**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/LM/23/3665**

**1B Duff Street, Aberdeen ("the Property")**

**Parties:**

**Eilidh Morisetti, 1B Duff Street, Aberdeen, ("the Applicant")**

**First Port Property Services Ltd, Queensway House, 11 Queensway, New Milton, Hampshire ("the Respondent")**

**Tribunal Members:**

**Josephine Bonnar (Legal Member)**
**David Godfrey (Ordinary Member)**

## DECISION

**The Tribunal determined that the Respondent has failed to comply with OSP 4, 6 and 11 and sections 2.1, 2,7, 5.7, 6.4 and 7.2 of the Property Factor Code of Conduct as required by Section 14(5) of the Act. The Respondent has also failed to carry out its property factor duties to a reasonable standard.**

**The decision of the Tribunal is unanimous.**

## Background

1. The Applicant 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 17 October 2023 and states that the Respondent has failed to comply with Overarching Standards of Practice ("OSPs") 2, 4, 6 and 11 and Sections 2.1, 2.4, 2.7, 3.1, 3.2, 4.8, 4.9, 5.5, 5.6, 5.7, 6.4 and 7.2 of the 2021 Code of Conduct ("the Code"). The application also states that the Respondent has failed to carry out its property factor duties. Documents were lodged in support of the application including a copy of the written statement of services (WSS), title deeds and correspondence.

2. A Legal Member of the Tribunal with delegated powers of the President referred the applications to the Tribunal. The parties were notified that a case management discussion ("CMD") would take place on 6 February 2024 at 10am by telephone conference call. Prior to the CMD, the Respondent requested an extension of time for lodging written submissions. This was granted but no submissions were lodged.

3. The CMD took place on 6 February 2024. The Applicant was represented by her father, Mr Morisetti. The Respondent was represented by Ms Nicol and Mr Grant.

4. The Tribunal noted that the Applicant had not submitted a mandate authorising Mr Morisetti to represent her. Mr Morisetti advised that he would arrange for this to be submitted and explained that Ms Morisetti was unable to participate in the CMD due to University commitments.

5. The Tribunal asked Mr Grant about the written submissions which had not been received. He stated that a response to the application had been drafted, but not finalised. However, this could be submitted after the CMD, if required.

6. The Tribunal advised parties that the case would proceed to a hearing and that the Respondent would be directed to provide a detailed written response to the application.

7. The parties were notified that a hearing would take place by telephone conference call on 18 July 2024. This was converted to video conference at the request of the Property Factor. Prior to the hearing, the Property Factor lodged a written response and documents.

8. The hearing took place on 18 July 2024. The Applicant participated, represented by her father, Mr Morisetti . The Respondent was represented by Mr Grant.

**The Hearing**

9. At the start of the hearing the Tribunal noted that the following complaints had been conceded by the Respondent in their written response and that the Tribunal would not require to hear any further evidence about them:- 1(a), 1(c), 1(e ), 1(f) and 2(e ). The Tribunal also noted that some other complaints appeared to have been partially conceded and that the written response did not fully answer some of the complaints set out in the application.

**Complaint 1(b) and 2(a) – Did the stage 1 response address all the matters raised in the complaint?**

10. Mr Morisetti was asked to clarify which aspects of the response were at issue. He said that the Applicant had asked whether there were defaulting proprietors. In the response the Respondent stated that there were no major debts. This was an evasive response. In addition, the writer of the stage 1 response appeared to be unaware that a replacement invoice had been

issued because the first requested the wrong amount. However, Mr Morisetti said that it is now accepted that these are relatively minor matters and stated that the Applicant was happy to withdraw this complaint.

**Complaints 3(a) and (c) – Failure to carry out barrier repairs and communicate with homeowners about barrier repairs. (Also 1(c) – failure to provide stage 2 response in relation to barrier repairs complaint – conceded)**

11. Mr Grant told the Tribunal that it is generally conceded that there were issues with communication due to staff absences. However, as there is no limit on delegated authority for repairs, the Respondent is not obliged to consult with the homeowners before they instruct repairs. That said, it would be best practice to do so. Mr Grant also advised the Tribunal that there have been a number of challenges regarding the barrier repairs. Mr Morisetti told the Tribunal that staff shortages is not a valid excuse for failing to comply with the WSS and fulfil their obligations.

12. The Tribunal asked for further information about the number of times that the barrier was out of commission and how long it took to repair. Mr and Ms Morisetti said that the first occasion was 27 January 2022. This was the episode which was possibly due to a Council bin lorry and the barrier was not repaired until May/June 2022 while the Respondent tried to get the Council to accept liability. The second episode came to light on 25 July 2023 and the barrier was not fixed until 22 September 2023. There was a third, but they cannot recall the dates.

13. Mr Grant said that there had been internal and external challenges. They had been unsuccessful in getting the Council to admit fault in 2022. With hindsight, they could have just instructed the repair and still negotiated with the Council. However, a barrier repair is not a routine matter, its not possible to get it fixed within a few days. Mr Morisetti said that even if that was the case, the homeowners ought to have been told what was happening but that didn't happen. Mr Grant stated that there should have been communication, but the property manager was off sick, and the development was being covered by other staff members.

14. Mr Morisetti referred the Tribunal to section 2.81 of the WSS which provides timescales for routine repairs. Mr grant said that the barrier does not fall within routine repairs as it can be difficult to get contractors, its not like getting an electrician. When asked which paragraph in the WSS applied to the barrier, he said that it falls in between the sections. Mr Morisetti said that there are security issues when the barrier doesn't work. Parking on the street costs money so if the barrier is open drivers, including football traffic, use the car park.

**Complaints 1(h) and 3(e) – other residents were dissatisfied with the Respondent and sent emails.**

15. The Tribunal advised the parties that they can only consider the complaints contained in the application submitted by the Applicant. Mr Morisetti said that he understood that and had only included the redacted emails to back up his complaints.

**Complaint 2(b) – the Respondent made a false statement about attempting to contact homeowners about the emergency light repairs**

16. Mr Grant said that the choice of words could have been better. He added that the Respondent is not required to communicate with the homeowners before emergency work is carried out. However, it might have been better if they had done so. The stage one response had been issued when the property manager was off sick and the person issuing the letter was mistaken. Mr Grant conceded that the person writing the letter could not have checked the system as it would have been clear that a letter had not been issued. However, if the statement was misleading, it was not deliberate.

**Complaint 2(c ) – stage 1 response regarding "improper payment request" stated that an "improper payment request" had not been made although a later invoice had corrected an error and requested an amended payment.**

17. Mr Morisetti said that the comment in the stage 1 response was disingenuous when the writer must have been aware that an amended invoice had been issued. Mr Grant said that the wording could have been better but that, although an accounting error had been made the word "improper" did not apply.

**Complaint 2(d) - Item 6 – Requests for details of site inspections in 2022 and 2023 were not properly answered. Firstly, only 2023 information was provided, then dates for 2021. The purpose of the requests was to establish if there had been a barrier inspection (for which a charge of £400 is made) in 2022 when the barrier was out of order.**

18. Mr Grant initially told the Tribunal that he did not concede that the Applicant had requested this information. The Tribunal noted that the information has now been provided in the response to the application. Mr Morisetti advised the Tribunal that the response also states that there will be one site visit per annum, although the WSS states that there will be two. In relation to the barrier testing Mr Grant said that it is in the budget, but it was not charged because it had not been carried out. It has now taken place. The development is billed in advance, but a reconciliation takes place at the end of the year. The barrier was serviced and tested in May 2024. Mr Moristti stated that the Applicant accepts the information about when the barrier was checked.

**Complaint 2(g) – Failure to provide information requested about fees and annual percentage increases.**

19. Mr Morisetti referred to the written response. This states that the only cost which the Respondent can control is the management fee. He said that the first time he was told this was when he spoke to Mr Grant in February 2024. A written response to this effect was not provided to the enquiry. He referred the Tribunal to the documents lodged with the application. Page 52 is a complaint letter dated 15 June 2023, which refers to the increased costs. Page 64 is the stage 2 complaint which again asks about the increased costs. Mr Grant said that the first letter just contained a statement, not an enquiry, and it has already been conceded that there was no stage 2 response. This was discussed and explained at the meeting. Mr Morisetti told the Tribunal that his email dated 26 April (page 34) was sent to the Chief Executive and he received no response to that either.

**Complaint 3(d) – CCTV has been suggested on several occasions to deal with the barrier issues. A survey was conducted in 2021 but no further action taken.**

20. Mr Grant confimred that Mr Morisetti asked about CCTV but that he is the only homeowner to do so. Most of the apartments are owned by investment companies, and they have the majority vote. However, the Applicant's views have been taken on board and CCTV has now been installed. Mr Morisetti referred to the emails submitted from other residents and stated that others had previously asked about CCTV. He confirmed that it is now accepted that the 2021 survey was not related to the barrier.

**Complaint 4 – Failure to comply with duties in relation to insurance provision. (Insurance claims and commission).**

21. Mr Morisetti told the Tribunal that, when the barrier was first damaged, they were told that there could not be an insurance claim because of the £1000 excess. That wasn't true because the excess is only £500. The Applicant now knows that a claim was made in 2023. The Respondent's statements that they could not make a claim and that a claim would increase premium costs doesn't make sense when they did make a claim in 2023. Mr Grant said that a claim was made in 2023 but that this is not the most cost-effective way to proceed as charges have gone up. It's a balancing act. He conceded that the homeowners should have been given the option of a claim on each occasion and said that the new property manager will do this from now on. The homeowners should have been consulted.

22. In relation to the insurance commission, Mr Morisetti said that it is not acceptable that both the Respondent and the broker, a related company, receive commission on the insurance. Mr Grant told the Tribunal that the information in the response in incorrect. He thought that the Respondent

receives commission as this is the usual arrangement. However, the Respondent is not regulated by the FCA and therefore does not receive insurance commission, only the broker as they are regulated. Most property factors are regulated.

**Complaint 5(d) – lack of communication/consultation**

23. Mr Morisetti withdrew this complaint

**Complaint 6 - Authority to act. Appointment not formalised and no discussion/agreement about core services, annual increases and consultation.**

24. Mr Morisetti said that a lot of the properties are rented, and this makes it difficult for a homeowner to arrange a meeting to discuss issues, including the possible appointment of a different property factor. He stated that the Respondent should arrange a meeting and they haven't done so. Mr Grant said that they have not had a request to hold a meeting and does not think the Respondent is obliged to do this where the purpose is to look at terminating the contract. The Tribunal noted that clause 7 of the DOC appears to indicate otherwise.

**Final remarks**

25. Mr Morisetti said that he had little more to add to what had already been said. However, the impact of the Respondent's failures on his daughter has been significant, especially when she is away from the property. He stated that there have been clear breaches, and the Applicant has been charged for services which she has not received. Staff shortage and sickness is not an excuse. The company is responsible for its own resilience. There needs to be a meeting and future failures should be severely dealt with. However, Mr Morisetti confirmed that there have been recent improvements. Ms Morisetti said that although this was the case, she had to send reminders following a report of a CCTV camera being vandalised. There are still communication failures and the improvements have not addressed the stress which has been experienced.

26. Mr Grant said that he concedes that there have been challenges. However, the Tribunal should note that the Respondents only income is from the management fee and services have been provided – collecting common charges, chasing debt and instructing planned maintenance. He said that the Tribunal could consider ordering a refund of the management fee for a year for the communication failures. He told the Tribunal that the new property manager is in post and has been visiting once a month. The CCTV has been installed and the reported graffiti is due to be removed on 24 July.

## Findings in Fact

27. The Respondent did not provide a response to the stage 2 complaint dated 10 July 2023.

28. In the stage 1 complaint response the Property Factor stated that the Respondent had endeavoured to contact homeowners about emergency lighting repairs before these were carried out. This statement was false.

29. The Respondent failed to communicate with the homeowners about repairs to the car park barrier and failed to consult with them regarding repairs and insurance claims for the damage.

30. The Respondent failed to provide a response to letters sent to them on 22 September 2023 which set out the Applicant's Code and duties complaints and stated that an application would be made to the Tribunal.

31. The Respondent failed to act on the Applicant's request that CCTV be installed at the barrier.

32. The Respondent failed to provide the Applicant's with details of site inspections in 2022 in response to two requests for this information.

33. The Respondent is obliged to convene a meeting of homeowners if they receive a request from one or more of the homeowners to do so. They have not received a request.

34. The Respondent failed to provide the Applicant with progress reports and timescales for repairs to the barrier.

35. The Respondent failed to arrange for a repair to the barrier in 2022 within a reasonable timescale.

## Reasons for Decision

**Communication failures. (OSP 2, 4, 11 and sections 2.1, 2.4 and 2.7 of the Code)**

**Stage 2 complaint.**

36. The Respondent concedes that the Applicant did not receive a response to the stage 2 complaint dated 10 July 2023. The reason offered was that a member of staff was on long term sick leave. The Tribunal is satisfied that this failure is a breach of OSP 11 and Section 2.7 of the Code.

**Stage 1 complaint**

37. A number of issues were raised in relation to the stage 1 response. The Applicant states that the Respondent did not respond or provided an evasive or incorrect response to enquiries about development debt, attempting to contact homeowners about emergency lighting repairs and an "improper payment request". During the hearing, Mr Morisetti withdrew the complaint about the development debt enquiry, stating that it was a minor matter.

38. In the stage 1 complaint (15 June 2023), Mr Morisetti asked for information about the emergency lighting repairs and why the homeowners were not consulted in advance. In their response dated 19 June 2023, the Respondent stated that the repairs in question were a health and safety issue and that "Every effort was made to communicate the requirement for these repairs…". Mr Grant conceded that no letters or emails had been issued prior to the repairs being carried out. The Tribunal is satisfied that this statement was in breach of OSP 4 as it was not true. It may have been unintentional but was certainly "negligently" misleading as the writer of the letter could have checked to see if any correspondence had been issued.

39. In the stage 1 complaint the Applicant asked, " Why was an improper payment request of £18.58 per household made for this work?" The response stated "We do not believe an improper payment request was made. Due to the costs and the budget set, to prevent any deficits an additional payment request was made". It is not disputed that the sum initially requested was later amended to a lesser amount. However, the Tribunal is not persuaded that the Respondent's statement was misleading or false. The use of the word "improper" appears to have caused confusion. The Applicant was challenging the amount of money requested, as it was later revised. The response addresses whether the Respondent were entitled to request a payment for the item in question. It seems to be a simple misunderstanding about the nature of the request. A breach of the Code is not established.

**Enquiries regarding the barrier repairs/communication about the barrier repairs.**

40. The Applicant states that the Respondent failed to respond to emails and telephone calls about the damaged barrier in 2022 and 2023 and that the only correspondence issued about the barrier were invoices for the repair costs. The Respondent concedes that communication was poor in relation to the barrier issues but denies that a breach of the Code is established. This is because there is no level of delegated authority in the title deeds or WSS. While this does appear to be the case, the development schedule states that the Respondent will "consult within statutory requirements" except for emergencies and health and safety risks. Section 1.4 states that the Respondent will "use reasonable endeavours" to consult. Furthermore, the Code requires property factors to respond to enquiries and complaints (OSP 11 and section 2.7). Section 2.1 requires there to be "good communication"

and appropriate consultation". At the very least, the Respondent ought to have notified homeowners that a repair issue had been reported and what action was being taken, even if they do not require to obtain consent before instructing the work. The Tribunal is therefore satisfied that the failure to respond to the Applicant's enquiries in 2022 (complaint 1(a) and telephone call on 1 August 2023 (complaint 1(d)) were breaches of OSP 11 and section 2.7. The failure to communicate with homeowners in 2022 and 2023, when the barrier was out of order, is a breach of section 2.1. The Tribunal is not persuaded that the failure to update homeowners in 2023 is a breach of the Code.

**Stage 3 complaint and letters notifying the Applicant about the application to the Tribunal** .

41. According to the Applicant, the stage 3 complaint was submitted on 20 September 2023 to be followed by an email on 22 September 2023 setting out the alleged breaches of the Code and property factor duties complaints. The Respondent concedes that no response was issued but says that this was not required as the letter simply informed the Respondent that an application was being made.

42. Ordinarily, the Tribunal would have expected the Respondent to respond to the stage 3 complaint (if it is part of the complaints procedure), but they were not given the opportunity to do so as the notification letters were sent only two days later. No breach is therefore established in relation to this letter. However, the Applicant used the template letters from the Chamber website when they notified the Respondent of their complaints prior to submitting the application. Both letters conclude with the following " Please acknowledge receipt of this letter and I await your response in resolving my complaints.". The letters were acknowledged but no response was issued. The Tribunal is therefore satisfied that the failure to respond to these letters is a breach of Section 2.7 of the Code.

**Enquiry about percentage increase in costs.**

43. During the hearing Mr Morisetti referred to two letters where this issue was raised. One of these (the stage 2 complaint) has already been considered. The other was the stage one complaint. Mr Grant told the Tribunal that this letter made a statement about the increased costs but did not contain an enquiry about the reason for this. Having considered the content of the letter, the Tribunal concludes that this appears to be the case. The Applicant comments on the increase as unsatisfactory but the only enquiry is for a copy of the WSS. The Tribunal concludes that no breach is established. However, as the letter was clearly a formal complaint it would have been better practice for the response to have included an explanation for the increase in costs.

**Enquiry about installing CCTV**

44. The application refers to a telephone call on 1 August 2023 when several issues were discussed, and Mr Morisetti asked that the Respondent consider

installing CCTV to cover the barrier. He was told that the property manager would return his call, but she did not do so. It appears from the written response that the Respondent concedes that the issue of CCTV was raised when they say, “Whilst the request to consider CCTV is reasonable this would be classed as major works and outwith the core services of the factor. We must consider all owners in this request.” The Applicant states that there have been other enquiries about CCTV from both the Applicant and other residents. There is also a reference to a CCTV survey in 2021, although it is now accepted that this was unrelated to the barrier.

45. Mr Grant told the Tribunal that the Applicant is the only homeowner who has asked about CCTV. Even if this is the case, the Respondent ought to have acted upon the enquiry. As an improvement, as opposed to a repair, the Respondent were entitled to take the view that unanimous agreement was required. Instead, they simply ignored the request. It is understood that CCTV has now been installed.

46. Having received a request to consider CCTV and having told the Applicant that they would consider it, the Tribunal is satisfied that the Respondent’s failure to consult the homeowners about installing CCTV, is a breach of OSP 6 of the Code which requires a property factor to “carry out the services you provide to homeowners using reasonable care and skill and in a timely way…”.

**Enquiry about site inspections.**

47. The Applicant lodged a copy of an email dated 15 September 2023 in which she asks for the dates of the site inspections in 2022 and 2023. A response was issued the same day which provided the dates for 2023. The Applicant replied, also on the same day, again requesting the 2022 dates. A response was issued on 20 September 2023, which provides dates for December 2020 and various dates in 2021. It is not clear why the requested information was not provided as Mr Grant listed the relevant dates in his written response to the application. The Tribunal is satisfied that the failure to provide the information requested by the Applicant is a breach of OSP 11 and section 2.7 of the Code.

**Insurance complaints (Sections 2.1, 5.5, 5.6 and 5.7 of the Code)**

48. The first complaint in relation to insurance is that no claims have been made in relation to damage to the barrier and that homeowners have not been consulted about whether insurance claims should be made. It is now conceded that a claim was made in 2023.

49. From the written response and the evidence at the hearing, it appears that the Respondent has been inconsistent in its approach to insurance claims and the barrier. They submitted a claim in 2023. After deduction of the policy excess, a payment of £293 was received. The Respondent’s explanation for not making claims on the policy is a reasonable one. It does not make economic

sense to claim for an inexpensive repair if the result is an increase in the premium. However, that does not explain why they decided to claim on one occasion, and not the others, or why they didn't discuss the matter with the homeowners and give them options. The failure to do so is a breach of Section 2.1 of the Code. They are also in breach of Section 5.7 which requires a property factor to "keep homeowners informed of the progress of their claim" in relation to the 2023 claim about which (it would appear) the Applicant was not told.

50. As was pointed out by Mr Grant in his response, it is usual for a property factor to receive commission from either the insurance company or the broker. However, during the hearing he revised his previous statement and said that, as the Respondent is not regulated by the FCA they do not receive commission. He confirmed that the broker ( a related company) does receive commission. It appears from the correspondence lodged by the Applicant that the broker's commission is disclosed. Furthermore, although the companies appear to be related, they are separate legal entities and there is no evidence of any improper dealings. The Applicant has not established a breach of the Code in relation to this complaint.

51. In the application the Applicant also refers to sections 5.5 and 5.6 of the Code. These sections do not appear to apply. Section 5.5 requires disclosure of commission. As the Respondent does not receive commission, this section is irrelevant. Section 5.6 requires a property factor to have procedure for submitting insurance claims. It appears from the evidence that they do so. No breach of these sections is established.

**Erroneous Insurance charge**

52. The Applicant challenged a charge for a desktop evaluation on the grounds that the insurance company had offered to carry out a free survey on behalf of homeowners. This appears to be a misunderstanding on the part of the Applicant as the Respondent explains in their response. The charge was for a re-instatement valuation which is obtained every 5 years to ensure that the property is insured for the correct amount. The survey referred to by the Applicant is an "additional risk survey". No breach of the Code is established.

**Excessive increases in costs (sections 2 and 3 of the Code)**

53. The Tribunal only heard evidence from the parties in relation to communication about increased costs. In the application a number of issues are also raised under Section 3 of the Code;- additional charges over and above the percentage increases and estimates, the custom and practice arrangement which means that these cannot be challenged, the above inflation increase in charges for insurance and electricity. The explanation offered is that the cost of insurance and electricity has increased and that the Respondent tries to keep costs low.

54. The Applicant did not provide any evidence to support the claim that the Respondent could have obtained electricity and insurance more cheaply.

Their complaint also lacks specification and detail. The principal complaint appears to be the fact that they cannot challenge the increases and that there is no written agreement between the parties which sets a cap on costs.

55. The Respondent states that they were appointed by the developer. In terms of clause 10.13 of the deed of conditions registered on 15 June 2016, Life Property Management were appointed as the first manager for a period of 5 years. It is not clear whether these two companies are related, but it appears to be accepted by the Applicant that the Respondent has been the property factor since 2016. Assuming that they were appointed by the developer, their status as the factor of the development has not come about by "custom and practice". In terms of the deed of conditions, the homeowners as a body are entitled to appoint a different factor and to terminate their contract with the Respondent. However, it is unlikely that any property factor will be willing to take the contract on the basis that costs will be capped at a level specified by the homeowners. Property factors do not control the market. They can carry out tendering to obtain the best price, but it is the contractors, utility companies and insurance providers who decide what they will charge. In any event, it does not appear to the Tribunal that the way in which the Respondent was appointed (which is the usual arrangement in new developments) is relevant to the concern over increasing costs. The evidence presented to the Tribunal did not establish that the homeowners are being charged more than they should for utilities or insurance. A breach of the Code is not established.

**Authority to act**

56. This is a further complaint about the Respondent's status as property factor. It is claimed that they operate as a result of "custom and practice " and that their appointment has not been formalised. As a result, the homeowners have no say or control over the services provided, a level of delegated authority or consultation.

57. As previously indicated, and although the DOC suggests otherwise, the parties are agreed that the Respondent was appointed in 2016 by the developer. The Applicant is frustrated because she wants a meeting to be held to discuss the termination of the contract and the appointment of a new factor. However, she does not have addresses for most of the homeowners which makes it difficult for her to convene a meeting. Mr Grant told the Tribunal that the Respondent is not obliged to arrange a meeting especially if its purpose is to discuss and vote on the termination of their contract, However, the DOC says otherwise. Clause 7.1 stipulates that " the Manager shall convene such a meeting if requested to do so by notice given by any of the relevant proprietors." When this clause was brought to his attention, Mr Grant said that they have not received a request. This was not disputed by the Applicant. If so, this can be easily remedied, and the Applicant should make a request. However, in the absence of evidence that a request has previously been made and either ignored or refused, no breach of the Code is established. The DOC does not stipulate that the manager must convene a meeting and seek re-appointment at the end of the initial term. Clause 10.13 states that the "appointment shall run for five years from the date of

appointment by the developer and shall be renewed thereafter unless terminated by a vote at a proprietors meeting." A breach of the Code is not established in relation to this complaint.

**Section 4, 6 and 7 of the Code.**

58. Although sections 4.8 and 4.9 of the Code are referred to in the notification letter, the application form and paper apart do not appear to refer to them. In any event, these sections relate to the provision of information about development debt. The Applicant's complaints in relation to this matter were withdrawn during the hearing.

59. Section 6.4 of the Code requires a property factor to carry out repairs within appropriate timescales and keep homeowners informed of progress and timescales. There is an exception made for repairs within delegated authority if it is agreed that "progress reports are not required". Although neither the title deeds nor the WSS require consultation about repairs, there is no evidence that the homeowners agreed that the Respondent is not required to provide them with progress reports and timescales for repairs. In relation to the barrier repairs, the Tribunal is satisfied that the Respondent has failed to comply with this section of the Code as they did not provide the homeowners with this information.

60. Section 7.2 of the Code requires the property factor to confirm their final decision in writing once the complaints procedure has been exhausted. Although she only received a response to the stage one complaint, the Applicant did exhaust the complaints process before making her application. The Respondent's failure to confirm their final decision in writing is a failure to comply with section 7.2 of the Code.

**Property Factor duties**

61. In the notification letter the Applicant states that the Respondent has failed to carry out their duties for the following reasons:-

(a) Delay in arranging barrier repairs,
(b) Failure to communicate and consult in relation to the barrier repairs, and
(c) Failure to make insurance claims in relation to the barrier repairs

62. The Tribunal is not persuaded that (b) is a failure to carry out property factor duties. Communication failures are generally considered a Code complaints and this issue has already been considered

63. During the hearing, the Tribunal heard evidence about two periods when the barrier was damaged and inoperable. The first was in 2022 when it was out of use from the end of January until June, a period of approximately four or five months. The Tribunal was told that this was mainly due to the negotiations with the Council about liability for the damage which may have been caused

by a bin lorry. The Tribunal is not persuaded by this explanation. The Respondent could have arranged for the repair while those negotiations were ongoing. The failure to do so was a failure to carry out their property factor duties to a reasonable standard. The second episode lasted two months. Mr Grant told the Tribunal that barrier repairs are not routine, and it can take longer to find a contractor. The Tribunal does not consider a delay of two months to be excessive, in the absence of any evidence from the Applicant that there were other reasons for the delay.

64. It is not in dispute that the barrier was damaged on three occasions and only one resulted in an insurance claim. The Tribunal is satisfied that the decision not to make a claim may have been justified but this was a decision for the homeowners and not the Respondent. The Tribunal is satisfied that the Property Factor failed in their duties when they did not consult with the homeowners about whether an insurance claim should be made on all three occasions.

**Decision**

65. The Tribunal determines that the Property Factor has failed to comply with OSP 4, 6 and 11 and sections 2.1, 2.7, 5.7, 6.4 and 7.2 of the Code. 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 17 August 2024