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/24/1678**

**Re: Property at 17 Lugar Street, Coatbridge ML5 3JS ("the Property")**

**Parties:**
**Mrs Kathryn Miller, 11 Street Farm Close, Harthill, Sheffield S26 7UH ("the homeowner")**

**Speirs Gumley Property Management Limited, incorporated in Scotland (SC078921), 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 Elizabeth Dickson (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 OSP11 and Section 2.7 of the Property Factors Code of Conduct effective from 16 August 2021 and with the property factor's duties. The Tribunal proposes to make a Property Factor Enforcement Order.**

**Background**

1. By application, dated 12 April 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 16 August 2021 ("the Code").

2. The complaint was made under OSP2, OSP4, OSP11 and Sections 2.1, 2.7, 4.1, 4.6, 6.1, 6.7 and 7.2 of the Code. The homeowner also alleged a failure 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").

4. The homeowner stated that the property factors had held that role for 30 years until 4 July 2023. Her complaints related to inveterate failure of the property factors to acquaint themselves sufficiently with the title deeds and conditions, pulling out instead of carrying out agreed repairs and maintenance, mainly to the common car park, her related decision to suspend payment of the factor management fee element of common charges, subsequent credit control threats and action, and the property factors' misleading information or lack of transparency on dates of arrears/adjustments for redistribution on termination.

5. The homeowner contended that the property factors repeatedly failed to keep their own written promises to respond to her letter of 2 July 2023, which detailed her complaint. Even acknowledgements or holding replies were overlong in coming and dates set for substantive responses seemed to allow the property factors more than generous amounts of preparation time, and these were still not met. This amounted to a failure to comply with OSP11 and Section 2.7 of the 2021 Code and also a failure to comply with the property factors' WSS Complaints procedure.

6. The WSS Credit Control section allows for withholding payment of a disputed item until the matter is resolved, provided remaining charges are fully paid. The homeowner's position was that she linked settling disputed payment to completion of repair works and even offered to pay once contractors were on site. The property factors, however, circulated her address to owner neighbours on 20 June 2023, labelling the disputed amount as "debt". She had letter-dropped owners in April 2023 regarding changing factors. This letter had her name and address on it, so owners could easily identify her from the address given in the property factors' communication of 20 June 2023. The homeowner referred to Section 2.2 of the 2021 Code regarding the obligation of property factors to ensure their clients' personal data is used safely and appropriately, but she did not include a Section 2.2 complaint in her application. On 2 July 2023 she intimated a counter-claim in respect of debt owed by the property factors to her. This related to their promise to reimburse flat owners for historic errors in their charging structure, for their incorrect split of charges between the two blocks of flats and their failure ever to charge the owners of the 29 houses that formed part of the Development. The homeowner challenged the reimbursement formula proposed by the property factors. It showed cumulative arrears of £1,438 from the 29 houses (one-third of the 89-property development), who had never been charged anything for 30 years, at the same time that they showed debt of £2,700 due from only four flat owners. That was impossible. The homeowner contended that the property factors had failed to comply with Sections 3.1, 3.2 and 3.6 of the 2021 Code, but none of these Sections were included in her application.

7. The homeowner provided the Tribunal with copies of a large number of emails passing between the Parties. Their content is summarised in the following paragraphs.

8. On 20 April 2022, the homeowner emailed Cheryl Dearie ("CD") of the property factors regarding a proposal for works at the communal car park, approval for which she had given on 8 April. She intimated her intention to withhold the quarterly management fees until the car park was fully restored. The projected completion date was one year after a site meeting. That would be 10 years from the date of her purchasing the Property. She said that she had constantly raised the issue since then, but there had been no meaningful inspection or maintenance. On 28 June, she emailed CD again, referring to a meeting at the Property a week earlier, and stressed the importance of car park repair to the value of owners' properties. CD responded on 15 July to say that she and SL were meeting the following week and would be in touch thereafter to provide the homeowner with a more meaningful update.

9. A Note of the meeting of 21 June 2022, prepared by the homeowner, indicates that the property factors stated that without funding, there could be no instruction of contractors to carry out the repairs. The homeowner said "no management, no fee payment" and stated that the property factors already had responsibility, in terms of the title conditions, to enforce repair and maintenance and to manage any dispute amongst residents on the matter. The property factors responded that repair enforcement would require court action by solicitors. The homeowner said that it was for the property factors to manage this on behalf of the owners, and that they could not choose which of the title conditions bind the residents, without the property factors being bound in turn, as part of their contractual agreement for service.

10. The homeowner stated in her application that the property factors had admitted there was no record of any maintenance or repair of the car park area, despite their claim that they carried out quarterly inspections, charged for under the core service. With her email of 28 June 2022, she included extracts from the portions of the Burdens Writs affecting the Development relating to common repairs and maintenance. The Disposition by the local authority to the Developers registered on 12 January 2013 included an obligation to construct parking areas and to repair them. This obligation was, in effect, passed on, by a Deed of Declaration of Conditions registered on October 1986 ("the Deed of Conditions") to those who purchased properties from the Developers. It gave to the property factors authority to sue for and recover costs, and stated that the duty of supervising, instructing and recovering cost of necessary maintenance should be discharged by a factor, who would have full power to bind proprietors.

11. Despite the comment in their email of 15 July 2022 that CD would be in touch after a meeting with SL to be held the following week, there was no further

response. On 25 October, the homeowner chased progress with CD. By 16 November, the homeowner decided that the car park repair was being mismanaged and on 21 November she wrote again to CD and attached a submission to the property factors' main board. On 9 December, CD apologised for the delay and promised a further response within 10 days and, on 20 December, she again postponed the date for a response, as the office was exceptionally busy as a result of recent freezing weather As it would be closed over the Festive break, their response would be issued by Friday 13 January 2023. The response came on that date. The homeowner regarded it as completely unacceptable that CD had replied to the homeowner's submission to the main Board, and she challenged this in an email to a Director, Tom McKie ("TMcK"), on 30 January. He never replied to that email.

12. On 14 March 2023, the homeowner received a "Final Reminder" notice in relation to unpaid fees. She responded on 21 March that the "Disputed Amount" figure was seriously understated and repeated that she would always settle contractors' fees elements of quarterly common charges and referred to her email of 30 January to TMcK, which had been copied to the Accounts Department and in which she explained her reasons for withholding management fees.

13. The homeowner provided a number of emails relating to her complaints about failures to respond and to resolve her complaints within reasonable timescales. On 30 June 2023, a letter from the property factors' Head of Credit Control, Liz McCann ("LMcC"), sent to all owners, stated that they had not received any substantive payment towards four owners' accounts. The addresses of these owners were listed and the letter advised that if the balances remained outstanding at the date of termination of the property factors' management of the Development (4 July 2023), they would proceed to disburse these debts to the other proprietors. The homeowner complained on 2 July to TMcK, LMcC and CD. On 16 July she again pressed LMcC, but the first reaction was not until 31 July, when TMcK acknowledged the correspondence and assured the homeowner of a written response within 28 days and to expect it by 28 August. It was chased up by the homeowner on 30 August, but no response was received.

14. On 14 September 2023, the homeowner emailed the CEO of the property factors' parent company, pointing to breaches of the 2021 Code. She received an immediate automated reply, which said he would reply on his return from annual leave on 19 September, but that did not happen.

15. On 4 October 2023, TMcK apologised that his response to the homeowner's complaint was overlooked. He said he would write separately with a detailed response. When this was not received by 31 October, the homeowner sought the help of her MSP, and a meeting followed at his surgery on 20 November. He had no response either by 1 February 2014. The homeowner then gave formal notification to the parent company's CEO of her intention to complain

to the Tribunal. This produced “a flurry of emails” with apologies from the property factors and from the parent company. The property factors conceded that the complaint was clearly unresolved and that she should not have had to pursue a response.

16. The homeowner said in her application that the failures had left her frustrated and angry and that she had concerns about the potential impact on her personal reputation and possible credit rating. The process had been hugely stressful and energy-sapping. It was an enormous and personal uphill task. The Development was left with a huge financial hole due to the 30-year gap in contractual coverage, with the flat owners being left to find some way to pull other house-owners back into contributing to much needed ground repair and maintenance. In her view, a well-publicised exemplary fine was needed, on a scale that would fix the car park or at least meet the shortfall between the funds previously collected and the current cost of the work. She also wished full financial recompense for the time she had had to spend on the matter and for personal damage to health and wealth.

17. The Tribunal’s Notice of Referral required the property factors to make any written representations by 8 August 2024, but on 30 July they requested an extension to 28 August, as key personnel were on holiday. The Tribunal granted an extension to 22 July. The homeowner objected to the extension being granted, but the Tribunal was satisfied that the new deadline would afford the homeowner adequate time to consider any written representations and to make any further submissions of her own in advance of the Case Management Discussion, and, in the event, she did. The property factors submitted their written representations on 22 August 2024. They extended to 299 pages and comprised 124 documents.

18. The documents include a copy of a letter from TMcK to the homeowner of 22 August 2024, which is the property factors’ response to the homeowner’s complaint. He noted the significant delay in his response and extended a sincere apology. In relation to the withholding of fees, he referred to a statement by CD in her email of 30 September 2022 that the property factors’ position was that the management fees remained overdue for payment. CD said that she was not authorised to put these management fees on hold or dispute and confirmed that the credit control process would continue if the outstanding sum was not settled. TMcK stated that communications to owners regarding car park repairs had sought the agreement and funding of the collective owners, including the flat owners and those not previously included on their system. The property factors could not continue to instruct works of such high value unless they had the required agreement and funding. As a result of co-owners not submitting their funding timeously, contractor costs increased. It was, he said, a well-documented fact that the set-up of Greenside Gate on their system had been incorrect. The property factors had made that clear in all communications to the clients of the Development when it became known to them, and they advised how they

might address this issue from 6 April 2022 and move forward. Their proposals were not, however, accepted by the co-owners, creating a situation where their continuing management of the Development was untenable.

19. The property factors referred to the homeowner's emails of 21 March, 3 April and 2 July 2023. Their view was that they had consistently told the homeowner that their position that all fees were due for payment had not changed since 30 September 2022. Their letter of 30 June 2023 updated owners about Development debt and advised them that this might impact owners who could receive their proportionate share of unpaid common charge account balances in accordance with the terms of the Deed of Conditions. Having followed proper process, it was appropriate to advise the collective owners, who had a legitimate interest in knowing, what balances remained outstanding and what steps the property factors were taking for recovery. The property factors did not accept the homeowner's assertion that they had "overcharged flat-owners by 33% for 35 years."

20. The property factors stated that the homeowner's letter to the CEO of the parent company did not make it clear that the property factors wrote to co-owners on 4 May 2023 intimating their decision to resign as managing agents for Greenside Gate. That letter set out in some details the reasons for their decision. TMcK understood that the CEO did not receive the homeowner's email of 14 September 2023 and, when she emailed him again, on 26 March 2024, the CEO acknowledged it and forwarded if for TMcK's attention and action.

21. TMcK concluded that the property factors could not accept the homeowner's complaint for the reasons he had set out. He believed that they acted appropriately in the circumstances and that they were transparent in their dealings with all clients. He accepted that he had delayed in communicating with the homeowner and realised this was unhelpful in the circumstances. On that basis, as a result of the delays and lack of communication, and as a gesture of goodwill, he had credited the homeowner's account with the sum of £260.77, which brought the homeowner's account to zero, with no further sums due by her.

22. The Homeowner provided a written response to the property factors' representations on 30 August 2024. She regarded the token apology for significant delay as worthless and contended that the statement that the CEO of the parent company had not received her email of 14 September 2023 as a straight lie. The documents already provided by her showed that she had received an immediate automated reply that he was on holiday and would respond on his return. The letter from TMcK of 22 August 2024 was his first ever acknowledgement of a hugely important document in the context of the case, which he had completely ignored for 18 months. She objected to the

fact that he seemed to be trying to deflect blame on the owners in his assertion that the property factors' failure to set up Greenside Gate properly on their system was a "well-documented fact" which had been made clear to the owners when it became known to the property factors. It was "made clear" just months before their resignation, over 30 years after they had been appointed by the original Developers, so it was small wonder that their proposals were rejected, particularly as they had baseless start dates of 13 years for flats and 2017 for houses. The homeowner maintained, therefore, that the property factors overcharged flat owners by 33% for 35 years. Communal charges had only ever been divided by 60 (the number of flats) and the property factors had to recognise that 29 houses represents one-third of an 89-property Development.

23. The property factors made further representations on 4 September 2024, but these were not considered by the Tribunal as relevant, as they related to the present factors of the Development, and the application was referable to the period that the property factors provided factoring services.

**Case Management Discussion**

24. A Case Management Discussion was held by means of a telephone conference call on the afternoon of 19 September 2024. The homeowner had advised the Tribunal on 8 July 2024 that she would not be attending and on the morning of the Case Management Discussion, the property factors confirmed that they would not be attending either. The Tribunal was satisfied that both Parties were content for the Tribunal to determine the application on the basis of their written representations.

**Findings of Fact**

i. The homeowner is the proprietor of the property, which is part of a Development known as Greenside Gate, in Coatbridge, comprising two blocks of flats, one of 48 flats and the other of 12, and 29 houses.
ii. The property factors, in the course of their business, managed the common parts of the Development of which the Property forms part, until 4 July 2023. 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").
iii. 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.
iv. The property factors are registered on The Scottish Property Factor Register.
v. The homeowner has notified the property factors in writing as to why she considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
vi. The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber on 12 April 2024, under Section 17(1) of the Act.

**Reasons for Decision**

25. 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.

26. The Tribunal considered carefully all the evidence and documentation before it. There was a large amount of written material to examine. The application is made under a large number of Sections of the Code of Conduct without, in some 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 or referred to in this Decision.

27. The view of the Tribunal was that there are, in essence, four areas of complaint. Firstly, the delay in having repair works carried out to the communal car park in the Development, secondly, the fact that for many years, the owners of 29 houses in the Development were not charged for maintenance of the common areas, including the car park, thirdly, the manner in which the property factors dealt with the homeowner's decision to withhold their fee element of quarterly bills and fourthly, the manner in which they dealt with her complaint.

28. At a meeting on 9 September 2021, the property factors explained to owners that they had previously obtained a cost of £30,000 for the work but had met with the contractors recently to discuss options with regard to phasing the works. When they had revised costs, a full consultation would take place. On 25 October 2021, they confirmed that they had spoken to another contractor who said they could carry out smaller repairs at a cost of £15,000, but that the contractor in question was no longer responding to their emails or letters. The property factors added that all improvement works are optional, so they could not force anyone to proceed with the repairs, but if a majority agreed to the work, they could look at adding the shares to the common charges or having shares underwritten by the rest of the co-owners. On 21 November 2021, the property factors told the owners that one contractor had quoted a price of £70,000.

29. On 1 April 2022, the property factors advised that, following a review of the Deed of Conditions, they had concluded that the houses within the boundary of the Development were in fact burdened with a share of the cost of maintaining the car park. The owners of the houses had been contacted and would be included in any forthcoming proposals for repair.

30. On 6 April 2022, the property factor reported that they now had three quotes, for £11,868, £12,948 and £70,000, all inclusive of VAT. They recommended accepting the lowest one, which would cost £154.13 per property. They proposed splitting this cost over the common charges accounts for May and August 2022 and if a majority did not object within 10 days, that was what they would do. The costs would be split amongst 77 owners (48 flats and 29 houses).

31. On 20 April 2022, the homeowner told the property factors that she would be withholding the management fee element of her quarterly accounts until the car park repairs were completed and on 29 April, the property factors responded that this was not acceptable to them, as their management fee covers many different services which are provided to the owners.

32. On 27 May 2022, the property factors told owners that if they were not provided with the necessary funding by the owners, they would not be in a position to instruct the car park repairs.

33. The homeowner withheld the management fee element of the common charges' invoices in May and August 2022 and became subject to the property factors' credit control processes. On 15 September 2022, she contacted them to say that, as they had her payment of £154.22 for the car park repairs and she had withheld £89.38, the account was still in positive territory. On 22 September, the property factors responded that her failure to pay the management fees activated their system generated debt recovery process, as the fees would not be held to be in dispute and that was why she had received a Final Notice. They confirmed on 30 September that their position had not changed. They also confirmed that the timescale for the car park repairs was completely dependent on when the owners provided the funding for the work to proceed. The homeowner had referred to the Deed of of Conditions which permitted the property factors to sue for common charges if they were not paid within one month of being demanded, but on 7 November 2022, the property factors said "To be clear, whilst the Deed of Conditions may provide the Factor with delegated authority to act, there is a very important but separate matter that goes hand in hand with authority to act and that is for the Factor to have sufficient funding from the owners to act/instruct repairs and maintenance." They also referred to their WSS, which stated that it was not within their remit to fund repairs and maintenance. Of the 48 flats, 44 had paid their shares, but 4 had not and, of the houses, only 7 of 29 had paid, so, although the property factors had majority agreement there were still 26 owners who had not paid. This created a shortfall of £4,007.12, which was why the property factors were not yet in a position to move forward.

34. On 16 November 2022, the property factors advised the homeowner that the 26 owners had still not paid and on 18 November they stated their view that

"Managing Agents are not in a position to take legal action against non-payers for work not yet completed."

35. On 20 December 2022, the property factors told the homeowner that the owners of the houses did not agree that the property factors had been appointed as their Managing Agents and did not accept that they have operated as such over many years, by custom and practice. In addition, some had disputed their liability for a share of the cost of maintenance of the communal car park. Until such times as they had agreement and funding from the house owners, they could not proceed with the repairs. Legal action against non-payers was an option, but the cost would exceed the amounts due by them and would then be treated as a common charge.

36. An email to the homeowner of 13 January 2023 was a response to hers of 21 November 2022, which is referred to in Paragraph 11 of this Decision. Attached to the homeowner's email was a summary of complaint which she stated was intended for review and decision by the property factors' Directors. The reply came from Associate Director, CD. The homeowner had said that the property factors needed to admit their decades long failure to familiarise themselves with the title deeds, which had led to a chronic wrongful charging structure, compounded by their having given seriously wrong advice to owners about paying their shares of maintenance and repair costs. Property factor mismanagement had brought about the fund-building difficulty. The homeowner's view was that the property factors should make up the £4,000 shortfall and instruct and pay for the repair work and that the title deeds provide that the "duty of supervising, instructing, suing for and recovering cost of maintenance…shall be discharged by a Factor."

37. The reply of 13 January 2023 acknowledged the anomalies with apportioning of charges in accordance with the Deed of Conditions. The property factors had written to the owners of the houses to explain the situation and had issued an apology. They had carried out a review of the common charges accounts for the flat owners in Phase 1 of the Development, taking into account the law of prescription, and had identified any charges since 2017 debited to those flat owners which ought to have included the 29 house owners. These charges had been reapportioned internally and credit would be applied to the accounts of the flat owners. They did not intend to retrospectively debit the accounts of the house owners, and those costs (£1,438.08) would be met by the property factors. They stated that the reality is that the obligation to maintain the car park surface has always been and will remain in all time coming with the Development owners, not the property factors. They summarised the events which began with their letter to the owners on 6 April 2022 proposing the acceptance of a quote, namely the debiting in May and August 2022 of the common charges accounts with the estimated cost per flat of the car park repairs, and their inability to ingather sufficient funding to be in a position to instruct the contractor to proceed. As

a consequence, the contractor had confirmed that their original quotation was no longer valid and would be subject to increase.

38. On 23 February 2023, the property factors wrote to the homeowner to let her know about a meeting they had held with two of the house owners at the office of their local MSP. The two owners were representing the 29 house owners, and the property factors had agreed a period to allow them to liaise with their fellow owners, but, despite a gentle reminder, they had received no further communication from them, nor from any of the other non-paying owners. Accordingly, the property factors were still not in a position to instruct the work, as they did not have sufficient funds. It was not within the remit of the property factors to financially contribute to the cost of the repairs or to underwrite the owners' shares that remained outstanding.

39. On 27 March 2023, the property factors wrote to owners to say that the proposal in relation to car park repairs would now be closed due to insufficient funds and that they would credit the accounts of those owners who had paid their shares. They added "we have no legal powers to enforce payment and as works are not complete there is no small claim action which can be raised". They reaffirmed that the house owners have legal liability to contribute but "they do not recognise us as the Factor therefore are not engaging with us."

40. On 4 May 2023, the property factors intimated their decision to resign as it had become increasingly clear to them that they had reached an impasse with a number of the owners. They had told the house owners that they would not be seeking to retrospectively charge them, but wanted to work closely with them in recognising and upholding the shared burdens outlined in the Deed of Conditions. The work proposal had been closed due to a lack of support and associated funding. The property factors expressed their concern that six owners had sums outstanding, with cumulative balances of £3,392.76 and added that, if these balances were not settled by the date of termination, the property factors might need to exercise their option, as per the Deed of Conditions, to recover from the other owners the sums that remained outstanding.

41. On 6 June 2023, the property factors advised owners that there was debt at the Development and that they were pursuing it in accordance with their Debt Recovery policy. They were not disclosing details of the debtors at that stage, but it might be necessary to do so where they felt that they were not making progress in recovering payment, subject to details of the debts being of legitimate interest to co-owners under the terms of the Deed of Conditions, where those debts impacted other owners financially. On 30 June, the property factors wrote to the owners again and intimated their decision to exercise the option contained in Clause Eighteenth of the Deed of Conditions to recover the sums outstanding by disbursing the debt to the other proprietors if the balances remained outstanding at the date of termination.

They did not list the debtors by name, but did so by address, stating that the co-owners had a legitimate interest in the information in the event that any owner chose to pursue their share of the disbursement.

42. On 26 March 2024, the Deputy Chairman of the parent company, in response to an email from the homeowner of 26 March, advising that she was escalating her complaint to the Tribunal as she had received no response to her email of 14 September 2023, emailed the homeowner to apologise for the lack of response to her earlier email. He did not doubt that she had sent it, but did not recall it and could not find any trace of it on his system. He had now asked TMcK to formally respond.

43. TMcK emailed the homeowner on 28 March and said that he had commenced investigation of the matter, to review communications from the homeowner in 2023, including her email to the parent company's Director, which the Director had been unable to trace. He was sorry that the matter clearly remained unresolved and accepted that the homeowner should not have had to pursue a response to her complaint. He would need to liaise with CD. It was a complex matter, given the Development houses were not included in the overall management of the Development by the property factors since their construction. CD would be returning from annual leave on 9 April and would provide the homeowner with a further update once he had met with her. The homeowner's account balance, currently £260.77, had been placed on hold. He would provide a further update on 11 April. On 12 April, he told the homeowner he aimed to provide a full and final written response by 30th April and that, if for any reason the property factors required additional time to consider matters, "we will of course advise you of this." This appears to be the final communication from the property factors prior to their letter of 22 August 2024, summarised in paragraphs 18-21 of this Decision.

44. The view of the Tribunal was that, whilst the Deed of Conditions entitled the property factors to sue for and recover in their own name from proprietors who failed to pay their proportion of common charges within one month, it did not oblige them to do so. They had the option of calling a meeting of the proprietors to decide if and to what extent such action should be pursued. The property factors could not be expected to instruct works to the communal car park unless they had the prior agreement of a majority of the owners to proceed and also sufficient funding from the owners, particularly where, as in the present case, the cost of the proposed work was considerable. Property factors act as agents for the group of homeowners they represent and cannot be expected to instruct work if they do not know how or whether it is going to be funded, as they are not in a position to ensure the contractors are paid when the work is complete and there is a risk that the owners who have paid their shares will ultimately end up also having to meet the shortfall caused by those who have not paid their proportion of the costs.

45. The Tribunal noted that the owners of the 29 houses in the Development were never charged for maintenance of the common areas, including the car park. This was a significant failure on the part of the property factors to have properly interpreted the Deed of Conditions, but the Tribunal did not accept that the flat owners had been overcharged by 33% over 35 years, as the homeowner contended. Much of the common repair work would have related to one or other of the blocks of flats, and the common insurance policy would have been a significant proportion of the overall costs, and would not have been payable by the house owners There was also no evidence that there had ever been repair work carried out to the car park. To the extent that common charges were not attributable to repairs, maintenance and insurance of the blocks of flats, the house owners ought to have borne a share over many years, but the Tribunal accepted that the law of prescription would have made any payments irrecoverable five years after they were due. The Tribunal was not in a position to check the accuracy of the calculations of the property factors which led to reimbursement credits to the flat owners, but noted that the property factors absorbed the sums which they could have sought to recover from the house owners. The view of the Tribunal was that there had at the point of completion of the Development been an error made by the property factors, which was not discovered for many years, but that they had acted reasonably in all the circumstances when it was discovered. The Tribunal could not speculate as to whether it was likely that the owners of the houses would have agreed to the car park repairs and paid their shares of the cost if the property factors had not misinterpreted the Deed of Conditions.

46. The Tribunal noted that the homeowner had withheld payment of the management fee element of her common charges bills from May 2022. She had made it clear to the property factors that, whilst she was happy to settle her share of invoices for communal works, she was refusing to pay their fees until the car park repairs were completed. Whilst appreciating that the ongoing delays in starting the work would have been extremely frustrating for the homeowner, who stated that she had been pressing since the time of her purchase for the works to be instructed, the Tribunal agreed with the property factors that the management fees covered all activities of the property factors in providing the core services set out in their WSS. These included arranging common buildings insurance, organising and instructing maintenance of the other common parts, visits and inspections, obtaining quotations for work, holding meetings with homeowners' groups, maintaining routine and regular payment of suppliers' invoices, issuing common charge invoices and managing credit control. They obtained quotes for the car park repairs, but were unable to instruct the contractors because a significant number of owners either failed or refused to pay their shares up front. The situation was complicated by the very late realisation that the house owners were also responsible for contributing to the cost of repairs to the car park, and this added considerably to the frustration of the homeowner, but the Tribunal held that she was not entitled to withhold the full management fees. The property factors made it clear from the outset that they did not accept that she had a right to withhold their fees and consistently told her that they regarded the

unpaid fees as debt and that she would be subject to their credit control policy. This led to a Final Notice being sent to her, and to the property factors telling all owners that, if the debts due by a number of them were not settled before their resignation date of 4 July 2023, they would consider redistributing the debt amongst the other owners. The Tribunal determined that the property factors were entitled to regard the unpaid fees as debt and, at their discretion, to follow their debt recovery procedure.

47. Section 4.1 of the Code of Conduct states that it is important that homeowners are made aware of the implications of late payment, and Section 4.7 provides that 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, while ensuring compliance with data protection legislation. The Deed of Conditions and the WSS both refer to the possibility of redistribution of debt. The homeowner's complaint was that listing the addresses of the properties whose owners had arrears was a breach of data protection legislation, but, on balance, the Tribunal decided that the property factors were entitled to disclose the address information in the way that they did. The owners as a group were entitled to know about the outstanding debts to which they might be required to contribute if, as stated in their letters of 4 May and 6 and 30 June 2023, the property factors redistributed the debt in their final accounts.

48. Having considered carefully all the evidence relating to the car park repairs, the fact that, for many years, the owners of the 29 houses in the Development were not charged for maintenance of the common areas, including the car park, and the manner in which the property factors dealt with the homeowner's decision to withhold their fee element of quarterly bills, the Tribunal decided that it would not uphold any of the homeowner's complaints regarding these matters.

49. The Tribunal then considered the manner in which the property factors had dealt with her complaint. The view of the Tribunal was that it was very badly handled. The complaint was made on 2 July 2023 and was addressed to CD, TMcK and the Head of Credit Control, LMcC. CD replied on 11 July to say that a response would be issued within 14 days. On 16 July, the homeowner sent a chasing email to LMcC. In an email of 31 July, TMcK advised the homeowner that some delays had occurred during July due to annual leave for both CD and him, but he would aim to provide his written response within 28 days. He told her to expect his response by 28 August. On 14 September, she appealed to Douglas Weir ("DW"), the CEO of the parent company, to provide a satisfactory response and resolution. She copied this email to the company's Chairman, Stuart Pender ("SP"). She received an automated response from DW to the effect that he was on annual leave until 19 September and would respond to her message, as required, on his return. On 4 October, TMcK apologised for the fact that his response to the homeowner's complaint had been overlooked. He was addressing the need

for a detailed response and would write to her separately in this regard. He confirmed that he had instructed the issuing of final accounts and that these would not include any disbursement of client indebtedness.

50. On 26 March 2024, the homeowner emailed DW again, as she had not received a response to her email of 14 September 2023. DW replied on the same day and told the homeowner that he would immediately pass her original email to TMcK and ask him to formally respond. On 28 March, TMcK said that he had commenced investigation of the matter. He would need to liaise with CD, who was on annual leave until 9 April, and he would provide the homeowner with an update on 11 April. He did not respond until 22 August 2024.

51. The view of the Tribunal was that the delays in providing a response to the homeowner's complaint, lasting more than 13 months, were completely inexcusable. Numerous promises of responses by certain dates were not met and the homeowner had to resort to contacting the parent company in the hope that this would result in action.

52. The Tribunal then considered the complaints with reference to the various Sections of the Code of Conduct under which the application had been made.

53. OSP2 states "You must conduct your business in a way that complies with all relevant legislation". The Tribunal found no evidence to support the complaint under OSP2 and **did not uphold** it.

54. OSP4 states "You must not provide information that is deliberately or negligently misleading or false." The Tribunal had no evidence before it to suggest that information provided by the property factors had been deliberately or negligently misleading or false. Accordingly, the Tribunal **did not uphold** the complaint under OSP4.

55. OSP11 states "You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure". The Tribunal noted that, in their WSS, the property factors state that they will endeavour to respond to enquiries received in writing within 7 working days of receipt and, for the reasons set out in Paragraphs 49-51 of this Decision, the Tribunal **upheld** the complaint.

56. 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 **did not uphold** the complaint under this Section. The evidence indicated that, whilst the outcome was not what the homeowner would have wished, there had been extensive communication between the property factors and the homeowner regarding the car park repairs proposal.

57. 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 timescale". Accordingly, the Tribunal **upheld** the complaint under this Section. It was clear from the evidence provided that the homeowner had been very persistent in attempting to hold the property factors to the deadlines by which they said they would respond, targets which they had frequently failed to meet. These failures related both to the correspondence regarding the car park repairs and to the handling of the homeowner's formal complaint.

58. Section 4.1 states, in the context of the possibility that non-payment may result in homeowners in the group being liable to meet non-paying homeowner's debts in relation to the factoring arrangement in place, that "it is important that homeowners are made aware of the implications for late payment and property factors have clear procedures to deal promptly with this type of situation and to take remedial action as soon as possible to prevent non-payment from escalating". The Tribunal **did not uphold** the complaint under this Section. There was clear evidence that the property factors had taken steps to make the owners aware of the Development debt and as to what they intended to do about it if it was not cleared by non-payers before the property factors' resignation came into effect.

59. Section 4.6 states that "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 factors must also issue timely written reminders to inform a homeowner of any amounts they owe." The Tribunal **did not uphold** the complaint under this Section. There was no evidence provide to suggest that the property factors did not have such systems in place or that timely reminders were not sent.

60. Section 4.7 states that "If an application against a property factor relating to a disputed debt is accepted by the First-tier Tribunal for consideration, a property factor must not continue to apply any interest, late payment charges or pursue any separate legal action in respect of the disputed part of the debt"

until such time as they are notified of the Tribunal's final decision. The Tribunal **did not uphold** the complaint under this Section. There was no evidence that the property factors had taken any steps in relation to debt recovery after the application to the Tribunal was made and the Tribunal also noted that, in their response of 22 August 2024 to the homeowner's complaint, the property factors indicated that they had credited the homeowner's account with the sum that they had claimed was due by her.

61. Section 6.1 states that "While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard." The Tribunal **did not uphold** the complaint under this Section, as it does not impose any specific obligations on property factors.

62. 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. There does not appear to have been a programme of cyclical maintenance for the Development and there was no evidence that any staff carrying out periodic visits were not suitably qualified or trained.

63. 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 Tribunal **did not uphold** the complaint under this Section. The property factors' decision was set out in their letter of 22 August 2024. It does not say that it is their final decision, but the implication is clear and, in any event, the homeowner had, by then, escalated matters to an application to the Tribunal.

**Property Factor's Duties**

64. In addition to their 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. The Tribunal noted that, in their WSS, the property factors state that they will endeavour to respond to enquiries received in writing within 7 working days of receipt. The Tribunal **upheld** this element of the complaint for the reasons set out in Paragraphs 49-51 of this Decision.

**Property Factor Enforcement Order**

65. Having determined that the property factors had failed to comply with OSP11 and Section 2.7 of the Code and with the property factor's duties, the Tribunal

then had to decide whether to make a Property Factor Enforcement Order. The Tribunal recognised that the property factors' failings, particularly around responding to enquiries and complaints, had caused very significant inconvenience to the homeowner, who was constantly having to send reminders. It took the property factors 13 months, and many chasing emails to them and their parent company, to provide a substantive response to the homeowner's complaint, and the homeowner had, by then, felt it necessary to apply to the Tribunal, with the additional time and inconvenience that the process entailed. The Tribunal noted, however that, albeit belatedly, the property factors had accepted that they had delayed in communicating with the homeowner and had written off the amount they were claiming from her. Having considered all the facts and circumstances, the view of the Tribunal was that the property factors should make a payment of compensation to the homeowner and that the sum of £100 would be reasonable, just and proportionate. Accordingly, the Tribunal proposes to make a Property Factor Enforcement Notice in terms of the Section 19(2)(a) Notice attached to this Decision.

66. 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.**

George Clark

**Legal Member** **18 October 2024**
**Date**