Housing and Property Chamber
First-tier Tribunal for Scotland

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

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

**Chamber Ref: HPC/PF/23/3962**

**Flat 5, 4 McEwan Square, Edinburgh, EH3 8EL ("the Property")**

**Bill Welsh, Helen Welsh, Flat 5, 4 McEwan Square, Edinburgh, EH3 8EL ("The Applicants")**

**Wheatley Homes East, Wheatley House, 25 Cochrane Steet, Glasgow ("the Respondent")**

**Tribunal Members:**

**Josephine Bonnar (Legal Member) and Sandra Brydon (Ordinary Member)**

**DECISION**

**The Tribunal determined that the Respondent has failed to comply with Sections 2.1, 2.6, 2.7 and 3.1 of the Property Factor Code of Conduct as required by Section 14(5) of the Act.**

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

**Background**

1. The Applicants lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. A related application was submitted under chamber reference HPC/23/3768. The Tribunal determined that the applications should be heard together in terms of Rule 12 of the Tribunal Procedure Rules 2017.

2. The parties were notified that a CMD would take place by telephone conference call on 11 April 2024 at 10am. Mr Carter and Mrs Welsh participated. The Respondent was represented by Ms Aitken and Mr Adams, solicitor. Prior to the CMD all parties lodged written representations and documents.

**Summary of Discussion**

3. The Tribunal noted that Mr Carter's application is based on OSP 11 and Section 3.2 of the Code. In addition, the application states that the Respondent has failed to carry out its property factor duties. Mr Carter confirmed that there are two aspects to his complaint. Firstly, that the Respondent has mismanaged the electricity charges in relation to the car park and secondly that historic repair charges have been applied when they should not have been, due to the passage of time. In relation to the electricity charges Mr Carter confirmed that there are several issues – the Respondents lack of awareness of the electricity charges/bills from 2015 until 2021, their failure to secure an acceptable rate from a utility company, recharging the residents for 2021 and 2022 in factoring accounts in 2023, wrong apportionment of electricity charges and charging a management fee during a period that they were mismanaging the development. In relation to the historic repairs, he said that in May 2023, he received a bill from the Respondent which included repairs from 2021 and 2022. The invoice has been lodged – Appendix 9 in his bundle. His complaint is that, when bills are issued so late, it is not possible for homeowners to check or verify the repair.

4. Mr Adams told the Tribunal that the second issue might have been the subject of a complaint that was upheld. Mr Carter said that it had been the subject of a stage 2 complaint that was not upheld. Mrs Welsh advised the Tribunal that she had made a similar complaint, but her complaint was upheld. Mrs Aitken told the Tribunal that the May 2023 account included 12 items. 4 were too old and should not have been included. These were removed in September 2023. In response to questions from the Tribunal she confirmed that she would look again at the May 2023 account in relation to the 2021 repairs which are the subject of the complaint

5. The Tribunal noted that Mr and Mrs Welsh's application is based on Sections 2.1, 2.3, 2.4, 2.6, 2.7, 3.1, 4.1, 4.9 and 4.11 of the Code. The application also refers to property factor duties although these are not referred to in the notification letter sent to the Respondent before the application was made. Mrs Welsh advised the Tribunal that she sent a copy of her C2 application to the Property Factor in October 2023, prior to submission of the application. This contained full details of the complaints. She had submitted evidence of this to the Tribunal. Mr Adam said that he would need to check if this had been received as he understood that the application was only received when sent to the Respondent by the Tribunal.

6. Mrs Welsh told the Tribunal that in December 2021, the electricity charges went up four-fold. As the homeowners were not invoiced until the summer of 2023, they had no opportunity to speak to the Respondent or challenge the increases. Copies of the electricity bills were only provided after numerous requests by homeowners. In relation to section 2.6, they were not consulted about the bills. They could have been consulted in relation to changing provider or making efficiencies.

7. Ms Aitken said that the Respondent has been re-negotiating with Scottish Power and a new deal has been agreed which will cost £30000 per annum. This will take effect in April 2024, for the previous year. In 2021, Scottish Power sent them all the electricity bills for 2015 onwards. These had not previously been received. They were challenged but the company said that they were due, and the Respondent arranged to pay them as action was threatened. They are still investigating the matter as the bills show some payments having been made but these payments were not made from the Lowther bank account, so they don't currently know who made the payments. Ms Aitken said that a pack is due to be issued to the homeowners regarding the electricity arrangements and a copy of these documents can also be submitted to the Tribunal. In relation to the issue of calculation of the shares of the electricity bills, Ms Aitken said that the Respondent has carried out a check of all the title deeds at the development. This has established that a handful of proprietors do not have rights in relation to the car park and are not liable for a share of the electricity and maintenance. It is a small number, and they will require to be refunded. However, these shares will not be passed on to the other residents. The pack that is to be issued will include full details of the sums due, the breakdown and the calculation of shares. Mr Carter said that there are other issues. The Hilton Hotel has a number of spaces and access, but do not appear to pay a share of the maintenance. In addition, some flat owners have sold their space to non-residents. Ms Aitken said that investigations are ongoing into the use of the car park by the Hilton. She said that Stay City own a number of spaces in the car park, and they pay their share of the maintenance and electricity.

8. Ms Welsh told the Tribunal that there is concern among homeowners about money due by former owners and current owners who have refused to pay. No information has been provided about this and the implications for the other residents. Mr Adams said that there are no debt recovery issues affecting the development that will have implications for homeowners and unpaid shares will not be passed on to the other homeowners.

9. In response to further questions from the Tribunal, Ms Aitken said that the Respondent decided that they would only pass on the electricity bills from 2021 onwards to the homeowners. Mrs Welsh raised the issue of the management committees. She said that there is one for block 4 and another for the rest of the development but they are not being consulted. Ms Aitken said that she was unaware that there was a validly constituted management committee and that she would look into the matter.

10. The Tribunal advised the parties that the applications would proceed to an in person hearing and that a direction would be issued for the production of further information and documents. The following factual matters require to be established; -

(a) Was the Respondent unaware of the electricity bills for the car park at the development until 2021? If so, why were they unaware and should they have been aware?

(b) Has the Respondent negotiated a reasonable rate with the utility company for the electricity provision in the car park and why has it taken three years to achieve this?

(c) Are the Applicants liable for a share of the electricity charges between 2021 and 2023?

(d) Has the Respondent miscalculated the Applicant's shares of the electricity bills since 2021?

(e) Are there non-homeowners who are liable to pay a share of the car park maintenance charges who have not been charged and have not contributed?

(f) In the account issued in May 2023, has the Respondent charged Mr Carter for repairs carried out in 2021 and 2022 and are they entitled to do so?

(g) Did Mr and Mrs Welsh notify the Respondent of their complaints under the Code and property factor duties? What was sent to the Property Factor on 11 October 2023 and delivered on 16 October 2023?

(h) Has the Respondent failed to communicate with the Applicants regarding the electricity charges or provide them with information regarding the electricity charges?

(i) Has the Respondent failed to respond to complaints and enquiries?

(j) Has the Respondent failed to consult with the Applicants in relation to the electricity charges and were they required to do so?

11. The parties were notified that a hearing would take place at George House, Edinburgh on 26 September 2024.Mr Carter and Mrs Welsh attended. The Respondent was represented by Mr Adams, solicitor. Mr Lyon and Ms Aitken also attended and gave evidence. Prior to the hearing both parties lodged submissions and documents in response to the direction.

## The Hearing

### Preliminary matters

12. At the start of the hearing, Mr Carter confirmed that his complaints are as discussed at the CMD. However, the historic repairs complaint has been resolved although one or two charges have still not been removed from his account. Ms Aitken advised the Tribunal that the remaining historic charges have now been removed from the account and Mr Carter confirmed that he was happy to accept that.

13. The Tribunal asked Mrs Welsh and Mr Adams to clarify the position regarding the complaints which were notified and whether the C2 form had been sent to the Respondent with the letter notifying the Respondent of her complaints. Mrs

Welsh stated that the C2 form was definitely sent to the Respondent with the letter. She was unaware that this is not the usual procedure. She referred to the track and trace report submitted as evidence. Mr Adams said that the Respondent is unable to say what was received. They have been unable to establish whether the letter or the letter and form were received. However, they accept that the track and trace report appears to establish that something was sent and signed for in October 2023. The Tribunal noted that as Mrs Welsh is certain that the form was sent, and as the Respondent is unable to dispute this, it might be reasonable for the Tribunal to accept that Mrs Welsh notified the Respondent of both Code and property factor duties complaints.

14. Mr Carter told the Tribunal that additional charges of £220 suddenly appeared on the factoring statements. Had it been small amounts, they wouldn't have noticed. It took a long time to get copies of the electricity bills but eventually most were provided. These showed payments had been made by the Respondent to the utility company. Mr Carter referred the Tribunal to one of the electricity bills lodged. This bill showed that payments had been made to the account although the Respondent claimed that they had only received the bills in 2023. There was no explanation for the payments and no explanation for the sums being requested from each owner. Mrs Welsh told the Tribunal that the electricity charges had first appeared in 2023. The bills go back to 2015, but the owners were only asked to pay the sums due from 2021 onwards. There had been no previous charges on any invoices for electricity. Mr Carter confirmed that he had not queried the absence of charges for communal electricity. However, the Respondent's invoices had been chaotic. He was not asked to pay toward the insurance policy for a while either. Mr Carter said the next issue was the price per unit. For domestic accounts this should be about 25p per unit. They were being charged £1 per unit. Mr Carter said that he looked into this. His daughter's block is charged 25p per unit for communal electricity and a government website said that this should be the average rate. He made a complaint about the rate which was not answered.

15. Ms Aitken told the Tribunal that the bills were received in October/November 2022. They started an investigation. The Respondent has a utilities team, and they tried to challenge aspects of the bills, but Scottish Power would not entertain this. Firstly, they challenged the VAT rate which had been applied. They were unsuccessful because of the commercial element in the development. The Finance Team decided that the bills would have to be paid as they were being threatened with court action. Scottish Power relied on the fact that payments had been made to the accounts. These payments had not been authorised. In response to questions from Mr Adams, Mrs Welsh said that she had purchased her property in 2017. Mr Carter said 2016.

16. Mr Lyon said that the Respondent had also tried to challenge the unit rate, but that Scottish Power would not reduce it. However, a better rate has been obtained for 2023/2024 with EDF. In response to questions from the Tribunal, Mr Lyon advised that the majority of properties are owned by letting and investment companies. There are only 90 individual owners. 20 units are owned by a Trust although these are occupied by Wheatley Group tenants. 144

properties are owned by commercial letting companies. Stay City own 49. The Stay City properties are mostly short term lets. Scottish Power would not reduce the unit rate retrospectively and the charges had to be passed on. Mrs Welsh said that the charges for 2015 to 2020 had not been excessive but that the costs had drastically increased in 2021 and 2022. Ms Aitken told the Tribunal that the Respondent had tried to negotiate a lower rate with Scottish Power and looked into other providers before the Tribunal applications had been made. They did not do so only because of the complaints. Mrs Welsh said that the letter issued in September 2023 didn't mention it.

17. Mr Lyon said that he believes that the developer arranged for Scottish Power to be the electricity provider. The Tribunal asked if the development had been tied to this provider for a fixed period. Mr Carter referred to the utility bills which indicate that 30 days notice after 2020 was required. The Tribunal also asked when the development had been finished. Mr Lyon said that construction started in 2010 with the first handover being 2012. The Applicant's block was the final one, handed over in 2017. Ms Aitken confirmed that the unit rate paid from 2021 was higher than the market average.

18. Mr Carter said that the next issue was how the electricity charges were apportioned. The bills were divided according to the number of flats. However, in terms of the title deeds, the bills should be apportioned according to the parking spaces. This has now been addressed. The Respondent has checked the deeds and established that some flats have one space, some a have two and there are some with no right to a parking space in the underground car park. However, although this issue has now been resolved, the homeowners are still not clear whether the bills have been correctly apportioned. This is because the car park is not the only area where there is communal electricity. The stairwells, common closes and lifts also have electricity and now some owners are not being charged because they don't have a parking space. Mr Lyon told the Tribunal that the car park has its own electricity meter and the bills refer to the car park. He does not believe the charges for all communal electricity have been aggregated. However, he is certain that there is a separate supply for the internal areas. The Tribunal asked the parties whether the factoring invoices include an entry for other communal electricity charges. Mrs Welsh provided the Tribunal and the Respondent representatives with an invoice from 2023. The Tribunal noted that this did not appear to include communal electricity. Neither Ms Aitken nor Mr Lyon was able to offer an explanation for the absence of electricity charges. Ms Aitken said that she could make enquiries. Mr Lyon said that it is very unlikely that there is only one meter for all the communal electricity, including the car park. The re-negotiations with EDF were just in relation to the car park. Ms Welsh said that she was concerned that some people, such as the Hampton Inns, were not being charged. Mr Lyon said that their legal team has been involved and the charges re-calculated. However, there is nothing in the title deeds about the upper level and they need to establish the legal position.

19. In relation to communication issues, Mr Carter said that there is a 50/50 chance of getting a response to an email. There is a call centre, but he prefers to email. Generally nothing happens until he gets to stage 2 of the complaints process.

He referred to the list of emails he submitted in response to the direction from the Tribunal. He said that it may not be complete as it took some time to go through everything. However, he did not get a response to any on the list. Ms Aitken said that all calls and emails go to the 24 hour call centre and previously were dealt with by general call handlers. A new system was introduced 4 or 6 weeks ago, and calls are now directed to the Lowther team. If they can't answer the enquiry it goes to an agent like John Alexander. The Respondent receives a large number of factoring emails. There is a huge backlog as they did not have enough staff, and the call handlers did not have the knowledge or experience to deal with the enquiries. They are currently working on a new system which should address the problem. This development is particularly complex, and they were not set up or trained to deal with that. In response to questions from the Tribunal Ms Aitken said that the Respondent concedes that the emails listed by both Applicants did not get a response.

20. At the conclusion of the hearing Mr Adams referred to some of the specific breaches of the Code in the applications. He said that section 4.11 is about debt recovery. However, no legal action has been taken against Mr Carter or Mrs Welsh. He also told the Tribunal that although they are entitled to do so, the Respondent has not and will not spread the unpaid charges of any homeowner among the others. Mr Adams asked the Tribunal to take into consideration the complexity of the development and the title deeds and the fact that the Respondent has covered the electricity costs for 2015 to 2020 from their own funds. He referred to the complaint about "improper" payments in terms of section 3.1 and said that there may have been errors, but nothing fraudulent. He said that Mr Carter is seeking a full refund but is not entitled to this as he is liable for his share of the common charges. In addition, the management fee is not just about the car park, but all the other services provided. However, the Tribunal may wish to consider ordering repaying of a proportion of the management fee only. He pointed out that the Respondent has re-credited the accounts with the historic repair charges already.

**Findings in Fact**

21. The Factoring department of the Respondent were unaware of the electricity bills for the period 2015 to 2022 for the underground car park at the development until 2023.

22. Between 2015 and 2022, the utility company issued invoices for the supply of electricity to the underground car park to the Respondent and payments were made to the account by the Respondent.

23. The unit rate charged by the utility company for 2021 and 2022 was higher than the average market cost and a better rate could have been obtained by the Respondent.

24. The Respondent miscalculated the Applicant's share of the car park electricity and maintenance costs as they apportioned the costs equally among all

homeowners and not according to the provisions of the deed of conditions for the property. The Respondent has reviewed the car park and the title deeds for each property and has corrected this error.

**25.** The Respondent failed to respond to complaints and enquires from the Applicant dated 11 August, 20 September, 29 September and 11 October 2023. The Respondent also provided late responses to enquiries and complaints made in June 2023 and 14 August 2023.

## Reasons for Decision

## Property Factor duties

**26.** The Tribunal notes that the Respondent is unable to comment on the issue of notification, in terms of Section 17(3) of the 2011 Act. They concede that the Applicant sent something to the Respondent, because she produced evidence of this in the form of a Royal Mail track and trace report. The only additional comment made by the Respondent's representatives during the hearing was to point out that the usual procedure is for an applicant to send a letter or email with their complaints and then submit the application form to the Tribunal. Mrs Welsh told the Tribunal (at both CMD and hearing) that she sent both the C2 form and the Code complaints template letter on 11 October 2023. She said at the hearing that she had not been aware that this was not the usual procedure. The Tribunal noted the following: -

(a) The application is dated 7 November 2023. It was submitted with an undated Code complaints letter based on the template which is available on the Chamber website. At the bottom of the letter, one of the Applicants has written "Sent to Lowther and signed for by John on 15 October 2023. No response has been received as of 7/11/2023". The letter makes no reference to property factor duties.

(b) The application was processed and then sifted by a Legal Member of the Tribunal. The Tribunal issued a request for further documents. This included a request that the Applicant provide evidence that she had notified the Respondent of the property factor duties complaints specified in the application form. The Applicants were advised that if they had not already done this, they should do so and send the evidence to the Tribunal. The Applicants responded to the request but did not address this issue. It appeared from the response that the Applicants had not fully understood the request.

(c) A further letter was issued by the Tribunal. The Applicants were again directed to provide the relevant evidence and notified that if they failed to do this, the Tribunal would only be able to consider the Code complaints. A response was received but no evidence of notification of property factor duties complaints was provided.

(d) At no point during the exchange of emails with the Tribunal did the Applicant state that the C2 form had been sent to the Respondent with the Code complaints notification letter.

(e) Following receipt of the second response, the application was accepted.

(f) In the timeline lodged with the application, the Applicants state "11 October 2023 – I sent a C1 form to Lowther which was signed for on 16/10/2023. No response has been received. 7 November. I am submitting from C2 to the Tribunal along with this timeline and further details of my complaint." The Tribunal notes that there is no C1 form with the paperwork. This form is used for applications under the previous (2012) Code of conduct. It appears that the reference to C1 might be an error, and the Applicants may have meant the template Code of conduct letter.

27. In terms of Section 17(3) of the Property Factors (Scotland) Act 2011, a homeowner can only make an application to the Tribunal if they have "notified the Property Factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty...". The section 14 duty referred to in the legislation is the requirement to comply with the Code of Conduct. Property Factor duties are separate and generally to be found in the deed of conditions and WSS. They include the services provided by the factor such as arranging common repairs and insurance.

28. Although the Tribunal endeavours to assist parties to present their case (and is required to do so in terms of the overriding objective), it is impartial and cannot provide either party with legal advice. The application was accepted on the basis that the Tribunal could only consider the Code complaints unless evidence was provided that the Applicants had notified the Respondent in writing of the duties' complaints. Having regard to the procedural history of the case, the Tribunal is **not** persuaded that the Applicant sent the C2 form with the Code complaint letter. The Tribunal determines that only the Code of Conduct complaints can be considered.

**The Code of Conduct**

29. The Tribunal noted that the parties are generally agreed about most of the relevant facts. The Respondent does not dispute that they failed to respond to enquiries. They accept that there were payments made to the electricity accounts, although they cannot explain this as the relevant department did not know about the electricity bills. They accept that the unit rate payable in terms of the 2021 and 2022 bills was significantly higher than should have been paid and that the charges were not properly apportioned until recently.

**Section 1 – Written Statement of services.**

**30.** The paper apart attached to the application form refers to two sections of the Respondent's WSS which relate to arranging contractors and providing clear, itemised bills. However, the Applicant does not specify which paragraphs of Section 1 of the Code have been breached. It appears that the Applicant has misunderstood what is required in terms of Section 1. The section requires a property factor to have a WSS and to provide homeowners with a copy of the WSS. It also specifies the information which must be included in the WSS. It is

not a breach of Section 1 that the property factor has not complied with the terms of the WSS, although this might be the basis for a complaint about property factor duties. The Tribunal is satisfied that a breach of this section has not been articulated or established.

**Section 2.1 – 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 they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.**

**31.** In the paper apart with the application, the Applicants state that the Respondent has not communicated effectively with the homeowners regarding the significant increase in the electricity charges or provided an adequate explanation. They also refer to the fact that each homeowner has been charged a 1/254 share with no account being taken of homeowners who have sold or recently purchased their property. They also failed to take account of the fact that some homeowners do not own a parking space.

**32.** This section of the Code is about communication. It is not a breach of this section that the Respondent has failed to properly apportion the car park electricity charges. However, based on the information and evidence provided, it appears that the Applicants first became aware of the electricity charges when they received their June 2023 direct debit confirmation. In May 2023, the payment was £51.78. In June 2023, it had risen to £386.62. The Respondent did not issue any information or explanation for the increase prior to the payment being confirmed. The first letter they issued was on 30 June 2023. This was sent following telephone enquiries and complaints from a number of homeowners. The Respondent's factoring team had been aware of the bills since October 2022. They were investigating and then trying to challenge them, but they should have notified the homeowners that the bills had been received and explained that charges might appear in future invoices. The Tribunal is satisfied that the Applicant has established a breach of this section in relation to the provision of information about the electricity charges.

**Section 2.3 – 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.**

33. The complaint under this section is that the Respondent did not explain why the electricity charges had dramatically increased or provide evidence that the commercial or non-resident owners of parking spaces were being asked to pay their share.

**34.** This section requires the Respondent to set out in the WSS the way in which homeowners can access information. It also lists the acceptable methods of distributing information. The Applicant's complaints do not relate to the WSS, or the format of information provided by the Respondent. Although it was established that there has been poor communication by the Respondent, it does not appear that this section is relevant to the complaints that have been made. A breach of section 2.3 has not been established.

**Section 2.4 – Where information or documents must be made available to a homeowner by a property factor on request, the property factor must consider the request and make the information available unless there is good reason not to do so.**

**35.** The complaint under this section is about the late provision of information in relation to electricity charges and historic repairs. However, this section does not require a property factor to provide information and documents within a reasonable timescale. There are other sections (including OSP 11 and 2.7) which do this. This section simply requires the Respondent to provide the information which the Code states "must" be provided. At the hearing, it was established that information about the electricity charges and the bills themselves were eventually provided to the Applicants. The complaint about historic repair charges was that they should not have been added to the invoices, not that the Respondent failed to provide information about them. The Tribunal is not satisfied that the Applicant has established a breach of this section.

**Section 2.6 – A property factor must have 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 are 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.**

**36.** The complaint under this section is that the Respondent did not follow the consultation procedure or seek approval regarding the increased charges. This is said to be particularly relevant since the charges were much higher than the previous charges. The Applicant also states that the Respondent has failed to arrange a meeting although this was requested in May 2023.

**37.** The Respondent's representatives told the Tribunal that they did not know about the electricity bills until the end of 2022. They also stated that the electricity charges have to be paid, they are not optional. However, although the relevant team appears to have been unaware of the electricity bills, the Respondent as an organization was aware, because they were being paid. The charges ought to have been passed on to homeowners from 2015 and the Applicants from the date of purchase of their property. When the charges were due to increase, the Respondent ought to have negotiated a better deal or sourced a different supplier.

**38.** The Tribunal notes that the Respondent has recently changed provider and secured a better rate, without consultation with the homeowners. It is arguable that, as electricity is essential and the only issue for homeowners is the cost, that consultation may not be required. However, the WSS is silent on the subject of communal electricity at the development. Part 2 of the document (the general part) only states that this will be covered by Part 1, if there is communal electricity. Part 1 is in the form of a letter which appears to be issued each year with the charges for that year. The letter issued on 17 February 2023 contains no information about electricity although the factoring team had become aware of the bills in 2022 and ought to have been aware of the charges since 2015. The Tribunal is therefore satisfied that the WSS does not comply with this section as it does not specify whether the Respondent is required to consult about electricity costs and if so, how they will do so.

**39.** Although the WSS states that one of the services provided by the Respondent is arranging meetings, the consultation procedure outlined in the document does not require a meeting to be convened when a vote is to be taken. The deed of conditions makes provision for a simple majority to approve works but again does not appear to require the vote to be taken at a meeting. The Tribunal is not persuaded that the failure to arrange a meeting, when asked to do so by the Applicant, is a breach of this section of the Code.

**Section 2.7 – 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 quickly and as fully as possible and to keep the homeowners informed if they are not able to respond within the agreed timescale**

40. The complaint outlined in the application form is in very general terms and does not refer to any specific enquiries or complaints. Although directed to provide a copy of all relevant correspondence (including email correspondence) sent to the Respondent to which they either did not receive a response or only received an incomplete response, the Applicants did not provide these documents. During the hearing, Mrs Welsh referred to the timeline lodged with the application and said that it contained the information relevant to this complaint. The Tribunal notes the following from the timeline; -

(a) In June 2023, the Applicants made a verbal complaint about the lack of advance notice of the electricity charges. The timeline refers to other enquiries, but these

were made by other owners and therefore not relevant to the application. The timeline says that a verbal reply was given on 14 June 2023 and a letter issued dated 30 June 2023. This letter was in fairly brief terms but appears to have provided the essential details - there is a new charge for electricity in relation to the car park, it covers the access gates, lighting and ventilation fans, the supplier of the electricity has issued bills and the owners are liable for a share. The letter also provides information about how the charges will be applied to the factoring invoices. In the timeline the Applicants state that the letter provides "no further details provided despite it being obvious details were wanted and needed". However, the Applicant does not specify what is absent.

(b) The next piece of correspondence is described as a "group letter" which was sent on 14 July 2023. The Applicants are part of the group. A reply was received on 14 August 2023.

(c) On 11 August a request was made for a meeting. No response was received.

(d) On 20 September a further request was made for a meeting. No response was received.

(e) The Applicant wrote to the Respondent on 29 September and sent the pre application Code complaints notification letter on 11 October 2023. No response was received.

(f) The other entries on the timeline relate to actions taken by other owners and are therefore not relevant.

41. The Respondents representatives conceded that communication had been poor. When asked about the correspondence listed in the timeline, they confirmed that responses had not been issued. They provided an explanation for their failure to respond to the emails. They said that the call centre was overwhelmed with calls and emails and that the staff dealing with the enquiries did not have the knowledge or expertise to deal with them. Although this may explain the failure, it does not justify or excuse it. The Respondent should not have undertaken factoring services at development if they did not have the resources and skills to do so. The Tribunal is satisfied that a breach of this section of the Code has been established in relation to the correspondence dated 11 August, 20 September, 29 September and 11 October 2023. The Tribunal is satisfied that the Respondent did provide a full response to the June 2023 enquiry, on 30 June 2023, and the group letter, on 14 August 2023. However, these responses were outwith the timescales specified in the WSS (five working days). A breach of the section is therefore also established in relation to these letters

**Section 3.1 – While transparency is important in the full range of services provided by a property factor, 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 requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery**

**do not apply**.

42. The complaint under this section is about the increase in electricity charges and the failure by the Respondent to explain the increase. Although they concede that the homeowners were not charged for the communal electricity used in 2021 and 2022 until 2023, and that the charges for 2021 and 2022 were higher than they should have been, the Respondent disputes that a breach of this section has been established. In particular they object to the suggestion that improper payment requests were made as the errors were not fraudulent or deliberate.

43. The Tribunal is satisfied that this section has been breached. There has been a complete absence of transparency in relation to the electricity charges. The Respondent ought to have been aware of the communal electricity and charged the homeowners accordingly from the date they purchased the property. The WSS should have included information about this, and the invoices should have included the relevant charges. When the issue came to light in 2022, they should have notified the homeowners immediately and advised them that they intended to challenge the bills. They should have kept the homeowners updated and should not have requested payment or issued invoices out of the blue. They should have been candid about the increased costs and the reason why the 2021/2022 charges were so much higher than before. They should have acknowledged that there had been failures on the part of the organization.

**Section 4.1 - 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 homeowners debts in relation to the factoring arrangements in place (if they are jointly liable for such costs). For this reason it is important that homeowners are made aware of the implications of 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.**

**Section 4.9 – A property factor must take reasonable steps to 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.**

**Section 4.11 - 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.**

44. The complaints under Section 4 are that the Respondent should have informed homeowners about the increased costs in a timely manner as non-payment could result in other homeowners being liable for the shares not paid by others. The Applicant also states that the Respondent started debt recovery proceedings before any dialogue has taken place and that the homeowners were not told about outstanding debts and potential liability for them. Lastly, the Applicant states that letters and phone calls have been issued threatening court

action without compliance with section 4.11.

45. In the timeline the Applicants state that on 31 July 2023, the Respondent started issuing debt recovery notices to property owners threatening legal action. They did not indicate that they were among the homeowners who received a notice, and did not provide a copy of the alleged notice.

46. In their written response, the Respondent states that reminder letters were issued in accordance with the debt recovery procedure. However, when the owner indicated that charges were being challenged, the debt recovery process was put on hold. At the hearing, Ms Adams confirmed that the Respondent has not started debt recovery proceedings against the Applicant and that they do not pass on to homeowners the debts owed by other owners in the development, although they are entitled to do so.

47. The Tribunal is satisfied that a breach of this section has not been established for the following reasons

(a) A property factor is only required to notify homeowners about the implications of late payment or non-payment if these will affect services or if the homeowners may become liable for a share of the debt. In this case, it was not established that either of these situations arise.

(b) A property factor is only required to notify homeowners about the existence of development debt if the homeowners could become liable for a share of these debts or if debt recovery action could have implications for the other homeowners. In this case it was not established that debt or any legal action taken in relation to the debt could have implications for the Applicants, as the Respondent does not pass on these debts to other homeowners.

(c) The reminder letters/letters threatening legal action appear to be the steps taken by the Respondent to comply with section 4.11 and the Respondent confirmed that legal action has not commenced against the Applicants.

48. The Tribunal is therefore satisfied that the Applicants have not established a breach of Section 4 of the Code.

**Proposed Property Factor Enforcement Order**

**49.** The Tribunal is satisfied that the Applicants should be compensated. They have been put to considerable inconvenience and their endeavors have clearly been time-consuming. In the circumstances, the sum of £1000 is proposed. As the Applicants received a very poor service from the Respondent it is reasonable that they should repay part of the management fee charged. As this also covers services unrelated to the complaints, the Tribunal proposes that the Respondent be ordered to repay 50% of the management fee for the period 16 August 2021 (when the current version of the Code came into force) to 31 December 2023.

The Tribunal therefore proposes to make a Property Factor Enforcement Order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

**Appeals**

**A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

Josephine Bonnar, Legal Member and Chair 27 October 2024