Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber in relation to an application made under Section 17(1) of the Property Factors (Scotland) Act 2011

Chamber Ref: FTS/HPC/PF/24/0203 and FTS/HPC/PF/24/0204

Re: Property at 59/4 Grange Loan, Edinburgh EH9 2EG ("the Property")

Parties:
Mr David Penny, residing at 59/4 Grange Loan, Edinburgh EH9 2EG ("the homeowner")

James Gibb Residential Factors, a trading name of James Gibb Property Management Limited, incorporated in Scotland (SC299465) and having their registered office at 3rd Floor, Red Tree Magenta, 270 Glasgow Road, Rutherglen, Glasgow G73 1UZ ("the property factors")

Tribunal Members:

George Clark (Legal Member) and Mary Lyden (Ordinary Member)

Decision
The First-tier Tribunal for Scotland Housing and Property Chamber decided that the application could be decided without a Hearing and determined that the property factors have failed to comply with Section 2.1 of the Property Factors Code of Conduct effective from 16 August 2021 and have failed to carry out the Property Factor's Duties. The Tribunal proposes to make a Property Factors Enforcement Order.

Background

1. By applications, dated 15 January 2024, the homeowner complained under Section 17(1) of the Property Factors (Scotland) Act 2011 that the property factors had failed to comply with the Code of Conduct for Property Factors effective from 1 October 2012 ("the 2012 Code") and the Code of Conduct for Property Factors effective from 16 August 2021 ("the 2021 Code") and had failed to comply with the Property Factor's duties.

2. The complaint was made under Sections 1.1a(A)(b), 2.1, 2.2, 2.4, 2.5, 3.3, 4.1, 4.3 , 4.5, 4.7, 4.8, 4.9, 5.2, 6.3, 6.4, 6.9, 7.1, 7.2, and 7.4 of the 2012 Code and OSP2, OSP3, OSP4, OSP 5, OSP7, OSP9, OSP11, OSP12 and Sections 2.1, 2.3, 2.4, 2.6, 2.7, 3.1, 3.2, 3.4, 4.1, 4.3, 4.4, 4.5, 4.6, 4.9 , 4.10,

4.11, 5.3, 6.4, 6.6, 6.7, 6.12, 7.1, 7.2 and 7.4 of the 2021 Code. The application also referred to Sections 7.7 and 7.10, but there are no such Sections in the 2021 Code. The homeowner also alleged a large number of failures to comply with the property factor's duties.

3. The applications were accompanied by a copy of the property factors' Written Statement of Services ("WSS") and several hundred pages of written documentation, principally emails between the homeowner and the property factors.

4. The alleged failure to comply with the Property Factor's duties was a failure to comply with the provisions of the title deeds, the manner in which they had dealt with his complaints and the fact that they had registered a Notice of Potential Liability in respect of charges that were disputed. In relation to the title deeds, the property factors had failed to make reference to the Deed of Conditions, which included lift insurance as part of the common property of the Development, choosing instead to mislead homeowners by referring to health and safety regulations as the reason for including lift inspections in the lift insurance. The homeowner's view was that the property factors had failed to follow their own guidelines regarding the treatment of disputed charges and had failed to provide details of their complaint findings. The homeowner had rejected the findings of their letter to him of 20 September 2022, following his complaint, and no final response was ever received.

5. The homeowner's complaints related primarily to the apportionment of communal electricity charges across the two blocks which comprise the Development 59 and 61 Grange Loan and issues regarding lift inspection and insurance. He stated that the provisions of the Deed of Conditions did not reflect the actual situation regarding communal electricity charges. Due to the location of meters, the block at 59 Grange Loan carried all of the external communal power for both blocks. The residents had approved at their AGM of 22 June 2014 a pragmatic solution, namely that the electricity bills for 59 and 61 would be combined and the resultant charge then apportioned amongst them all. The owners had also agreed that the cost of electricity attributable to the lifts, which was not separately metered, would be deemed to be one-third of the total communal electricity charges. The property factors had, however, abandoned this agreed formula in 2018, without any explanation to the owners. This resulted in their charging the owners of Number 59 a one quarter share each of the bill for 59, which included all the elements such as garage doors and lighting which were common to both blocks, and the owners of Number 61 a one-seventh share each of the bill for their block, which did not include these common elements. The homeowner had disputed the bills since then, but the property factors had refused to re-allocate the costs and had pursued the homeowners for debt, including lodging a Notice of Potential Liability against the Property, when the sums being sought were all under dispute. This had caused great stress and injury to feelings. The registration of the Notice of Potential Liability was malicious and intended to cause maximum emotional and reputational damage. The homeowner wished its immediate Discharge, with a letter to the Keeper of the Registers (in terms drafted by the homeowner) exonerating the homeowner

and his wife, settlement of correctly apportioned and authorised costs, refund of management fees, a full and unreserved apology and compensation for the stress caused.

6. On 14 June 2024, the property factors provided written representations to the Tribunal. They stated that they no longer manage the Development, the owners having given notice on 1 August 2023 and factoring services having ceased on 1 November 2023. Many of their responses in relation to specific Sections of the 2012 and 2021 Codes were to the effect that no evidence had been provided by the homeowner in support of his complaints. For ease of convenience and to avoid repetition, their substantive responses in respect of alleged failures to comply are set out in the Reasons for Decision portion of this Decision. They contended that the homeowner had failed to provide any evidence of any breach of the Codes of Conduct. They accepted that the homeowner had, in his view, various long-standing disputes, but these had been refuted and were not accepted as valid. The property factors had, however, taken the commercial decision ultimately to write off any amount owing by the homeowner, given the rather exhausting and continuous resource they had had to dedicate to managing this one client.

7. The property factors' position was that the homeowner had consistently refuted the requirement to have lift insurance in place to include lift inspections. They provided a copy of the Insurance Certificate showing that the total premium comprises a proportion for lift insurance and a proportion for the insurer carrying out detailed lift inspections every six months. That point had been explained to the homeowner on a number of occasions and the Executive Director of the property factors had met with him in February 2023 and clarified the requirement that lift inspections required to be in place. Where lifts are managed by a property factor, there is a health and safety implication on the property factor to ensure the lift meets LOLER requirements and that all lifts should be thoroughly examined. Given the fact that the property factors had chosen to write off any amounts outstanding with regard to disputed charges, this point has no financial impact on the homeowner and should be ignored.

8. In relation to the electricity costs, the property factors did not dispute the fact that there had previously been what they described as "a rather complex and convoluted" method applied for working out the apportionment of costs. The main reason for the property factors drawing back from this position was that it was unsupported by the Deed of Conditions, which defines common parts and how costs should be split and does not, in any way, support any deviation from that. Again, as they had chosen to write off any amounts outstanding with regard to any disputed charges, this point had no financial impact on the homeowner and should be ignored.

9. A Notice of Potential Liability was registered against the homeowner's Property on 3 October 2023. This was done in accordance with the property factors' Income Recovery procedure and on the basis that the homeowner continued to dispute previous charges which they, in turn, held to be valid and correct, but again, given that they had chosen to write off any amounts

outstanding with regard to the NOPL, the point had no financial impact on the homeowner and should be ignored.

10. The property factors provided with their written representations copies of their WSS, their Income Recovery/Distribution of Debt/Legal Costs etc. document, their Customer Complaints document, an Insurance Policy Schedule of 7 June 2022 issued by Marsh Ltd as insurance brokers to the property factors, an Invoice from TECX Roofing dated 16 August 2022, the property factors' Report to the Grange Hall 2002 Annual General Meeting and the property factors' Stage 1 response to the homeowner's formal complaint regarding electricity charges, the response including the steps to be taken by the homeowner if not satisfied that his complaint had been properly addressed and a copy of the Complaints Procedure. They also provided copies of email correspondence between the Parties

Case Management Discussion

11. A Case Management Discussion was held by means of a telephone conference call on the morning of 26 June 2024. homeowner was present. The property factors were represented by Mr Nic Mayall, an Executive Director.

12. The Tribunal began by asking the homeowner whether he wished to move for a postponement of the Case Management Discussion, given the fact that the property factors' written submissions had arrived less than 14 days prior to the Case Management Discussion. The homeowner confirmed that he wished to continue and was not seeking a postponement.

13. The homeowner told the Tribunal that he had always been happy to pay the property factors' Invoices once the disputed items were sorted out. The response of the property factors was that they had made efforts to look at the disputed matters and to meet with the homeowner but had ultimately decided that they did not consider the disputed items to be valid, so they remained payable. This had resulted in a Notice of Potential Liability being registered. The homeowner's view was that the correspondence he had submitted to the Tribunal did not show any effort to investigate his complaints. He repeatedly asked for a meeting with an executive of the company, but was ignored until January 2023.

14. In relation to the electricity charges, the homeowner stated that the bulk of the power used for common purposes came from Number 59. Over the years, various factors had applied a particular formula. Their property factors had adopted that formula in 2014, and it appeared to work satisfactorily, but at the beginning of 2018, the property factors had arbitrarily reverted to applying the ratios provided for in the title deeds. The homeowner had pointed out to the property factors on multiple occasions that Number 61 was being undercharged and Number 59 overcharged. A new formula was discussed in February 2023 and the homeowner told the property factors that this would

have to be put in writing to all owners for discussion at a general meeting. The property factors told the Tribunal that they were uncomfortable that there was any deviation from the title deeds provisions by an ad hoc recalculation of electricity charges. The homeowner responded that the arbitrary change meant that the owners of Number 59 were carrying the bulk of the common electricity costs for the external lighting, electric garage doors and freezers and tumble dryers kept in their garages by some of the owners. They were paying a one-quarter share each of those costs, whereas the meters in Number 61 only covered their stairwell lighting, video entry system and lift and the costs were divided by seven.

15. The property factors confirmed that the decision to alter the basis of charging had been taken by them and was not prompted by complaints from neighbours. They accepted that the ad hoc arrangement might seem logical at one level, but asked how they were to be expected to deal with it if it was challenged by an owner or if, for example, an owner removed their tumble dryer from the garage. They had taken the decision to comply with the title deeds.

16. With regard to the lift inspections carried out by or on behalf of the insurers, the homeowner told the Tribunal that their previous factors had not required them. The legislation to which the property factors were referring was introduced in 1998, but none of their factors made any reference to it before 2014. The item first appeared in the March 2015 Invoices, without any prior reference to the owners within the Development. The homeowner had been told that it was a legal requirement, but he did not understand why a residential development would be subject to the Regulations. The property factors had then admitted that the Regulations did not apply, but had then referred to Health and Safety and to best practice and insisted that if the owners did not agree with their approach, they would require an indemnity from all of them, absolving the property factors of all responsibility in the event of an accident to anyone using or working on the lift. There was no provision in their WSS or elsewhere for such an indemnity.

17. The property factors told the Tribunal that they had raised this specific issue at a meeting in January 2023. At no point had they stated that the Regulations did not apply. They said that it was an essential Health and Safety requirement. The LOLER and other Regulations are binding on any managing agent. They followed up the issue in an email of 28 February 2023. It was a requirement imposed by the insurers, for cover against vandalism and power outages. The property factors referred the Tribunal to the Certificate of Insurance.

18. The Parties told the Tribunal that they were content for the application to be decided on the basis of their written representations and the evidence they had given at the Case Management Discussion and that neither of them wished to have an evidential Hearing.

Findings of Fact

i. The homeowner is the proprietor of the property, which is a ground floor flat in a block of 4 at Number 59 Grange Loan, Edinburgh, part of a Development known as Grange Hall, Edinburgh, the Development comprising Numbers 59 and 61 Grange Loan. There are 7 flats at Number 61.

ii. The Deed of Conditions, recorded GRS Midlothian on 14 September 1995, provides that the Common Property of the Development includes "The lift, liftshaft, liftgear, lift plant room and all other pertaining solely to the provision of a lift in the development and the insurance of said lift ("the lift facility") in each of Number 59 and Number 61 Grange Loan." The share of the cost of maintaining, repairing and renewing the Common Property to be borne by each of the flats in the Development is also set out in the Deed of Conditions. The combined proportion payable by the owners at Number 59 is 40%, the balance of 60% being divided amongst the owners at Number 61.

iii. The property factors, in the course of their business, manage the common parts of the tenement of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").

iv. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.

v. The property factors first registered on 23 November 2012. Their present registration is dated 17 May 2019.

vi. The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.

vii. The homeowner made applications to the First-tier Tribunal for Scotland Housing and Property Chamber on 15 January 2024, under Section 17(1) of the Act.

viii. The property factors' WSS, read with the Development Schedule, limits the property factors' delegated authority to act at £20 plus VAT per flat for non-emergency repairs. Any works that are likely to exceed that cost require the approval of the Homeowners' Association (or the approval of homeowners in accordance with the Deed of Conditions).

ix. The WSS provides for a late payment penalty of £40 per invoice.

x. The WSS states that all costs incurred in the on-going communal works provided by the property factors will be shared, as appropriate, between homeowners and that the split is normally determined by the Deed of Conditions. These costs specifically include Block Insurance and Lift Insurance/Inspections.

Reasons for Decision

19. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal was satisfied that it had before it all the information and documentation it required to enable it to decide the application without a Hearing.

20. The Tribunal considered carefully all the evidence and documentation before it. The written representations run to many hundreds of pages and the applications are made under a very large number of Sections of the 2012 and 2021 Codes of Conduct without, in many instances, specific evidence attributed to them. This made the work of the Tribunal extremely challenging, but the Tribunal has considered everything presented to it, even if not every adminicle of evidence is set out in this Decision.

21. The view of the Tribunal was that the property factors appeared to have decided arbitrarily to revert to the cost-sharing provisions in the Deed of Conditions rather than continue the convention agreed by homeowners over a number of years that common electricity charges should be apportioned in a manner that more equitably reflected the situation on the ground, namely that the location of electricity meters did not allow accurate measurement of the amount of electricity used within each Block. When this was queried by the homeowner, they did not handle the matter well. They had chosen to alter the basis of charge without reference to homeowners, ending a pragmatic arrangement that appeared to have worked satisfactorily. The property factors were well aware of the arrangement and should have canvassed owners and/or held a meeting of the owners to explain the changes they proposed to make.

22. The Tribunal noted that the Deed of Conditions, doubtless drafted before the Development was completed, did not envisage the situation which transpired, namely that the electricity meter readings would not accurately reflect the manner in which the costs should be apportioned, as the meter readings for Number 59 included the items common to both Blocks, namely garage doors and lighting, together with the electricity costs of items such as freezers within the individual garages.

23. The property factors said in their written representations that, whilst they accepted that there was previously a rather complex and convoluted method of working out the apportionment of electricity costs, the main reason they drew back from that position was that it was unsupported by the title deeds. They said that, as they had now chosen to write off any amounts outstanding with regard to any disputed charges, there had been no financial impact on the homeowners and the matter should be ignored. The Tribunal did not agree. The decision to write off disputed charges had, by their own admission, been a commercial one, related to the resource the property factors had had to dedicate to managing the homeowner, rather than a genuine attempt to resolve the issues about which he had complained.

24. The Tribunal accepted that the property factors were uncomfortable with allowing owners to deviate from the title deeds provisions and that it was questionable whether the arrangement agreed with owners would be binding on successors of owners who had consented to it in the first place, but if they intended to ignore the arrangement, they should have consulted with the owners in advance. When the disparity was brought to their attention, the property factors must have realised that strict adherence to the provisions of the Deed of Conditions produced an unfair outcome and they could, for

example, have suggested that the arrangement be reviewed and, if agreed, endorsed at each Annual General Meeting.

25. In relation to lift insurance and inspections, the property factors' position was that the copy insurance certificate provided by them showed that the total premium comprised a proportion for lift insurance and a proportion for the insurers to carry out detailed lift inspections every 6 months, but the homeowner had consistently refuted the requirement that lift insurance should include lift inspections. They stated that when lifts are managed and maintained by a property factor, there is a health and safety implication on the property factor to ensure the lift meets The Lifting Operations and Lifting Equipment Regulations of 1988 ("LOLER") requirements and that all lifts should be thoroughly examined. They added that, as they had agreed to write off any amounts outstanding in relation to common charges the issue had no financial impact on the homeowner and should be ignored. The Tribunal did not agree, for the reasons set out in relation to the common electricity charges.

26. The Tribunal did not regard it as within its competence to determine whether The LOLER Regulations apply to communal lifts in residential blocks. Their purpose is to ensure all lifting equipment is suitable and safe to use and they apply to all people and companies who own, operate, or have control over, all types of lifting equipment. The Tribunal made no finding as to whether the LOLER Regulations apply in the present case, but noted that the Insurance Schedule provided by the property factors' appointed brokers included engineering inspections. The property factors did not negotiate with the insurers. The WSS makes it clear that brokers will be involved. The property factors were entitled to rely on the recommendations of their brokers and, if the lift insurance included, or the insurers required, two inspections per year, the property factors had no duty to challenge it.

27. Irrespective of whether LOLER Regulations apply, it is clearly in the interests of all owners within residential blocks with lifts to have the lift equipment tested on a regular basis, for the protection of themselves, visitors and contractors who will use them. Accordingly, in a situation where owners are indicating, contrary to the advice of their property factors, that they do not want the lifts to be regularly inspected, the property factors are entitled to seek an indemnity against any claim that may be made against them, should an accident take place. The property factors told the homeowner in an email of 28 February 2023 that the matter of lift insurance was non-negotiable.

28. With regard to the homeowner's complaint that the property factors had lodged a Notice of Potential Liability against the Property, the property factors stated in their written representations that it was done in accordance with their income recovery procedure and on the basis that the homeowner continued to dispute charges which they, in turn, fundamentally held to be valid and correct. They had advised the homeowner of this on multiple occasions. They provided copies of an email dated 4 December 2023, in which they said, "as we have confirmed to you on multiple occasions, we do not consider that there are any valid disputes on your account and, therefore, the whole

outstanding sum remains payable." This repeated, in effect, comments they had made in emails of 24 August and 23 October 2023, copies of which were also provided.

29. The view of the Tribunal was that the property factors had clearly indicated to the homeowner that they did not accept that the homeowner had a valid reason for failing to pay their Invoices in full and that, accordingly, they were entitled to register a Notice of Potential Liability to protect their position in the event of a sale of the Property. Provided they have investigated and responded honestly and fairly to homeowners who have disputed Invoices, property factors cannot be expected to do nothing to recover debt when a homeowner does not accept their conclusions. They have a duty to the other owners in the Development to try and avoid the necessity of burdening them with the distribution of the debt of those who do not pay. The logical conclusion of doing nothing would be that a homeowner could simply persist in saying they were disputing an Invoice, irrespective of whether they had valid grounds for doing so, and the remaining owners would end up picking up the shortfall.

30. The Tribunal noted that the property factors, "Income Recovery/Distribution of Debt/Legal Costs etc." document makes provision for the lodging of a Notice of Potential Liability in respect of unpaid costs. This is separate from the section headed "Court Action" and is not a prerequisite of raising legal proceedings to recover debt. It is a measure used to provide some protection for the other owners of a Development against having to distribute amongst themselves debt left behind by an owner who sells their property. The document states that disputed items will be excluded from Income Recovery actions until the dispute is resolved. The view of the Tribunal was that the property factors had advised the homeowner that they did not consider he had any right to withhold payment. In such circumstances, they were entitled to register the Notice of Potential Liability. Had they proceeded to take legal action against the homeowner, he would have had the opportunity to contest their claim in the sheriff court.

31. The Tribunal then considered the complaints made under the various Sections of the 2012 and 2021 Codes.

The 2012 Code

32. Section 1.1a (A)(b) provides that the WSS should set out "where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation." The Tribunal **did not uphold** the complaint under this Section. The WSS contains a provision for delegated authority of up to £20 plus VAT per flat.

33. Section 2.1 states "You must not provide information that is misleading or false". The Tribunal **did not uphold** the complaint under this Section. In the absence of specific submissions set against this Section, the Tribunal assumed that the complaint related to the requirement or otherwise for lift

inspections. The Tribunal had made no finding as to whether such inspections were mandatory, but had concluded that, in any event, the position taken by the property factors was reasonable.

34. Section 2.2 states "You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action." The homeowner's complaint related to the fact that the property factors registered a Notice of Potential Liability, which he regarded as intimidatory. The Tribunal found no evidence, however, that any communication with the homeowner was abusive or intimidating or threatening, apart from giving him reasonable indication that they might take legal action against him. Accordingly, the Tribunal **did not uphold** the complaint under this Section.

35. Section 2.4 provides "You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service." The Tribunal **did not uphold** the complaint under this Section. The WSS states that any works in excess of the delegated authority of £20 plus VAT per flat require the approval of homeowners in accordance with the Deed of Conditions and the Development Schedule. The homeowner's complaint related to the decision of the property factors to alter the agreed basis for apportioning the common electricity costs. This is dealt with in the portion of this Decision relating to failure to comply with the Property Factor's Duties (beginning at Paragraph 88). The homeowner had also complained that the property factors had failed to carry out a competitive tender exercise before appointing a roofing contractor. The property factors' response was that they took this to relate to carrying out mastic repairs and gutter cleaning to balconies, the charge for which had appeared in the homeowner's Invoice of August 2022. The property factors provided copies of their report of 8 June 2022 given at the proprietors' AGM in which they advised owners that these repairs would be carried out on 26 July, and a letter to all owners on 21 July 2022, advising them that the contractors had given a quote for cleaning gutters and that the property factors were inclined to go ahead as the price was considerably cheaper because they were already carrying out works on site. That letter stated that owners should get in touch with the property factors as soon as possible if they did not wish this to go ahead. There was no evidence provided to the effect that the owners did not agree to the work being carried out. The Tribunal's view was that the property factors had acted prudently in taking advantage of the opportunity for gutter cleaning to be carried out when the contractors were already on site and that, therefore, their decision not to put that work out to tender was reasonable in the circumstances.

36. Section 2.5 states "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement." The property factors accepted, in their written submissions, that, on occasion, the

homeowner's correspondence had not been responded to within the timescales stated in the WSS, but the frequency and regularity of his correspondence was high and often simply regurgitated previous emails which had been responded to in full. The Tribunal agreed that there had been occasional failures to respond within the timescales set out in the WSS, but was of the view that, judged in the context of the many hundreds of emails received from the homeowner, such occasional lapses were understandable from individuals who had a significant workload. There was no evidence that the homeowner had been prejudiced by these lapses. Accordingly, the Tribunal **did not uphold** the complaint under this Section.

37. Section 3.3 states "You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for." The Tribunal **did not uphold** the complaint under this Section. The property factors responded that all owners received quarterly Invoices. They provided a copy of their Invoice for the period to 27 May 2023, which contained full and detailed descriptions of the activities and works charged for.

38. Section 4.1 requires that "You must have a clear written procedure for debt recovery which outlines a series of steps you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts". The Tribunal **did not uphold** the complaint under this Section. The WSS contains a detailed Section on Income Recovery and also refers to the property factors' "Income Recovery Guide", available on their website, with hard copy to be provided on request. The Guide, entitled "Income Recovery/Distribution of Debt/Legal Costs etc" describes the process for lodging and the effects of a Notice of Potential Liability.

39. Section 4.3 states "Any charges that you impose relating to late payment must not be unreasonable or excessive". The Tribunal **did not uphold** the complaint under this Section. The WSS provides for a late payment penalty of £40 per Invoice, as an additional charge for the additional workload incurred by the property factors in pursuing debt. The Tribunal did not regard £40 as an unreasonable or excessive charge for sending reminder letters or a 7-day demand letter, given the administrative time involved.

40. Section 4.5 states "You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timeously written reminders to inform individual homeowners of amounts outstanding." The Tribunal **did not uphold** the complaint under this Section. The WSS and Income Recovery Guide clearly set out the Income Recovery Process, with Stage 1 and Stage 2 Reminders and a 7 Day Demand Letter.

41. Section 4.7 states "You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs." The Tribunal **did not**

uphold the complaint under this Section. The property factors' submission was that they had not distributed any debt or unpaid charges to the homeowner's account. Section 4.7 is designed primarily to operate to protect the owners amongst whom unpaid debt is distributed. There was no evidence that the sums claimed from the homeowner had been distributed amongst the other owners in the Development.

42. Section 4.8 states "You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention." The Tribunal **did not uphold** the complaint under this Ground. The property factors have not taken legal action against the homeowner and if the complaint relates to the lodging of a Notice of Potential Liability, this happened after the 2012 Code was superseded by the 2021 Code.

43. Section 4.9 states "When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action)". The property factors said in their written submissions that no evidence had been provided by the homeowner to support the complaint. The Tribunal determined in relation to the complaint under Section 2.2 that it had found no evidence of such conduct, so **did not uphold** the complaint under this Section. The homeowner had regarded the lodging of the Notice of Potential Liability as intimidatory, but this happened after the 2021 Code replaced the 2012 Code.

44. Section 5.2 states "You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this." The Tribunal **did not uphold** the complaint under this Section and agreed with the property factors' submission that the Insurance Certificate met the requirements of Section 5.2.

45. Section 6.3 states "On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercises of use in-house staff." The Tribunal **did not uphold** the complaint under this Section. No evidence was produced to support the complaint which related to events prior to the 2012 Code being replaced by the 2021 Code.

46. Section 6.4 states "If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works." The submission by the property factors was that, whilst regular inspections were carried out and made available via the client portal, there was no formal agreement with regard to core services, but these were outlined by default within the Development Schedule. The Tribunal **did not uphold** the complaint under

this Section, as the Development Schedule does not include a planned programme of cyclical maintenance.

47. Section 6.9 states “You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a co lateral warranty from the contractor.” The Tribunal **did not uphold** the complaint under this Section, no evidence in support of the complaint having been provided.

48. Section 7.1 states “You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.” The Tribunal **did not uphold** the complaint under this Section. The WSS includes a detailed Section on Complaints and refers also to a “Customer Complaints Guide” available on their website and also, on request, in hard copy.

49. Section 7.2 states “When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing This letter should also provide details of how the homeowner may apply to the Tribunal.” The property factors, in their written submissions, contended that no formal complaint was received from the homeowner prior to August 2021, when the 2021 Code replaced the 2012 Code. The Tribunal agreed that this appeared to be the case and **did not uphold** the complaint under this Section.

50. Section 7.4 states “You must retain (in either electronic or paper form) all correspondence relating to a homeowner’s complaint for three years as this information may be required by the Tribunal.” The property factors’ view was that no detail or evidence had been provided by the homeowner in this regard. The Tribunal agreed and **did not uphold** the complaint under this Section.

The 2021 Code

51. OSP2 states “You must be honest, open, transparent and fair in your dealings with homeowners.” The Tribunal **did not uphold** the complaint under OSP2. There was no evidence to indicate a failure to comply.

52. OSP3 states “You must provide information in a clear and accessible way.” The Tribunal found no evidence to support this complaint and **did not uphold** it.

53. OSP4 states “You must not provide information that is deliberately or negligently misleading or false.” The Tribunal noted that the information given by the property factors regarding the necessity or otherwise of lift inspections was inconsistent and, at times, confused, but did not regard this as deliberately or negligently misleading. It is clear that the property factors consider lift inspections to be required under the LOLER Regulations and, whilst the Tribunal made no finding as to whether or not that is correct, the

property factors reasonably believed the position to be as they stated. In any event, it appeared to be a condition of the insurance policy negotiated by the property factors' brokers. Accordingly, the Tribunal **did not uphold** the complaint under OSP4.

54. OSP5 states "You must apply your policies consistently and reasonably." No evidence was before the Tribunal to support the homeowner's complaint, which was, therefore, **not upheld** by the Tribunal.

55. OSP7 states "You must not unlawfully discriminate against a homeowner because of their age, disability, sex, gender reassignment, being married or in a civil partnership, being pregnant or on maternity leave, race including colour, nationality, ethnic or national origin, religion, belief or sexual orientation." The Tribunal **did not uphold** the complaint under OSP7. There was no evidence of any discrimination in relation to the property factors' dealings with the homeowner. The homeowner had suggested that his elderly female neighbours had not felt able to challenge the property factors, but they are not parties to the present applications.

56. OSP9 states "You must maintain appropriate records of your dealings with homeowners. This is particularly important if you need to demonstrate how you have met the Code's requirements." The Tribunal found no evidence provided in support of this complaint and **did not uphold** it.

57. OSP11 states "You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure." The property factors, in their written representations, conceded that they had not always responded to communications from the homeowner within the timescales set out in their WSS, but referred to the very large number and regularity of emails received from the homeowner. The Tribunal regarded these as occasional lapses which, given the volume of correspondence, were not unreasonable. There was no evidence to indicate that the homeowner was prejudiced by these lapses and the Tribunal **did not uphold** the complaint under OSP11.

58. OSP12 states "You must not communicate with homeowners in any way that is abusive, intimidating or threatening." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraphs 34 and 43 of this Decision.

59. Section 1.5(A)(3), under "Authority to Act" states that the WSS must set out "where applicable, a statement of any level of delegated authority, for example the financial thresholds for instructing works and the specific situations in which the property factor may decide to act without further consultation with homeowners." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 32 of this Decision, but noted that the decision of the property factors to alter the method of apportionment of the common electricity charges should be dealt with when the Tribunal considered the complaint of alleged failures to carry out the Property Factor's Duties.

60. Section 1.5(B)(4) requires that "Services Provided" must include "the core services that the property factor will provide to homeowners. This must include the target times for taking action in response to requests from homeowners for both routine and emergency repairs and the frequency of property visits (If part of the core service)". The Tribunal **did not uphold** the complaint under this Section. The WSS refers, for Core Services, to the Development Schedule, where they are clearly set out, and the WSS itself, in Section 4.6, covers response times in relation to both routine and emergency repairs. The Development Schedule states the frequency of property visits (4 per annum).

61. Section D (13) requires that the WSS states "how homeowners can access information, documents and policies/procedures that they may need to understand the operation of the property factor." The Tribunal **did not uphold** the complaint under this Section. The WSS sets out how homeowners can access information, documents, policies and procedures, mainly through the property factors' website, and offers hard copy on request.

62. Section D (14) requires that the WSS sets out "Procedures and timescales for responding to enquiries and communications received from homeowners in writing and by telephone (including details of the property factor's standard working hours). The Tribunal **did not uphold** the complaint under this Section, partly for the reasons set out in Paragraph 60 of this Decision. Section 4 of the WSS does not set out the property factors' standard working hours but it does clearly detail the procedure for out-of-hours requests and the Tribunal was not prepared to find that the omission of details of standard working hours was sufficient to make a finding that they had failed to comply with Section D (14).

63. Section D (15) requires that the WSS sets out "the property factor's complaints handling procedures." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 48 of this Decision.

64. Section 2.1 states "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect, It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard, They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations". The Tribunal **upheld** the complaint under this Section. The property factors did not consult the homeowner and his neighbours before arbitrarily departing from the arrangement they knew the owners had agreed amongst themselves regarding the apportionment of the common electricity charges. It might seem odd that the homeowner was complaining, on the one hand, in relation to the lift insurance, that the property factors had not pointed out the title deeds' definition of common property and, on the other hand, that they should not follow the title deeds in relation to the apportionment of common electricity

charges, but the Tribunal did not see any contradiction. The complaint under Section 2.1 was not that they had decided to adhere to the Deed of Conditions. It was that they had failed to consult before making changes to the manner in which these costs had been split in previous years.

65. Section 2.3 states "The WSS must set out how homeowners can access information, documents and policies/procedures. Information and documents can be made available in a digital format, for example on a website, a web portal, app or by email attachment. In order to meet a range of needs, property factors must provide a paper copy of documentation in response to any reasonable request by a homeowner." The Tribunal **did not uphold** the complaint under this Section. The WSS makes a number of references to the property factors' website, where their client portal is available, and to separate documents which owners can find on the website or can request in hard copy.

66. Section 2.4 states "Where information or documents must be made available to a homeowner by the property factor under the Code on request, the property factor must consider the request and make the information available unless there is a good reason not to." The Tribunal **did not uphold** the complaint under this Section. There was no evidence that the property factors had failed to make available such information or documents requested by the homeowner.

67. Section 2.6 states "A property factor must have in place a procedure to consult with all homeowners and seek homeowners' consent, in accordance with the provisions of the deed of conditions or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner". The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 35 of this Decision.

68. Section 2.7 states "A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timetable". The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 36 of this Decision.

69. Section 3.1 states "While transparency is important in the full range of services provided by a property factors, it is essential for building trust in financial matters. Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment request are included in any financial statements/bills." The Tribunal **did not uphold** the complaint under this Section, which does not impose any specific obligations on property factors.

70. Section 3.2 states the overriding objectives of Section 3 ("Financial Arrangements"). The overriding objectives do not impose any specific compliance obligations on property factors, so the Tribunal **did not uphold** the complaint under this Section.

71. Section 3.4 states "A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial statement showing a breakdown of charges and a detailed description of the activities and works carried out which are charged for." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 37 of this Decision.

72. Section 4.1 sets out the reasoning behind Section 4 ("Debt Recovery"). It does not in itself impose any specific obligations on property factors, so the Tribunal **did not uphold** the complaint under this Section. It relates to the fact that non-payment by some homeowners may affect provision of services to others, or may result in other homeowners in the group being liable to meet the non-paying homeowner's debts and that, for this reason, it is important that homeowners are made aware of the implications of late payment. The property factors' Income Recovery document clearly states in Sections 1 and 4 that if the property factors have been unable to collect debt, it will be distributed amongst the remaining homeowners, if the factor has used all reasonable steps to recover the debt. There was no evidence that the sums claimed as debt by the property factors had been distributed amongst the other owners in the Development.

73. Section 4.3 states that "Any charges that a property factor imposes in relation to late payment by a homeowner must not be unreasonable or excessive and must be clearly identified on any relevant bill and financial statement issued to that homeowner." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 39 of this Decision.

74. Section 4.4 states "A property factor must have a clear written procedure for debt recovery which outlines a series of steps which the property factor will follow. This procedure must be consistently and reasonably applied. This procedure must clearly set out how the property factor will deal with disputed debts and how, and at what stage, debts will be charged to other homeowners in the group if they are jointly liable for such costs." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 38 of this Decision

75. Section 4.5 states "When dealing with customers in default or in arrears difficulties, a property factor should treat its customers fairly, with forbearance and due consideration to provide reasonable time for them to comply. The debt recovery procedure should include, at an appropriate point, advising the customer that free and impartial debt advice, support and information on debt solutions is available from not-for-profit debt advice bodies." The Tribunal **did not uphold** the complaint under this Section. The Tribunal had seen correspondence between the Parties, extending over many months regarding

the sums claimed, and the property factors Debt Recovery document urges homeowners in financial difficulties to seek advice from one of a number of named impartial public bodies, including Citizens Advice Bureau and National Debtline.

76. Section 4.6 states "A property factor must have systems in place to ensure the monitoring of payments due from homeowners and that payment information held on these systems is updated and maintained on a regular basis. A property factor must also issue timely reminders to inform a homeowner of any amounts they owe." The Tribunal **did not up**hold the complaint under this Section. No evidence was led in support of the complaint and there was clear evidence that the property factors had issued reminders to the homeowner.

77. Section 4.9 states "A property factor must take reasonable steps to keep homeowners informed in writing of outstanding debts that they may be liable to contribute to, or any debt recovery action against other homeowners which could have implications for them, ensuring compliance with data protection legislation." In their written representations, the property factors stated that no bad debt had been recharged to the homeowner. In the absence of any evidence to the contrary, the Tribunal **did not uphold** the complaint under this Section.

78. Section 4.10 states "A property factor must be able to demonstrate it has taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging other homeowners (if they are jointly liable for such costs). The Tribunal **did not uphold** the complaint under this Section for the reasons set out in the immediately preceding paragraph.

79. Section 4.11 states "A property factor must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice to the homeowner of its intention to raise legal action." The position of the property factors was that no formal legal action had ever been taken against the homeowner. The homeowner's complaint related to the lodging of the Notice of Potential Liability, but the view of the Tribunal was that such a Notice does not constitute taking legal action against a homeowner. It is merely a protective measure and is not a necessary pre-requisite of legal action. Accordingly, the Tribunal **did not uphold** the complaint under this Section.

80. Section 5.3 states "A property factor must provide an annual insurance statement to each homeowner… with clear information demonstrating the basis on which their share of the insurance premium is calculated, the sum insured, the premium paid, the main elements of insurance cover provided by the policy and any excesses which apply, the name of the company providing insurance cover and any other terms of the policy. This information may be supplied in the form of a summary of cover, but full details must be made available if requested by a homeowner." The Tribunal **did not uphold** the

complaint under this Section, for the reasons set out on Paragraph 44 of this Decision.

81. Section 6.4 states “Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress report are not required.” No evidence in support of this element was provided and the Tribunal **did not uphold** the complaint under this Section.

82. Section 6.6 states “A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.” The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 45 of this Decision.

83. Section 6.7 states “It is good practice for periodic visits to be undertaken by suitable qualified/trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure a property is maintained appropriately. If this service is agreed with homeowners, a property factor must ensure that people with appropriate professional expertise are involved in the development of the programme of works” The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 46 of this Decision.

84. Section 6.12 states “If requested by homeowners, a property factor must continue to liaise with third parties i.e. contractors within the limits of their “authority to act” in order to remedy the defects in any inadequate work or service that they have organised on behalf of homeowners.” The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 47 of this Decision.

85. Section 7.1 states “A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code…that the property factors must provide homeowners with a copy of its complaints handling procedure on request.” Section 7.1 goes on to set out various things that must be included in the procedure, namely the series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps, information on how a homeowner can make an application to the Tribunal if their complaint remains unresolved when the process has concluded, how the property factor will manage complaints against contractors or other third parties used by the property factor to deliver services on their behalf and, where the property factor provides access to

alternative dispute resolution services, information on this. The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 48 of this Decision.

86. Section 7.2 states "When a property factor's in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing. The property factors, in their written submissions accepted that a formal complaint had been made by the homeowner in 2022. They had responded to that complaint and the homeowner had never asked that it be escalated to the second stage of their complaints procedure. They provided a copy of a letter to the homeowner dated 20 September 2022. The complaint related to the electricity charges, and, in their letter, the property factors stated - "we consider this to draw a line under all matters relating to that period's charges" and "I trust that this clarifies matters and look forward to payment of your account." The Tribunal was in no doubt that the homeowner did not agree with the explanation or conclusions of the property factors, but he does not appear to have asked them to formally escalate his complaint to Stage 2 of their complaints process. Accordingly, the Tribunal **did not uphold** the complaint under this Section.

87. Section 7.4 states "A property factor must retain (in either electronic or paper format) all correspondence relating to a homeowner's complaint for a period of at least 3 years from the date of the receipt of the first complaint." The Tribunal **did not uphold** the complaint under this Section, for the reasons set out in Paragraph 50 of this Decision.

Property Factor's Duties

88. In addition to his complaints under numerous Sections of the Codes of Conduct, the homeowner contended that there had been a failure to carry out the Property Factor's duties, namely a failure to comply with the provisions of the title deeds, the manner in which they had dealt with his complaints and the fact that they had registered a Notice of Potential Liability in respect of charges that were disputed.

89. He did not address this contention specifically in his written and oral evidence, but it appeared to the Tribunal that the issue was the decision of the property factors to depart from an agreed position, of which they were aware, regarding apportionment of the common electricity charges. The view of the Tribunal was that, whilst the property factors were entitled to tell the homeowners that they were uncomfortable with applying a formula that was not supported by the Deed of Conditions, they were not entitled to make an arbitrary decision in 2018 without first consulting with the owners in the Development. It should have been clear to them that strict adherence to the Deed of Conditions produced an inequitable result and that the owners had agreed a pragmatic solution some years before. Accordingly, they should have called a meeting to discuss the issue and, if they were not willing to continue on the previously agreed basis but the owners were insisting on it, they could have considered their position. The Tribunal accepted that the property factors might have encountered difficulties with incoming owners not

accepting the situation, but they should have consulted instead of simply implementing a change. Accordingly, the Tribunal **upheld** the complaint that there had been a failure to carry out the property factor's duties. Their WSS states that the apportionment of costs is normally determined by the Deed of Conditions, but they were aware of an issue which produced an unfair outcome.

90. The Tribunal did not accept the argument that the property factors had failed to comply with the title deeds by not mentioning at the outset that lift insurance was included in the definition of common property of the Development. The dispute was whether lift inspections were required, and the Deed of Conditions is silent on this. The Tribunal did not make a finding as to whether lift insurance can ever be regarded as common property, as it was not relevant to the matters in dispute.

91. The Tribunal had already determined that, whilst he disagreed completely with the outcome of his complaint at Stage 1, the homeowner had not formally required the property factors to escalate it to Stage 2, so the Tribunal did not consider further the complaint under Property factor's Duties regarding the manner in which his formal complaint had been dealt with.

92. The Tribunal did not consider the lodging of the Notice of Potential Liability as a failure to comply with the Property factor's Duties. The homeowner contended that it was unnecessary and ignored his and his solicitor's repeated offers to settle the dispute. That would have involved the property factors in accepting that the disputed charges were not due, but it was clear throughout the correspondence that they were adamant that the charges were fundamentally valid and correct.

Property Factor Enforcement Order

93. Having made its Decision on the merits, the Tribunal then considered whether to make a Property Factor Enforcement Order ("PFEO").

94. The Tribunal noted that the homeowner had sent hundreds of emails to the property factors and had expended a huge amount of time and energy on his complaints and on formulating his applications to the Tribunal. The Tribunal had, however, only upheld one of his complaints, which were made under 54 different Sections of the 2012 and 2021 Codes of Conduct, so the Tribunal had to consider proportionality. The view of the Tribunal was that the homeowner was entitled to receive compensation for the inconvenience and distress caused to him by the property factors' failure to comply with Section 2.1 of the 2021 Code and with the property factor's duties, but that such compensation should be modest. Having taken into account all the facts and circumstances of the case, the Tribunal decided that a compensation figure of £250 would be reasonable, just and proportionate.

95. The Tribunal noted that the property factors have written off the sums disputed by the homeowner and would expect them to register a Discharge

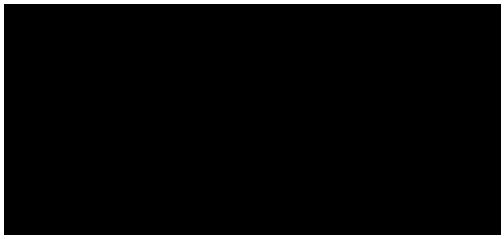
without delay, but having found that the property factors were justified in registering the Notice, it would not be appropriate to instruct them to send a letter to the Keper of the Registers exonerating the homeowner and his wife, and it would no longer be necessary, as regards the homeowner at least, for the property factors to adjust the apportioned and authorised costs. The property factors' failures did not justify a claim for refund of management fees, or the full and unreserved apology that the homeowner had requested. In the light of the Tribunal's Decision, and their statement that they have written off any sums they alleged were due by the homeowner, the Tribunal would expect the property factors, without further delay to discharge the Notice of Potential Liability.

96. The Tribunal proposes to make a PFEO in accordance with the Section 19(1)(a) Notice attached to this Decision

97. The Tribunal's Decision was unanimous.

Right of Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party 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.



Legal Member **19 August 2024**
Date