Property Factor cannot distance itself in this way from the failures of the contractors. They must have a mechanism for forcing compliance with the contract.
11. The Tribunal advised parties, that they would issue a direction for the production of further documents and submissions and decide on further procedure once these had been received.

12. In response to the direction, the Homeowner lodged a timeline, a submission with more details of his complaints and some further documents. The Property Factor also lodged a timeline, a response to the specification of complaints and some documents.
13. The parties were notified that a hearing would take place by telephone conference call on 31 October 2023. The hearing took place on this date. The Homeowner participated. The Property Factor was represented by Ms Borthwick.

The Hearing

14. The Tribunal discussed the preliminary issues which had been identified at the CMD. The Tribunal noted that the Homeowner had provided better specification of the complaints in his submission of 13 June 2023. The Tribunal also noted that the correspondence lodged, when taken together with the emails dated 17 and 29 August 2022, appeared to establish that the Property Factor had been properly notified of the complaints in terms of Section 17(3) of the 2011 Act. Lastly, the Tribunal noted that the complaints appeared (with one or two exceptions), to be new complaints and not duplicates of the complaints raised in application LM/22/0320. The Tribunal also advised parties that they would hear evidence on the issues in the order specified in the submission from the Homeowner dated 13 June 2023.

Item 1 – Storm Drain Maintenance and Tree Pruning dating back to email of 22 September 2021. (OSP 1, 2, 3, 5, 6, 8 and 11 and PF duties to a “reasonable standard”)

15. Mr Millen confirmed that this complaint related to unannounced visits by contractors, the failure by the Property Factor to notify the homeowners when the contractors would be visiting and requiring access, poor/incomplete work by the Tree contractor, lack of specification of tree pruning work and deemed completion of tree pruning and storm drain maintenance work.
16. Mr Millen told the Tribunal that the “relevant legislation” which applies in terms of OSP 1 for all complaints in the application is Section 14 of the 2011 Act. In relation to OSP 2 he said that the Property Factor has been “behind the pace” and struggling to get up to speed with the required works. As a result, they have been unable to be open and transparent about what is happening with contractors. This led to contractors turning up to do work and take access to properties when the homeowners were not notified in advance. This is also a breach of OSP 3. Information about contractor visits was not clear or accessible. Their visits were a surprise, and it is not clear what work was completed. In relation to OSP 5, Mr Millen said that he was struggling to see what the Property Factor’s policies are in relation to some matters. There was no scope or specification for the tree pruning. The specification for the drainage work was not applied. OSP 6 applies because the services were not provided with reasonable care and skill and in a timely manner. Two years have passed, and they are still debating whether Area 1 storm drainage work is complete. They have not been given clear definition of the tree works

carried out. Mr Millen told the Tribunal that he accepted that any link between his complaint in item 1 and OSP 8 is tenuous.

17. In relation to OSP 11, Mr Millen referred the Tribunal to the timeline which he had lodged. He said that he did not receive a response to emails dated 22 and 26 September 2021 until 4 October 2021, although the WSS states that a response will be provided within 5 working days. In addition, he did not receive a response to his email of 25 October 2021. This is still outstanding.
18. Ms Borthwick told the Tribunal that the homeowners were notified on 17 July and 16 August 2021 that contractors would be coming to the development and would require access to some properties. However, although contractors are always told that they must notify the Property Factor in advance of a planned visit, there were unannounced visits. As a result, homeowners did not get advance notice. The *contractor* took advantage of a dry day, following a long period of rain, to visit the site. Ms Borthwick was unaware that the tree contractor would need access to private property, the trees being situated within a common part of the development, so did not expect to have to give the homeowners advance notice. There is further tree pruning planned, but this usually takes place in October/November which is why it has not yet taken place. It has been instructed and a date from the contractor is awaited. There has been a delay which is due to a shortage of trees as part of the work instructed involves replacing trees. A walk round the development with the contractor took place in early June to establish what is required as homeowners wanted clarification. There were no issues raised in relation to the last tree survey. Ms Borthwick advised the Tribunal that there was a delay in the progression of work between September 2021 and May 2023. However, the specification of work to be carried out by the tree contractor was sent out on 20 July 2023.
19. Mr Millen said that he had received the specification sent out in July but that this related to the recent tree survey. His complaint related to the work carried out in 2021. This was unsatisfactory and trees were missed. In the period 2021 to 2023 the Hornbeam and Birch trees have become out of control. The delay is due to the absence of any meetings until 2023. His complaint is that there was no specification of the tree facing work before it was carried out in 2021.
20. Ms Borthwick advised the Tribunal that the homeowners were not given a specification of the tree pruning work before it was carried out and that meetings were delayed. In relation to OSP 2 she stated that she did her best to communicate with the homeowners about contractor visits and a lot of information was issued. Furthermore, the response times stipulated in the WSS are qualified by the word "endeavour". The Property Factor aims to respond within 5 days but the WSS does not guarantee that they will. Sometimes they require to investigate an issue. However, they meet the target 99% of the time. Mr Millen disputed this stating that they fail to meet the target 99% of the time.

Item 2 – Quarterly Account queries, dating back to email of 1 October 2021 (OSP 2, 3, 5, 6, 8 and 11 and property factor duties to a reasonable standard)

21. Mr Millen confirmed that this complaint relates to the failure by the Property Factor to provide an explanation to homeowners where the quarterly invoice includes non-routine items. His written submission states that it is “custom and practice” for such an explanation to be provided. He told the Tribunal that Ms Borthwick’s predecessor always provided information with the invoices about the non-routine charges when these were included. This should be the case so that homeowners don’t have to ask for further information to understand the charge.
22. **Account dated 1 October 2021.** Mr Millen said that he queried this on 3 October 2021. He confirmed that he got a response on the same date which addressed his enquiry, but he should not have had to ask for the information. One of the items is still in dispute and has not been paid (tree pruning).
23. **Account dated 20 December 2021.** Mr Millen said that he was not provided with information when the account was issued regarding certain charges. He conceded that the failure by the Property Factor to respond to his enquires regarding this invoice was dealt with in the previous case (LM/22/0360).
24. Accounts 5 April 2022, 1 July 2022, 3 October 2022, and 22 December 2022. No information provided with the invoices and no response to his enquires regarding same. Mr Millen referred the Tribunal to his timeline.
25. Mr Millen said that the failure to provide the required information with the invoices or in response to enquires is a breach of OSP 2 as the Property Factor is not being open and transparent about charges. It is also a breach of OSP 3 because the information is not clear and accessible. Although the habit of issuing information with invoices was not a policy, it was a practice which had not been applied, and therefore a breach of OSP 5. The failure is also a breach of OSP 6. Mr Millen said that OSP 8 does not apply. However, there has been a breach of OSP 11 in relation to responding to enquiries. He referred to the documents lodged by him on 14 October 2023.
26. Ms Borthwick agreed that some things in the accounts were not explained. A newsletter is issued with the accounts, but she accepts that not everything is included. She said that she accepted that information should have been provided, especially about complex items. She also said that she accepted that Mr Millen did not always get a timely response to his enquires. The staff work in multi-functional teams. Sometimes she has to refer an enquiry to the development inspector as he has more expertise in some matters. This can cause delay. Ms Borthwick said that she accepted that there had been a breach of OSP 11 but not OSP 5 as the issuing of information with the accounts had been a practice and not a policy.

Item 3 – Playpark repairs dating back to email of 3 October 2021.

27. Mr Millen confirmed that this complaint relates to delays in repairs being carried out to the playpark and the failure/delay in communication with the homeowners about these repairs. Following receipt of a safety report on the playpark in February 2022, the Property Factor did not issue a copy of the report to homeowners. Mr Millen received a copy of it in April 2022 because he asked for it. A repair to the “wet pour” surface was not carried out until May 2023. This was a health and safety issue with implications for the development public liability insurance. A bench repair is still outstanding.
28. Mr Millen said that the failure to send out the safety report was a breach of OSP 2. Also, the failure to advise homeowners of the implications for the insurance of the repair issues was a breach of this section. This failure also breached OSP 3 as the relevant information was not clear and accessible. Furthermore, information still has not been provided about the bench repair and the debris and algae which needs cleared from the lower playpark and which is a health hazard. In relation to OSP 5, it should be a matter of policy that the playpark reports are exhibited and adhered to, and relevant information issued about to the insurance. There has been a failure to apply policies in this regard. The delay in the carrying out of the repairs is a breach of OSP 6. The wet pour work was not carried out until May 2023, although the cost was within the Property Factor’s discretionary threshold and the work was eventually carried out in terms of this arrangement. Mr Millen told the Tribunal that he accepted that OSP 8 may not apply. However, OSP 11 had been breached as the Property Factor failed to respond to emails sent in April and July 2022 asking about the proposals for the work. Mr Millen referred to Appendix 3.0 in his October 2023 submission.
29. Ms Borthwick told the Tribunal that they replied to the email of 7 April 2022 on 8 April. A copy of this response has not been lodged but it confirmed that they intended to make proposals for the playpark repairs and that these would be discussed at a meeting. The meeting took place in February 2023. She also said that repairs to both benches have now been completed. The delay was getting the right wood. There was a delay in relation to the wet pour repair as they investigated a potentially cheaper option using bark. The outcome of the investigations was presented at the meeting in February 2023 (which was not quorate). A further meeting was held in May 2023. Homeowners were told that the bark option was not possible.
30. Ms Borthwick confirmed that the playpark report was not issued to all homeowners. It was used to obtain the cost of getting the repairs carried out. She agreed that the delay between February 2022 and May 2023 was not reasonable but stated that the public liability insurance was not affected and was renewed as usual. In relation to the Code, she said that it might be good practice to issue the reports but not a policy. She agreed that the delay might be an issue in terms of OSP 6, but it was partly due to an attempt to limit costs. In response to questions from the Tribunal, Ms Borthwick said that a copy of the insurance policy is issued every year to homeowners.

31. Mr Millen told the Tribunal that he cannot dispute that he was sent an email on 8 April 2022 although its not on his timeline which suggests he has no record of it. He did not get a response to his subsequent reminder to the Property Factor on 26 July 2022. He does not believe that the policy is issued every year. He has only received it in response to requests.

Item 4 – lack of advance notice of works requiring access to Homeowner’s properties dating back to email of 6 October 2021. (OSP 1, 2, 3, 5, 6, 8 and 11 and property factor duties to a reasonable standard.

32. Mr Millen confirmed that this complaint is essentially the same as item 1 although he also makes reference to the cancellation of two homeowner meetings in 2021 and 2022. He advised the Tribunal that this item could be amalgamated with item 1.

Item 5 – Request for sight of scope and specification of tree works dating back to email of 25 October 2021. (OSP 2, 3, 6, 11 and property factor duties to a reasonable standard).

33. Mr Millen confirmed that this item could also be amalgamated with Item 1 as it relates to the same issues.

Item 6 – Area 2 and 3 Storm drainage definition of drain routes and maintenance dating back to email of 2 November 2021 and still not resolved. (OSP 1, 2, 3, 6 and 11 and property factor duties to a reasonable standard.

34. In the written submission, Mr Millen states that the Property Factor agreed to instruct a civil engineer, following the departure of their in-house surveyor in July 2021. The appointment of a new client relations manager delayed this, and it was not arranged. In November 2021, the Property Factor circulated an “estimate of cost comparison” for a CCTV survey. This was condemned by the Drainage Steering Group (DSG). Will Rudd Davidson (Civil Engineers) were instructed to project manage. The Property Factor agreed to fund this at a cost of £1700. WRD have produced a preliminary location drawing of the drain routes, the work has not yet been out to tender, although the homeowners agreed to a level of expenditure at the May 2023 meeting.
35. Mr Millen told the Tribunal that the Area 2 and 3 work has been approved in principle. His complaint relates to the delay in getting to the present stage. It is a repetition of the delays in progressing the Area 1 work. Meantime, silt continues to accumulate in the drains which gives rise to a risk of flooding. Mr Millen stated that the processes and procedures have already been established in relation to Area 1. The Property Factor should therefore have been aware of what they needed to do. Everything is taking too long, and the same mistakes are being made.
36. Mr Millen advised the Tribunal that he is not claiming that there has been dishonesty on the part of the Property Factor but that they have not been open and transparent as to why it has taken so long. There is no institutional memory because the people dealing with the issue are not the same as those

involved in Area1. That is not an excuse for delay. In relation to OSP 3, the information on tendering, the terms and conditions of tender and timescales are all unclear. The Steering Group expect to get more regular information. Mr Millen told the Tribunal that the Property Factor has also breached OSP 6. In relation to OSP 11, the cancelled meetings led to delays in information being provided. It was not until February 2023 that the DSG had the opportunity to suggest the appointment of WRD. However, Mr Millen said that he could not refer the Tribunal to a specific complaint or enquiry to which a response was not received in relation to this item.

37. Ms Borthwick told the Tribunal that the meetings had to be cancelled because the drainage plans were found to be inaccurate. The first set of plans had come from the developer. However, these included private drainage so were too complicated to use. WRD were instructed to prepare an accurate plan. When this was issued, several homeowners reported discrepancies. The plans were then amended. They then had to wait for a quorate meeting to progress matters. The drainage issue is complex and technical and outwith the knowledge of the in-house staff. They have to rely on the expertise of the engineer and contractors. The work was put out to tender. 3 contractors submitted quotes. However, these contained discrepancies and WRD requires to go back to the contractors to get quotes based on similar terms and conditions. Ms Borthwick said that the Property Factor is not responsible for the delays. The issue is complicated, and they are working with the Steering Group. They are happy to meet more regularly with the group but there may be nothing to report. In response to questions from the Tribunal, Ms Borthwick said that Area 1 was dealt with first because it was the area most affected. It was therefore the priority. She also advised that the Factor covered the cost of the £1700 report from WRD because it was defective and therefore the cost could not be passed on. Some of that has been re-couped from WRD.

38. Mr Millen told the Tribunal that WRD were first instructed in May 2022. He said that the delays have been due to the Property Factor's procurement process which should be standard. It should involve scope and specification of works, terms and conditions and a tendering process. The Property Factor accepted the estimates but ought to have known that they were not satisfactory as they did not include terms and conditions and scope and specification. Also, there was exceptional disparity between the prices quoted - £4000, £8000, and £10000. There was no investigation by the Property Factor. They should not simply be relying on the fact that the drainage issue is complex. Mr Millen also said that his recollection is the £1700 paid by the Property Factor was a goodwill gesture because of delay and he was not aware they intended to get it back from WRD.

Item 7 – dispute on quarterly invoice in tree works and drainage dating back to email of 3 January 2022

39. Mr Millen advised the Tribunal that this could be amalgamated with item 2.

Item 8 – Challenge to discretionary threshold in revised WSS dating back to email of 18 January 2022. (OSP 2, 3, 5, 6 and 11 and property factor duties to a reasonable standard).

40. In his written submission, Mr Millen states that the Property Factor changed the discretionary expenditure limit from the sum of £2000 (specified in the DOC) to £3120 plus VAT, without consultation with homeowners. Mr Millen challenged this on 18 January 2022. It was not until 18 August 2022 that the Property Factor acknowledged that they could not do this and said that they would update the WSS. They did not do so.
41. Mr Millen told the Tribunal that, rather than correcting the error, the Property Factor has again increased the threshold in the WSS. He said that he has not made a complaint to the Property Factor about this yet. Once again, there has been no consultation, as required by clause 6 of the WSS.
42. Ms Borthwick told the Tribunal that the Property Factor increased the threshold across their whole portfolio so that they could continue to provide an effective service. She said that she will investigate and could not offer any justification for this. She did not make the decision. She confirmed that a vote was not taken.
43. Mr Millen said that the Property Factor's actions were less than transparent, in breach of OSP 2. They did not make the homeowners aware that they had to consult and take a vote on the matter. They also failed to sort the matter out, having undertaken to do so in August 2022. In response to questions from the Tribunal, Ms Borthwick said that she had issued the email in August 2022 stating that she would rectify the position. She sent the email on to someone senior in the organisation who is responsible for updating the WSSs. She said that she will make further enquiries and that newsletters are issued.
44. Mr Millen said that there has been a breach of OSP3 because the information provided is less than clear. It was only when he saw the WSS that he saw what was happening. In relation to OSP 5, the DOC is not being applied. In terms of OSP 6, reasonable care and skill are not being used. In relation to OSP 11, the Property Factor said the issue would be sorted out in when the next WSS was issued. That was not a reasonable timescale and other homeowners have not been told of the error.

Item 9 – Clarification of outstanding development debt going back to email of 30 March 2022.

45. In the written submission Mr Millen states that he has not received a response to an email dated 30 March 2022 asking the Property Factor to explain why he is liable for a share of the debt owed by a flat owner in the development. Information was issued which did not address his enquiry.
46. Mr Millen told the Tribunal that there are 5 blocks of flats in the development in addition to the houses. There is common property within the curtilage of the blocks which are only common to the flats and the blocks have their own deed

of conditions. Mr Millen referred the Tribunal to Appendix 9.0, the email querying the account which included a share of debt. The account itself was not lodged. He said that he has not received a response. He then referred to Appendix 9.1, a further request. Again, he did not receive a response. Later, the homeowners were given information about the debt, but it only related to the efforts to recover it.

47. Ms Borthwick said that she had misinterpreted Mr Millen's enquiry. They had received a lot of emails from homeowners about the debt and had not appreciated what he was asking about. She told the Tribunal that the blocks of flats (Hillpark Rise) have two factoring accounts. One for the property common to the flats only and one for their share of the development common property. The debt owned by the flat owner had to be apportioned between the two. In response to questions from the Tribunal, Ms Borthwick said that the flat owner had failed to pay both his development wide and flats only common charges and the debt had therefore to be apportioned accordingly. She confirmed that she had not given Mr Millen this information.
48. Mr Millen referred to OSP 2 and said that the Property Factor had not been open and transparent about the debt. They had not explained how his liability arose. In relation to OSP 3, they had failed to provide the information requested and instead focused on their action to recover the debt. He said that they had provided information which was "negligently" misleading or false in terms of OSP 4. They had not applied the DOCs in relation to the apportionment of the debt by failing to take account of the common property exclusive to the flats and their separate DOC. They failed to exercise reasonable care and skill in terms of OSP 6.
49. In response to questions about the credit note referred to in Mr Millen's submission, Ms Borthwick said that they had made an error in the initial calculations and had not taken account of the fact that the flats have property which is only common to them. This was noticed before Mr Millen had queried the account. The credit note was issued to correct the error. She said that OSP 5 is disputed as they correctly applied their debt recovery process.

Item 10 – clarification of remedial work from playpark inspection reports dating back to email of 7 April 2022 and still awaited.

50. Mr Millen said that this complaint could be amalgamated with item 3. He said that the wet pour has been patched, the benches may have been completed but that the debris and algae, which are a slip hazard, have not been removed and should be attended to immediately.

Item 11 – Advice of membership of the DSG and need for liaison, unannounced visits by TG industrial and lack of factor management, dating back to email of 14 April 2022.

51. Mr Millen said that this could be amalgamated with items 1 and 6. He said that since the hearing on the previous application (when Ms Borthwick said that

another homeowner had told her that the DSG had been disbanded) liaison has been desultory. Meetings are irregular although there had been a commitment to regular meetings by the Property Factor. In response to questions from the Tribunal, Mr Millen conceded that there is no provision in the DOC for a steering group.

52. Ms Borthwick told the Tribunal that she is happy to meet regularly, even weekly, but there may be nothing to report on such a frequent basis.

Item 12 – recurring queries and disputes on quarterly accounts dating back to letters of 12 January, 19 April, and 15 July 2022.

53. Mr Millen told the Tribunal that this could be amalgamated with items 2 and 7.

Part 2 of the application – Area 1 Storm Drain maintenance

54. Mr Millen said that the works in relation to the Area 1 storm drain were intended to establish a baseline or starting point. The intention was to make provision for keeping the drain and the 40 manholes clear of silt and obstructions, to allow for drainage of surplus water from the Corstorphine Nature Reserve. He told the Tribunal that the drain is located on the western boundary and northern edge of the development. There is a lot of surface water and silt, especially in the lower parts of the drain at numbers 6, 5 and 11 Hillpark Grove. TG Industrial were instructed to do the work. The scope and specification of the work was outlined in the Property Factor's letter to homeowners dated 29 April 2021. They were to restore the drain to a clean state, establish a condition log for each manhole and provide recommendations for the future maintenance regime. The specification had been drafted by the in-house surveyor, Sean Currie. The Property Factor deemed the work to be complete although it was not. The recommended planned maintenance and condition log were not provided. Furthermore, the specification required the jetting and vacuuming of all 40 manholes. They only did 10. When asked how he knew this, Mr Millen said that he was present when the 10 manholes were treated. When asked about the letter and specification, Mr Millen also said that the jetting/vacuuming of all manholes and provision of a log was his interpretation. He referred to points 1, 3, 7 and 10 on the letter.

55. Ms Borthwick told the Tribunal that the contractor told the Property Factor that the work was complete, and they accepted this to be the case. They propose to arrange an independent inspection to establish if the work has been completed. The contractor told them all of it was done. A planned maintenance programme cannot be put in place until this is established. In response to questions from the Tribunal, Ms Borthwick said that she accepts that a condition log and the jetting of all 40 manholes were part of the contract. The condition log was not provided.

56. Mr Milen told the Tribunal that the Property Factor has repeatedly asserted "deemed completion" and issued an invoice. A year has passed, and it will not now be possible for a third party to establish what was done after all this time.

In response to questions from the Tribunal, Mr Millen said that he wants the Property Factor to complete the work at their own cost. In relation to OSP 2 he said that they have been less than honest in their conduct of the contract – in relation to unannounced visits, what is included in the contract and the lack of completion. The information provided has been anything but clear, and they are still at loggerheads, a breach of OSP 3. They failed to exercise a proper procurement policy with relevant checks and balances (OSP 5). Reasonable care and skill have been absent (OSP 6). The link with OSP 8 is tenuous but OSP 11 applies as they were less than frank in their complaint response. He referred to the correspondence lodged with his application (Number 5) including his email of 17 August 2022. They did not respond to this until 6 October, which is a breach of this section, and did not give a full response.

57. Ms Borthwick said that she agreed that they had taken too long to respond to the complaint. In relation to the work, she said that she had relied on the contractors as they are the experts. On reflection, the condition log and planned preventative maintenance recommendations ought to have been obtained before they deemed the contract to be complete. However, she is of the view that the third-party inspection should be able to establish what work was previously carried out.

Final remarks

58. Mr Millen advised the Tribunal that he was not insisting on his complaints in relation to section 1.1 and 7.1 of the Code. He referred to the written submissions lodged by the Property Factor and said that he objected to the claim that the Property Factor does not “employ” contractors. Ms Borthwick said that she meant that they were not employees of the Property Factor. Mr Millen said that the chain of command ends with the Factor.

Findings in Fact

59. The Property Factor did not notify the Homeowner of the date on which the tree pruning contractor was due to carry out work at the development.
60. The Property Factor did not provide the Homeowner with the “scope and specification” of the tree pruning work before it was carried out or afterwards, although the Homeowner made a written request for this to be provided.
61. The Property Factor did not know that the tree contractor would require to access private property to carry out the tree pruning work.
62. TG Industrial were told by the Property Factor to give advance notice of the date on which they intended to carry out work at the development. They did not do so.

63. There has been no tree pruning work carried out at the development since 2021 although the Homeowner complained about the quality of the work and stated that it was incomplete.
64. The Property Factor told the Homeowner that the storm drain work was complete and issued an invoice for it in October 2021. The Homeowner challenged this statement by email dated 4 October 2021, and subsequently.
65. The Property Factor's statement that the storm drain work was complete was based on information given to them by TG industrial.
66. The Property Factor did not investigate the Homeowner's complaint that the storm drain and tree pruning work were not complete.
67. TG Industrial did not provide the Property Factor with recommendations on the frequency of future planned preventative maintenance or a condition log of the manholes.
68. The Property Factor does not know if all 40 manholes in the development were jetted and vacuumed.
69. The Property Factor intends to arrange for a third party contractor to inspect the manholes in the development.
70. The Property Factor did not issue explanatory information with accounts issued to the Homeowner between October 2021 and December 2022.
71. The Property Factor did not fail to respond to enquiries about charges in the accounts issued between October 2021 and December 2022.
72. The Property Factor received a Safety Inspection report regarding the playparks in the development in February 2022.
73. The Property Factor did not issue a copy of the report to homeowners to tell them what remedial work was recommended.
74. The Homeowner requested a copy of the playpark report in April 2022 and was sent a copy of it on the same day.
75. Remedial work at the playpark did not commence until May 2023 and has not been completed.
76. Investigations and definition of the Area 2 and 3 drain routes and maintenance has been delayed.
77. The following factors have contributed to the delay; - the focus on Area 1, the resignation of the in-house surveyor, defective plans provided by the developer and the project manager, discrepancies in estimates obtained, the cancellation of meetings, the objections raised by the drainage steering group to estimates obtained and a postal vote and the failure by homeowners to

attend a meeting in February 2023.

78. The Property Factor has failed to provide an explanation for the delays in progressing the Area 2 and 3 drainage works between November 2021 and May 2022, October 2022 and February 2023 and May 2023 and the present day.
79. The Property Factor has failed to provide regular progress reports and to explain reasons for delays in the progress of Area 2 and 3 drainage plans.
80. In December 2022, the Property Factor increased the delegated authority limit for the development specified in the WSS from £2000 to £3120 plus VAT.
81. The Property Factor did not consult with homeowners regarding the increase, call a meeting or take a vote on the proposed increase.
82. The Property Factor did not notify the homeowners that they could only increase the level of delegated authority if a majority of homeowners agreed.
83. The Property Factor failed to amend the WSS when the Homeowner notified that the increase had not been carried out in accordance with the deed of conditions.
84. The Property Factor failed to respond to an enquiry from the Homeowner about his liability for a share of a development debt.

Reasons for Decision

OSP 1 – You must conduct your business in a way that complies with relevant legislation.

85. Mr Millen told the Tribunal that all complaints under this section of the Code related to the Property Factor's failure to comply with Section 14 of the 2011 Act. In other words, to comply with the Code of conduct. The Tribunal is not persuaded that this is a valid complaint. By considering the complaints in the application, the Tribunal is already assessing whether there has been compliance with section 14. It is not an argument that the Property Factor has failed to comply with Section 14 of the 2011 Act by failing to comply with part of the Code. The Code is part of the same legislation. It is clear that OSP 1 relates to other legislation which a property factor may have to apply such as the Tenement (Scotland) Act or GDPR. As the only legislation referred to is the 2011 Act, The Tribunal does not uphold the complaints in relation to OSP 1.

Unresolved issues – Items 1, 4, 5, 11

86. In response to a direction issued by the Tribunal, both parties lodged a timeline and documents. The Property Factor's timeline is incomplete. It relates to correspondence issued to all homeowners, meetings, and other events, but does not cover the correspondence between Mr Millen and the Property Factor. Mr Millen's timeline is more detailed although he refers to correspondence which has not been lodged. However, the evidence given at the hearing (when taken with the correspondence lodged) appears to establish the following.

- (a) Prior to the tree contractor carrying out work in the development the Property Factor did not issue the homeowners with information regarding the "scope and specification" of the work. They also failed to notify the homeowners when the contractor would attend. Ms Borthwick gave two slightly contradictory explanations for this. The first was that she did not think that the tree contractor needed access to private property for their work, so it was not necessary to give advance notice. The second was that all contractors are told to give the Property Factor advance notice of the date on which they intend to carry out the work, and the tree contractor failed to do this.
- (b) Mr Millen asked the Property Factor for the scope and specification of the tree work but not until after the contractor had been on site. He also expressed dissatisfaction with the work. This was in September/October 2021. To date he has not been provided with the specification and no further work has yet been carried out although, following a meeting in May 2023, tree pruning work is planned.
- (c) TGI (the storm drain contractor) carried out work at the development in September 2021. Their visit was also unannounced. Ms Borthwick was more convincing in her evidence on this matter and stated that TGI were told that they must give advance notice but failed to do so.
- (d) The homeowners were given the scope and specification of the storm drain work in advance of this being carried out.
- (e) The Property Factor told the homeowners that the work was complete following the visit in September 2021. They maintained that this was correct even when challenged by Mr Millen.
- (f) Two aspects of the work specified in the contract were not completed. The contractor did not provide recommendations for "future frequency of planned preventative maintenance requirements" (item 3 on the specification). They also failed to provide a condition log of all manholes. (item 1/1 and 2/1 on the specification).
- (g) The specification requires the contractor to inspect and clean all manholes. It also stipulates that the contractor is required to use high pressure jetting/vacuuming equipment. It does not appear to stipulate that the

contractor must use this equipment on all manholes, but they were certainly required to check and clean them all. The evidence did not establish whether this occurred. Mr Millen says not, because he was present when 10 of the 40 manholes were treated. However, the contractor may have investigated and cleaned the others when he was not there. Ms Borthwick admitted that she does not know. The contractor told them that the work was complete. The matter has not been investigated, although challenged by Mr Millen at the time. The Property Factor intends to arrange for an independent contractor to check all the manholes. Mr Millen says that too much time has passed but presumably the current condition of the manholes will give some indication as to whether they have been cleaned/vacuumed/jetted in the last few years or not.

87. The Tribunal is not satisfied that the Property Factor's failure to provide the Homeowner with information about the "scope and specification" of the tree pruning work before it took place is a failure to carry out their property factor duties to a reasonable standard. Firstly, it is not clear what Mr Millen means by "scope and specification". In his submissions, he states that one of the trees was missed, although it was supposed to be included. This suggests that he was aware that tree pruning was to take place and had a general sense of what it would entail. The Tribunal is not persuaded that it would be usual practice for property factors to provide homeowners in a large development with a list of every tree which is to be pruned and how they would be pruned, even if some expect this level of detail. The legislation only requires the provision of services to a "reasonable" standard. Secondly, Mr Millen did not ask for the scope and specification until after the contractor had carried out the work. Had he made the request in advance, it might have been reasonable for the Property Factor to provide him with some details. However, the Property Factor's failure to investigate his complaint about the quality of the work and to challenge TG Industrial on their failure to complete the storm drain contract is a failure to carry out their duties to a reasonable standard. A complaint had been made about the work and they ought to have investigated it. Their reliance on the contractor's expertise and claims that work was finished is not an excuse for their failure to act on complaints that this was not the case. Furthermore, they ought to have been aware that TG Industrial had not provided the condition log and recommendations for future maintenance as set out in the storm drain specification which had been prepared by their own surveyor.
88. The Tribunal is not satisfied that the unannounced visits by the contractors were the result of a failure to carry out property factor duties. Mr Millen did not provide any evidence to contradict the statement by Ms Borthwick that the contractors were told to notify them in advance. The storm drain specification makes specific reference to "resident notification". In the absence of evidence to the contrary, it seems entirely possible that the failure by the contractors to tell the Property Factor of their plans was outwith their control. Mr Millen appears to expect a level of control over contractors which goes beyond what can reasonably be expected, although his frustration and annoyance are perhaps understandable.

89. In terms of the Code complaints, the Tribunal is not persuaded that a lack of openness and transparency has been established. This section appears to apply when a Property Factor chooses not to provide homeowners with information or provides incomplete or inaccurate information. As Mr Millen pointed out in his evidence, the Property Factor was not “up to speed” with what was happening. They were not attempting to mislead Mr Millen, rather they were not fully aware of what was happening themselves. For the same reason, a breach of OSP 3 is also not established. Mr Millen’s complaints are about lack of information rather than the format and content of what was provided. In relation to OSP 5, Mr Millen’s complaint seems to be about an absence of policies rather than a failure to comply with them. No breach of this section is therefore established. However, for the reasons stated in paragraphs 87 and 88, the Tribunal is satisfied that a breach of OSP 6 (which requires a property factor to carry out its services using “reasonable care and skill”) has been established.
90. In relation to OSP 11, the Tribunal is not persuaded that the failure by the Property Factor to respond to the emails on 22 and 26 September until 4 October is a breach of the Code. OSP 11 does not require a property factor to comply with their own targets, only to respond within a reasonable timescale. In relation to a matter which is not urgent or time sensitive, 6 or 8 working days seems reasonable. However, it is not disputed that no response has ever been provided to the email of 25 October 2021. This being the case, the Homeowner has established a breach of OSP 11 in relation to this email.

Item 2, 7 and 12

91. This complaint relates to quarterly invoices issued between 1 October 2021 and 22 December 2022. Unfortunately, neither party submitted copies of the invoices, so the Tribunal was unable to form a view on whether they were clear or otherwise. Ms Borthwick told the Tribunal that although the newsletter issued with the accounts provides information about some charges, it does not always include everything. She accepted that it would be better to issue information routinely with the accounts. The second part of Mr Millen’s complaint is that he was not provided with the required information in response to his enquires.
- (a) Account dated 1 October 2022. It is accepted that the information requested on 3 October was provided the same day.
- (b) Account dated 30 December 2021. This account and the subsequent enquiry from Mr Millen were one of the matters considered and determined by the Tribunal in case reference LM/21/0320. The Tribunal is satisfied that it cannot be considered again.
- (c) Account dated 5 April 2022. Mr Millen refers to an email dated 7 April and a letter dated 19 April 2022. The letter was not lodged. The email does not appear to query any of the charges in the account. It does ask for a copy of the playpark report which was provided the same day. The written submissions states that Mr Millen made enquires about the development debt

charge in the email and letter but there was no evidence of this.

- (d) Account dated 1 July 2022. Mr Millen lodged a copy of an email sent to the Property Factor on 2 July 2022. In the email, he queries three of the charges in the account and asks the Property Factor to resume their previous practice of issuing information with invoices on non-routine charges. In his submissions Mr Millen states that he followed up the email with a letter dated 15 July 2022. The Property Factor responded on 4 August and there followed an exchange of emails between the parties. None of this correspondence was lodged by either party so the Tribunal is unable to establish if the queries were answered satisfactorily. However, it appears from the submission that a response was provided, even if Mr Millen was unhappy with its contents.
- (e) Account dated 3 October 2022. Mr Millen lodged a copy of this letter of 18 October 2022. This letter refers to a cheque in part payment and to the matters which are still in dispute. The letter also refers to enquires made in previous correspondence, but not any new enquires. No information is given about whether he received a response to the letter.
- (f) Account dated 22 December 2022. Mr Millen lodged an email dated 24 December 2022. He refers to an earlier email (6 August) and states that he did not receive a response. This email was not lodged. He then refers to the charges which are in dispute. The email does not appear to contain any new queries about the account.

92. Although the evidence and submissions did not clearly establish that the accounts issued by the Property Factor were unclear, the Property Factor conceded that it would be better practice to issue information with the invoices to explain the charges. However, the Tribunal is not persuaded that the failure to do this, or respond to enquires, is a failure to carry out property factor duties. Communication with homeowners is more relevant to the Code than to services provided by property factors in terms of the development deeds of conditions and their WSS. It is not claimed that the charges related to work which was not carried out or that invoices were not issued at appropriate intervals.

93. In the absence of copies of the accounts or all the relevant correspondence, the Tribunal is not satisfied that the Homeowner has established a breach of OSP 2 or 3. In relation to OSP 5, it was not established that issuing information with accounts was ever a policy of the Property Factor. For the reasons outlined in the preceding paragraphs regarding property factor duties, OSP 6 does not appear to apply. Mr Millen advised the Tribunal that OSP 8 does not require to be considered. Again, in the absence of all relevant correspondence and documents, the Homeowner has not established a breach of OSP 11.

94. The Tribunal is satisfied that the delay between the playpark report being received in February 2022 and work commencing in May 2023 is excessive and amounts to a failure to carry out property factor duties to a reasonable standard. Similarly, the playpark report ought to have been issued to the homeowners or a letter issued which provided full details of the content of the report. The failure to provide this information also a breach of OSP 2. The Tribunal is not persuaded that OSP 3 applies as it is the lack of information, rather than the format or content of information provided, which is at issue. In relation to OSP 5 the Homeowner did not direct the Tribunal to any policies which had not been followed or applied, but rather indicated that they ought to have a policy regarding reports from third party contractors. For the reasons outlined at the beginning of this paragraph the Tribunal is also satisfied that the delay in getting the work done and the failure to issue the report is a breach of OSP 6. OSP 8 is not relevant to this complaint. In relation to the failure to respond to enquiries, there seems to be some uncertainty about the email sent on 7 April. Ms Borthwick said that a response was issued on 8 April, although a copy of this was not lodged. Mr Millen said that he could not be sure that he had not received this email. The reference to the July 2022 email appears to relate to the email sent to the Property Factor on 26 July 2022, in relation to all “unresolved issues” complaints. This was lodged with the application paperwork by Mr Millen, as was the response from the Property Factor dated 18 August 2022. In this email the Property Factor states that costs have been obtained for the playpark repairs and that these would be communicated prior to the next development meeting. A breach of OSP 11 is therefore not established.

Item 6

95. The Tribunal is satisfied that the Homeowner has established a failure to carry out property factor duties in relation to this matter. For the most part, the sequence of events appears to be agreed.

- (a) In July 2021, the Property Factor’s in house surveyor left and was not replaced.
- (b) Also in July 2021, the Property Factor agreed to appoint a civil engineer as project manager once a CCTV survey had been obtained.
- (c) A new client relations manager was appointed in October 2021.
- (d) On 1 November 2021, the Property Factor circulated “an estimate of cost comparison” for the CCTV survey. The Steering group objected to this due to the significant differences between the prices obtained. The Property Factor also tried to take a postal vote on the estimates which the Homeowner objected to, as not permitted in terms of the DOC. The Property Factor cancelled the vote and said they would obtain a specification and discuss at a meeting.
- (e) A homeowners meeting arranged for 25 November 2021 was cancelled. The Property Factor cancelled the meeting because the drainage plans obtained

from the developer included private drainage and were too complicated to be of use.

- (f) WRD was appointed as project manager in May 2022.
- (g) On 27 June 2022, a letter was issued by the Property Factor to advise that WRD have been instructed and will carry out a survey and prepare drawings. Thereafter a tender process is to be carried out for a CCTV survey.
- (h) WRD walked round Areas 2 and 3 on 20 July and 15 September 2022. The second visit took place because the first had been unannounced.
- (i) A homeowners meeting scheduled for 13 October 2022 was cancelled because homeowners reported discrepancies in the plans prepared by WRD. They were asked to amend the plans.
- (j) A homeowners meeting took place in February 2023. No decisions could be made because the meeting was not quorate.
- (k) The homeowners agreed at a meeting in May 2023 to put the work out to tender and agreed a level of expenditure.
- (l) The work has been put out to tender. Three contractors submitted estimates, but these contained discrepancies and WRD have had to go back to them to resolve these. (This is based on the evidence of the Property Factor only).

96. Assuming this timeline is accurate, there have been unexplained delays. In particular, between November 2021 and May 2022, October 2022 and February 2023 and May 2023 and the present day. It is not clear what caused these specific delays. What is evident is that a number of factors have contributed to the length of time it has taken to reach the present position. Firstly, both the Property Factor and the Drainage Steering Group prioritised the Area 1 drainage issues. Secondly, the drainage issues are not straightforward, and several third parties have been involved and contributed to the sequence of events, such as WRD and contractors who have submitted tenders. The two cancelled meetings undoubtedly led to significant delay in progress being made. However, there was no evidence that the reasons provided for these cancellations were invalid. The failure by homeowners to attend the February 2023 meeting also played its part. Lastly, the Drainage Steering Groups interference (objecting to the estimates obtained and to a postal vote) even if completely justified, will certainly have impeded progress. The Property Factor's submissions and evidence did not explain the delays referred to at the start of this paragraph. In the absence of a reasonable explanation, the Tribunal is persuaded that Mr Millen has established that the Property Factor has failed to carry out its duties to a reasonable standard.

97. The Tribunal notes from the timelines submitted by both parties and the documents lodged, that there has been very little information issued to the

homeowners about the Area 2 and 3 Storm drain work. As two scheduled meetings were cancelled, with the result that no meeting took place between February 2021 and February 2023, the Property Factor ought to have provided regular written progress reports. Their failure to do so, and to explain the delays to the homeowners, is a breach of both OSP 2 and 3. The Tribunal is also persuaded that there has been a breach of OSP 6, for the reasons outlined in paragraphs 96. During the hearing Mr Millen advised the Tribunal that he could not direct them to evidence of a failure to reply to enquiries on this issue so no breach of OSP 11 is established.

Item 8.

98. Clause Sixth, part (iv) of the DOC for the development sets the Property Factor's delegated authority at a maximum of £2000, "or such other amount as may be determined by the Proprietors." The Property Factor concedes that they made a decision to increase this threshold without consulting with the homeowners, taking a vote, or even notifying the homeowners that they could only do this if a majority of homeowners agreed. Mr Millen became aware of the change in December 2021/January 2022, when homeowners were told of changes to the WSS. He challenged it immediately. In August 2022, Ms Borthwick acknowledged that they were not entitled to change the limit in this way. She said that she would arrange for the WSS to be amended. During the hearing, she said that she had referred the matter on to the person in the organisation responsible for the WSSs. She did not dispute that the WSS has not been corrected.
99. The Tribunal is satisfied that the Property Factor failed to carry out their property factor duties to a reasonable standard and breached OSP 6 when they increased the delegated authority limit without consultation with the homeowners, failed to correct the error when it was brought to their attention and failed to notify homeowners that they were not entitled to increase the threshold without taking a vote. The latter is also a breach of OSP 2 and 3. Their failure to address Mr Millen's enquiry about the increase until August 2022 is also a clear breach of OSP 11.

Item 9

100. Ms Borthwick conceded during the hearing that Mr Millen did not receive a proper response to his various enquiries about the development debt. If there were lots of enquiries it is perhaps understandable that the Property Factor initially assumed that he (like the others) simply wanted to know what action was being taken against the non-payer. However, Mr Millen sent several emails about the matter and the lack of an appropriate response suggests that these were not read or were simply ignored. Mr Millen told the Tribunal that his query related to the fact that there is property common to the flat owners which is covered by a separate deed of conditions. The owners of houses in the development are not liable to contribute to the maintenance of these areas. Separately, there are areas which are common to the whole development. He wanted to know whether the debt related to the former or the latter. Ms Borthwick told the Tribunal that there are two factoring accounts

for the flat owners. One is for the development common areas and the other is for the property common to the flat owners only. In response to questions, she confirmed that the sums owed by the homeowner in question related to his common charges for both accounts. She also said that the debt had been apportioned appropriately so that only the flat owners paid towards the part of the debt which related to the flats. She also said that the credit note was issued because an error had been made when the accounts were first issued, to correct their failure to distinguish between the 2 accounts.

101. During the hearing Mr Millen stated that the Property Factor had failed to take account of the separate deed of conditions for the flats and that the house owners should not have been asked to pay toward the debt. However, this is not the complaint outlined in his application and submissions. Furthermore, he produced no evidence in support of this claim.

102. The Tribunal is not persuaded that the failure to respond to Mr Millen's enquires about the development debt is a failure to carry out property factor duties or comply with OSP 6. The Homeowner has also failed to establish a breach of OSP 2, 3 or 4. It appears that information was issued by the Property Factor, even if it was not what Mr Millen was asking about. As neither party submitted copies of the relevant documents and correspondence, the Tribunal was unable to assess whether the information was unclear, inaccessible, inaccurate, or misleading. Ms Borthwick told the Tribunal that the debt recovery policy had been followed and there was no evidence presented to the Tribunal to dispute this. However, the Tribunal is satisfied that the Property Factor failed to comply with OSP 11 when it failed to explain to Mr Millen how his liability for a share of the debt arose or why a credit note had been issued, when he asked them to do so.

Area 1 Storm Drain Maintenance

103. There are substantial overlaps between this complaint and parts of item 1. The Tribunal's conclusions can be found in the relevant section of this decision. In his submission under this heading, Mr Millen also refers to OSP 4 although he did not mention this at the hearing. The basis of the complaint appears to be that the Property Factor stated in correspondence that all the work had been completed and that the manhole condition log was not part of the contract specification.

104. In her evidence, Ms Borthwick admitted that the storm drain work was not complete when the Property Factor told Mr Millen (on several occasions) that it was. Although they still don't know if all manholes were jetted and vacuumed, it is not disputed that the contractor failed to provide the manhole condition log or the recommendations for future maintenance, both of which were part of the specification. In that respect, the information provided in various emails was misleading and false. The Tribunal is not persuaded that this was deliberate. The Property Factor was simply telling Mr Millen what the contractor told them. However, it was certainly "negligently" misleading and

false. They failed to check their own specification or investigate Mr Millen's complaint when he said the work carried out did not comply with it. The Tribunal is satisfied that a breach of OSP 4 is established.

Decision

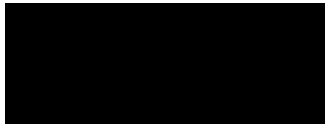
105. The Tribunal determines that the Property Factor has failed to comply with OSP 2, 3, 4, 6 and 11. They have also failed to carry out their property factor duties to a reasonable standard.

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 and Chair

14 November 2023