

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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**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/23/4430**

**Flat 0/2, 36 Budhill Avenue, Glasgow, G32 0PN ("the Property")**

**Kathryn Meeke, Rosewood Cottage, Lesmahagow, ML11 0HL ("The Applicant")**

**James Gibb Residential Factors, 65 Greendyke Street, Glasgow, G1 5PX ("The Respondent")**

**Tribunal Members:**

**Josephine Bonnar (Legal Member) and Carol Jones (Ordinary Member)**

### **DECISION**

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

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

### **Background**

- 1. The Applicant lodged an application in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The parties were notified that a CMD would take place by telephone conference call on 15 April 2024 at 10am. Prior to the CMD, both parties lodged a bundle of documents and submissions.**
- 2. The CMD took place on 15 April 2024. The Applicant was represented by Mr Neilly, solicitor. The Respondent was represented by Mr Wallace and Mr Miller.**

### **Summary of discussion at CMD**

- 3. The Tribunal noted that the application had been submitted with a copy of an email dated 13 July 2023, from the Applicant to the Respondent. This is headed**

“Stage 1 Formal Complaint”. It details complaints in relation to an alleged failure to comply with the written statement of services (“WSS”), being property factor duties complaints, and complaints under OSP 2, 4, 11 and section 2.1 of the Code. However, the application form also includes complaints under sections 2.7, 6.4, 6.6 and 7.2 of the Code. Furthermore, the email of 13 July 2023 does not make reference to gutter repairs or insurance. The application form refers to an alleged failure to respond to enquiries about the insurance charges, but the gutters are not mentioned until the submission lodged shortly before the CMD. Mr Neilly said that the insurance and gutter issues are connected to the complaint about a failure to communicate, which has been intimated. They did not arise until after the stage 1 complaint was made. Mr Wallace said that they had prepared for the CMD based on the complaints outlined in the stage 1 complaint. The Tribunal noted that parties were content to leave this issue with the Tribunal to determine what complaints/matters could be considered.

4. In response to questions from the Tribunal, Mr Wallace said that it is conceded that responses have been outwith specified timescales and that the action taken by the Respondent regarding the structural repair has taken longer than was reasonable. This was partly due to the investigations required to establish the cause of the defect and ascertain if the insurance company would accept the claim. However, a proposal was issued to the homeowners on 16 January 2024. Since this was issued, they have not obtained agreement from the homeowners to proceed with the work. Mr Wallace confirmed that they indicated that they would arrange a meeting and is not sure why this hasn't happened.
5. The Tribunal was told that the property is in a four-storey block with two flats on each floor. The property is on the ground floor. Mr Wallace said that they don't always know which flats are occupied by tenants, although a different contact address might indicate that this is the case. In response to questions from the Tribunal about documents lodged, Mr Neilly said that there is a suspicion that the structural defect has been caused by the incomplete renovations carried out to Flat 0/1. This property may be unoccupied. Mr Wallace said that they believe that the owner does not live at the property, as his contact address is different. There are problems within the block and a general failure by the owners to engage. There is factoring debt of about £6000 and historically several repairs have not been carried out as the homeowners would not agree. The Respondent became aware of the renovations at 0/1 in 2022 or 2023. There were contractors working in the flat. The property manager tried to speak to them but got no information. The owner of the flat has failed to engage/respond. He also failed to make an insurance claim in relation to the leak at the property, although he may have been entitled to do so.
6. The Tribunal noted that the Respondent's submissions refer to four communications to the Applicant about the structural defect – an email of 14 June 2022 and letters dated 13 July, 18 and 22 August 2022. The Respondent lodged a copy of the email of 14 June 2022 with a response dated 15 December 2022, in which the Applicant states “Hi. Any update on the stairwell. Didn't see this email coming and only realised issues with stairwell when estate agents advised”. Mr Neilly stated that the Applicant accepts that she received this email. However, she disputes that she received the letters or the letter dated 16

January 2024 that contains the proposals in relation to the structural repair work. Mr Wallace said that the letters were all sent by post, as their system indicates that this is the Applicant's preference, but they might also have been sent by email. Information is also on the portal. Mr Neilly said that the Applicant has demonstrated her desire to get the repair issue resolved as she wants to sell the property and is currently unable to do so. If she had received the letters she would have acted on them. The letting agent would have arranged for access as the property was occupied by tenants until May 2023.

7. Mr Wallace said that there is nothing on the system to indicate that the Applicant responded to the correspondence until December 2022. There are emails with the letting agent in June 2023 and the Applicant acknowledged receipt of the letter of 16 January 2024 by email on the 18 January 2024. The emails from the letting agent appear to indicate that some internal damage had been noted. He said that the Respondent accepts that little progress was made in relation to the repair issue between August 2022 and January 2024. Things stalled. In response to questions from the Tribunal Mr Wallace said that a reminder has not been issued to the homeowners since the letter of 16 January 2024 and that this should be arranged. However, none of the homeowners have responded to the proposal so the work cannot be progressed. In response to questions from the Tribunal, Mr Neilly said that the Applicant's expectations in relation to the application are laid out in the paper apart. He is also able to provide vouchers for her losses. He stated that the title deeds make provision for access to the properties, so the homeowners are required to provide this.
8. Following the CMD, the Tribunal determined that the application would proceed to an in person evidential hearing and that a direction would be issued for the production of further information and documents. The Tribunal noted the following matters require to be determined: -
  - (a) Has the Applicant complied with Section 17(3) of the 2011 Act in relation to the complaints under section 2.7, 6.4, 6.6, 7.2 of the Code and complaints regarding insurance costs and gutter repairs/maintenance?
  - (b) Why did the Applicant fail to respond to the email from the Respondent dated 14 June 2022?
  - (c) Did the Respondent send (and did the Applicant receive) the letters dated 13 July, 18 and 22 August 2022 and 16 January 2024?
  - (d) Has the Respondent failed to comply with the Code and carry out its property factor duties in relation to the structural repair required at the property?
  - (e) Has the Respondent failed to comply with its obligations in relation to dealing with complaints, in terms of the Code of Conduct and the WSS?
  - (f) Has the Applicant sustained losses associated with the Respondent's failure to comply with the Code and carry out their property factor duties?

9. The parties were notified that a hearing would take place at Glasgow Tribunals Centre on 4 September 2024. The Applicant attended and was represented by Mr Neilly. The Respondent was represented by Mr Wallace. Prior to the hearing both parties lodged submissions and documents in response to the direction. A further submission was lodged by the Applicant on 3 September 2024.

## **The Hearing**

10. At the start of the hearing the Tribunal noted that the Applicant had lodged a late submission and report from Leslie Plummer Associates. Mr Wallace confirmed that he had no objection to this being considered by the Tribunal. Mr Neilly provided the Tribunal with a joint minute in relation to factual matters agreed by the parties.
11. The Tribunal noted that the Applicant had not submitted any further representations regarding the complaints which could be considered by the Tribunal. As discussed at the CMD, it appeared that the only complaints which had been notified in terms of Section 17(3) of the 2011 Act were alleged breaches of OSP 2, 4 and 11 and section 2.1 of the Code. In addition, there was a failure to carry out property factor duties complaint in relation to structural repairs at the property. Mr Neilly confirmed that the other sections of the Code in the application had not been mentioned in the notification letter. However, section 2.7 of the Code mirrors OSP 11. Sections 6.4 and 6.6 are about repairs obligations. These are mentioned in the notification letter even if the sections of the Code are not. Section 7.2 is about responding to complaints. Again, related to OSP 11. The complaint about gutter repairs mentioned in the application arose after the notification letter had been sent. In any event, it has been resolved.

## **The evidence**

12. Mr Wallace told the Tribunal that it is accepted that there is an issue with the property but that there has to be better engagement from the owners. A proposal has now been issued but only one owner has paid their share, not the Applicant. He stated that the Respondent does not know which properties are occupied by tenants although a different home address may be an indication that this is the case. However, there may be empty flats in the block. There is one owner who owes about £7000 in unpaid common charges. This is being pursued although Mr Wallace doesn't think it's at court yet. Access has been a problem for some time and previous required repairs have not been carried out because the homeowners did not pay.
13. Ms Meeke told the Tribunal that her letting agent went to the property because she had decided to sell the property. The agent discovered that there was a problem with the stairwell and notified Ms Meeke. Initially Ms Meeke said that this had happened in the summer of 2022, then stated that it happened in December 2022. She then realised that there had been an email from the Respondent in June 2022 which she hadn't seen which related to the problem. She replied to it and asked the Respondent for an update on the repair. The

property was occupied by a tenant at that point, but the tenant had not reported the problem. The letting agent had not carried out any inspections so had also been unaware. The tenant vacated the property a few months later. In response to questions from the Tribunal Ms Meeke said that she had not received any correspondence from the Respondent about the damage and did not receive the letters which were lodged by the Respondent in July and August 2022. She confirmed that the letters are correctly addressed. She explained that her home is rural, and she does experience problems with her post from time to time, but had received her invoices from the Respondent during this period. She didn't get an update or response to her email of 15 December 2022. She made a number of phone calls. She thinks that she also sent emails and got no response. When she eventually spoke to Darren, he said that he had only recently started although he had been there for a year and a half. After the tenant moved out the letting agent said it could not be re-let as it was possibly dangerous. In response to questions about the frequency of her telephone calls, Ms Meeke said that she would sometimes call twice a day or several times a week. In early 2023, she went to the property and spoke to the occupant of flat 3/1 who told her what had happened. The Tribunal noted that the documents lodged suggest that she did not email the Respondent until 26 May. Ms Meeke said that she thought that she had emailed before that. When she called, she would reach the switchboard. They would take her details and say that someone would call back. On one occasion she spoke to Darren who said that he would get back to her but didn't.

- 14.** Ms Meeke told the Tribunal that she was not provided with copies of the reports obtained by the Property Factor until June 2023. The Tribunal noted that she had confirmed receipt of the Respondent's invoices by post which presumably would have included her share of the costs for these reports. The Tribunal also noted that the Property Factor had submitted a copy of an email dated 16 December 2022. This email referred to a telephone conversation with the Applicant and had a report from RM Consulting attached to it. Ms Meeke said that she could not recall getting that email or the conversation. When she did get the reports, it wasn't clear from them what is actually wrong.
- 15.** Mr Wallace told the Tribunal that the Respondent has been trying to find the cause of the damage to establish if it is covered by the insurance for the property. In January and April 2024, they wrote out to all the homeowners and asked them to pay £400 to instruct RM Consulting Ltd to project manage and put the work out to tender. Only one owner, not the Applicant, has paid. Ms Meeke referred to the report she got from Leslie Plummer in February, and said she sent it to the Respondent. No response was received. She said that she has recently spoken to various people. The owner of flat 3/2 is willing to pay and the owner of flats 0/1 and 1/1 is willing to get things sorted out. She has also spoken to the letting agent for 2/1 who is keen to find out what is needed. There is one empty flat. These discussions happened recently. Although Mr Wallace spoke about arranging a meeting at the CMD he has not done so. Ms Meeke told the Tribunal that although the Respondents have instructed various reports, the cause of the damage was not identified until the Applicant obtained her own report. She did not pay for the tendering exercise because her own engineer

has identified the work that is needed. Currently, her property is unsellable.

- 16.** Mr Wallace told the Tribunal that the Respondent was contacted by a resident in December 2021. They arranged for IGW Associates Limited to attend. Following their visit, the respondent contacted Glasgow City Council who attended and installed Acrow Props in the stairwell as a temporary support measure. The Respondent notified the insurers and sent them a copy of the IGW report. The insurers appointed Sedgwick loss adjusters who said that more information was required to assess the situation. Ramsay McMichael (RM Consulting Limited) were instructed to do a survey in July 2022. Mr Wallace said that he does not know why it took so long to instruct them. He also conceded that the first contact with the homeowners appears to have been in June 2022. The email sent to the Applicant would have been sent to all the owners. Mr Wallace said that he doesn't know if any of the others responded. However, the letters were issued, and information was put on the portal (pages 133 to 135 of the submission). The letters were also on the portal. Ms Meeke's preference was post not email so the letters were sent to her home address. Ms Meeke advised the Tribunal that she does not use the portal. Mr Wallace said that they asked BELFOR UK Limited to attend to try to ascertain the cause of the damage, but they had issues with access and were unable to do so. In response to questions from the Tribunal Mr Wallace conceded that between August 2022 and January 2024, they made little or no real progress. The current position is that the information obtained by Ms Meeke has been passed to Sedgwick and RM Consulting Limited to see if they can ascertain what has happened and if it will be possible to make a claim to the insurer. In January 2024 they put out a proposal about instructing surveyors and proceeding with work without insurance cover. There has been a complaint from one owner about the work not being covered by insurance. That particular owner previously paid for required repairs.
- 17.** After a short adjournment the Tribunal heard further evidence and submissions from the parties about the schedule of loss lodged by the Applicant and the sections of the Code specified in the application.
- 18.** OSP 2. Ms Meeke said that although not specifically mentioned in the notification letter, she had repeatedly called the Respondent about contacting the other owners and getting access. The Respondent failed to be forthcoming when providing information. The Tribunal noted that the notification letter states that the breach of this section is the failure by the Respondent to pass on to the homeowners the quotes obtained for the repair work. Mr Wallace said that they have only obtained indicative costs which were communicated. Until access was obtained, they could not progress further.
- 19.** OSP 4. The notification letter says that the Respondent's employee, Darren, provided false information on 14 June 2023 when he said that they were attempting to gather costs from RM Consulting Ltd. This was untrue because they already had the costs. Again, Mr Wallace said that the costs obtained were only indicative and that this was made clear in the correspondence. The specific costs referred to in the email of 14 June 2023 were for instructing the engineer

and tendering for the works.

20. The Tribunal noted that the other sections of the Code and the property factor duties complaints had already been covered.
21. In relation to the claim for rent, Ms Meeke said that the tenant moved out of the property in May 2023 and that she had been unable to re-let it because of the condition. Two letting agents had refused to do so. The property cannot be sold because it is not mortgageable at present. Her preference would be to sell.
22. The claim also includes the estimated utility costs incurred while the property has been empty and the Council Tax she is required to pay from 30 November 2023. The schedule includes legal costs. Mr Neilly confirmed that the Applicant has been made aware that the Tribunal's ability to award legal expenses is extremely limited. She is also claiming for the costs of the engineers reports she has obtained together with a sum for distress and inconvenience and a reduction in the management fee for the relevant period.
23. In response to questions from the Tribunal about whether the alleged losses are somewhat speculative, Mr Neilly denied that this is the case. He said that the Respondent should have made greater efforts to contact the homeowners and that simply sending letters out in the post was not good enough. He stated that the Applicant has twice had to instruct her own engineer, and that the Respondent should have arranged a meeting, and indicated at the CMD that they would do so.
24. Mr Wallace said that some of the owners do not want to receive communications by email so post has to be used. He conceded that a meeting had not been called. He said that the appropriate sanction would be a reduction in the management fee, for the poor service. He does not believe that the Respondent is responsible for the lost rent and other costs.

## **Findings in Fact**

25. In December 2021, another homeowner contacted the Respondent about the condition of the communal stairwell.
26. The Respondent instructed IGW Associates Ltd to carry out an inspection.
27. IGW Associates Ltd carried out an inspection on 1 February 2022. They advised the Respondent that the stairwell was dangerous.
28. The Respondent contacted Glasgow City Council on 2 February 2022. The Council arranged for a temporary repair to make the stairwell safe.
29. IGW Associates Ltd issued a report to the Respondent on 4 February 2022. In part 4 of the report, they recommended a series of remedial works. They also recommended that the owners of the flats should check plumbing installations

in rooms adjoining the common close and stair. The report did not identify the cause of the damage but indicated that “an ongoing moisture source” might exist. IGW Associates stated that a project management team should be appointed and offered to provide a quote for this.

- 30.** The Respondent did not contact the Applicant or the other homeowners or send them a copy of the report.
- 31.** The Respondent contacted the building insurers and provided them with a copy of the IGW report. The insurers appointed Sedgwick Loss Adjusters who stated that the report did not confirm the cause of the damage and that further investigations were required before a decision would be made about whether the damage was covered by the policy.
- 32.** The Respondent instructed Ramsay McMichael (RM Consulting Ltd) to carry out a survey. RM attended at the property on 23 May and 28 June 2022.
- 33.** On 14 June 2022, the Respondent sent an email to the Applicant. This email advised the Applicant that there was an “ongoing matter” with the stairwell which was with the insurance contractor so that a claim could be made to get the repairs done. The email further explained that RM had been instructed to carry out a structural survey as this had been requested by the insurer and that RM required access to the property. The Applicant was asked to confirm if access could be provided on certain days. The Applicant was asked to respond.
- 34.** The Applicant received the email, but she did not read it, acknowledge it or provide a response.
- 35.** RM completed their report on 5 July 2022. This confirmed that they had not been able to access the flats in the block. The report recommended remedial work in parts 5.01 to 5.04. At part 5.05 they stated that the “apparent escape” of water required to be located. They thought that “internal drainage issues” were the cause and not “external fabric issues”.
- 36.** On the 13 July 2022, the Development Manager for the property wrote to all owners. The letter was sent by post and placed on the Respondent’s online portal. The letter provided an update and erroneously stated that he was in the process of instructing a structural engineer and that he would update the homeowners when one was appointed. This information was incorrect as the engineer had already carried out the inspection and completed their report.
- 37.** On 18 August 2022, a further letter was issued by the Respondent to all owners. It was sent to the Applicant by post and placed on the portal. This letter stated that the Respondent was now looking to identify the source of water ingress and that BELFOR UK Ltd would be attending on 23 August 2022 when access to the property would be required. A copy of the RM report was attached to the letter.
- 38.** On 22 August a further letter was issued, again by post and on the portal, to say that BELFOR UK Ltd were attending on the 23 August 2022, that the repair

cost might not be covered by insurance and that the cost of the report would be £109 per owner.

- 39.** BELFOR UK Ltd issued a leak detection report following their inspection. They had been provided with access to flats 1/1 and 0/2. They found minor leaks but nothing which would have caused the damage to the stairwell. They did not get access to the other flats.
- 40.** On 15 December 2022, the Applicant sent an email to the Respondent in response to their email of 14 June 2022. She stated that she had not seen the email and requested an update. She said that she had only become aware of the issues with the stairwell when advised by her estate agent.
- 41.** On 16 December 2022, the Development Manager sent an email to the Applicant. This referred to a telephone call from the Applicant a few minutes earlier and enclosed a copy of the RM report. The email stated that the letting agent and tenant had not reported mould at the property. He stated that a meeting had taken place on 30 November 2022 with RM and Sedgwick. He had posted a notice in the building the following day to ask residents to make contact for access. However, this was proving difficult as two properties were unoccupied.
- 42.** On 26 May 2023, the Applicant made a formal written complaint. She said that she had emailed the Property Manager on 17 May 2023 and had not received a reply. She also stated that she had been told that the reason for the work not being carried out was the lack of response from owners. However, she had not been told that access was required and there had been no communication since 16 December 2022.
- 43.** On 7 June 2023, the Respondent acknowledged the letter, said that the property manager would provide an update but that the complaint was not accepted as there had been no breach of the WSS. The email also said that there had been attempts to engage with the owners but that some did not engage.
- 44.** On 14 June 2023, the Property Manager sent an email to the Applicant. He apologised for the delayed response and attached the RM and IGW reports. He said that BELFOR had attended on 23 August 2022 but had only accessed the Applicant's property and one other property. He attached a copy of the letter of 18 August and said that further letters had been issued to other owners for access on 20 September but there had been no access to 0/1 and 1/ 2 due to the ongoing renovation works. He advised that the insurers would not cover the repair costs until the cause had been established. He also stated that they were getting costs from RM which would be issued in due course.
- 45.** The Applicant acknowledged this email on 15 June 2023 and requested a phone call. On 20 June 2023 she sent a further email asking whether the Respondent had contact details for all owners. The Respondent responded on the same day which confirmed that they had contact details but did not know if these were up to date. The Respondent also stated that they had asked RM for

a fee proposal. On 30 June and 8 July 2023, the Applicant requested an update.

- 46.** On 12 July 2023, the Respondent sent the Applicant an email with a copy of a report from RM regarding the possible costs involved in the work. They said this was not a contractor's quotation and was indicative only. The email also said that the fee quotation from IGW was only for project management and a full quote was being requested. The Applicant responded on the same date to ask why the quote included roof works and scaffolding when the work relates to the stairwell.
- 47.** On 13 July 2023, the Applicant submitted a stage 1 complaint. This was acknowledged on 2 August 2023 and on 8 August 2023 the Applicant was notified that a response would be issued by 12 September 2023. On 19 September 2023, the Respondent sent an email apologising for the lack of a response and stating that this would be issued by 29 September 2023.
- 48.** The Respondent did not provide a stage 1 response and on 2 October 2023, the Applicant sent an email asking for her complaint to be escalated to stage 2.
- 49.** On 7 November 2023, the Applicant sent an email stating that she was now making an application to the Tribunal.
- 50.** On 23 November 2023, the Respondent sent an email with an apology for the lack of a complaint response.
- 51.** On 16 January 2024, the Respondent issued the Applicant and other owners with details of the costs of project management and tendering. The owners were asked to put the Respondent in funds to proceed. Only one owner provided their share of the funds. The Applicant did not do so.
- 52.** On 17 January 2024, the Respondent issued their response to the complaint.
- 53.** On 18 January 2024, the Applicant acknowledged receipt of the letter of 16 January 2024 and said that she had instructed her own structural engineer.
- 54.** On 13 February 2024, the Applicant sent an email to the Respondent with a copy of the first Leslie Plummer Associates report.
- 55.** On 19 February 2024, the Applicant sent an email requesting an update on access to the unoccupied property.
- 56.** The engineers and surveyors instructed by the Respondent failed to identify the cause of the damage to the stairwell.
- 57.** The Insurance company have not confirmed that they are willing to cover the cost of the repair work until the cause of the damage is established.
- 58.** The Respondent has not obtained quotes for the repair work. They issued a request for payment to the homeowners on 16 January 2024. This payment is

to cover the cost of instructing RM to project manage the work. Only one owner has paid. The Applicant has not paid.

**59.** A number of previous repairs at the property have not proceeded because the owners were unwilling to pay for these to be carried out.

**60.** The Applicant's property has been unoccupied since May 2023.

**61.** The Applicant wants to sell the property.

## **Reasons for Decision**

**62.** The Tribunal did not find the Applicant to be credible or reliable. She had difficulty answering the Tribunal's questions at times and had to be prompted by her solicitor on one or two occasions. She claimed to have made numerous calls to the Respondent but could not provide the Tribunal with any details or evidence. She also claimed that she sent emails between December 2022 and May 2023. However, the parties had been directed to provide copies of all correspondence and neither produced any emails for this period. It appeared to the Tribunal that the Applicant had little interest in the damage at the property until her tenant moved out in May 2023 and she had to make plans. The Applicant also stated that she could not recall the telephone conversation with the Property manager referred to in his email of 16 December 2022. It seems unlikely that he would mention a conversation that had not taken place. Furthermore, the conversation appears to have followed her email of 15 December 2022 which states that she had not seen the email of 14 June 2022, although it was in her inbox, and had only recently become aware of the issue with the stairwell. The Applicant denies having received the Respondent's letter of 16 January 2024 although the Respondent provided an email from her dated 18 January 2024 acknowledging receipt of the letter. The Applicant's evidence was vague and her answers sometimes evasive.

**63.** Mr Wallace told the Tribunal that he is not responsible for the property on a day to day basis. His evidence was largely restricted to what is contained in the documentary evidence lodged and what he has ascertained from the Respondent's records. This meant that he was unable to answer some of the questions from the Tribunal and he conceded that this was the case.

**64.** The application was submitted on 11 December 2023. On 19 December 2023, a legal member of the Tribunal determined that the application should be accepted and referred it to the Tribunal. Both parties have lodged correspondence which postdates the date that the application was made, and the Applicant seeks to rely on events which have occurred in 2024. The later correspondence is useful in terms of establishing the current position, the timeline of events and the credibility and reliability of the parties. However, the Tribunal is satisfied that it would not be appropriate to consider the later events and the 2024 correspondence when deciding whether there has been a failure to carry out duties or comply with the Code. The Applicant could not complain

(or make an application to the Tribunal) about events which had not yet occurred. The Tribunal has therefore restricted its consideration of the complaints to the period between December 2021 and December 2023.

### **Property Factor duties.**

**65.** The Respondent concedes that there have been unnecessary and unacceptable delays in the progress of the structural repair work. The Tribunal notes the following

(a) The period between the damage being reported and the instruction of IGW – mid December 2021 to the end of January 2022. During this period, the Respondent was unaware that the stairwell was dangerous. Having regard to the Christmas and New year holiday period, the timescale involved does not appear to be excessive or unreasonable.

(b) 4 February 2022 to mid-May 2022. It is not clear why it took so long to progress to the next stage, namely the instruction of RM to inspect and try to identify the cause of the damage. There may have been a delay on the part of the insurer and/or Sedgwick, but the Respondent did not claim that this was the case. As the Respondent was aware that the damage was serious, this delay was unacceptable.

(c) 5 July 2022 (the date of the RM report) to 23 August 2022 (the date of the leak detection report from BELFOR). This was not unreasonable in the circumstances. The RM report had to be considered, passed to the insurer, a decision taken about the next step and the contractor instructed.

(d) 23 August 2022 to December 2023. There appears to be no satisfactory explanation for the Respondent's failure to progress matters during this period. They did not take further action to get access to the remaining properties with a view to identifying the source of the damage. They did not notify the owners that, without this information, the insurance company would not cover the damage, and they did not obtain quotes from potential project managers and/or contractors in connection with remedial work. At the hearing, Mr Wallace conceded that the Respondent should and could have done more. However, he pointed out that there had been problems with access and limited engagement. He also said that this was always a problem with this block and that previous repairs had not proceeded because of the refusal or failure by the owners to agree to them and pay.

**66.** The Tribunal is satisfied that the Respondent made some efforts to get access to the flats in the block. They issued letters, posted the letters on the portal and placed a notice within the communal close. The Applicant denies having received these letters. However, she failed to respond to an email dated 14 June 2022 which was delivered to her inbox, and also denies having received the letter of 16 January 2024, although she acknowledged receipt of same on 18 January 2024. The Tribunal is therefore not convinced that these letters were

not delivered, although it is certainly possible that she didn't read them. It is clear that the Applicant took little interest in the property prior to May 2023. She did not visit or inspect it and did not arrange for her letting agent to do so. She did not respond to correspondence and did not check the portal for information. However, given the severity of the damage and the lack of engagement from the homeowners in the past, the Respondent should have done more to secure access. There are only eight flats in the block. It would have been reasonable to expect the Respondent to send a letter or email to each owner stressing the urgency of the situation and explaining the consequences of a failure to cooperate. The letters could have been sent by post as well as email, where available. It might also have been reasonable to expect the Property Manager to telephone owners and perhaps send copies of important letters to the properties as well as to the contact address. This would be unduly onerous in a large development of flats or houses, but not unreasonable in a block of eight when the situation is serious. However, the outcome may have been the same and the Applicant did not produce any evidence that the other owners had been willing to cooperate and were not given the opportunity to do so in 2022/2023.

**67.** The Tribunal is therefore satisfied that the Respondent failed to carry out their property factor duties to a reasonable standard in relation to the following: -

**(a)** The significant delays between February and May 2022 and August 2022 and December 2023 in progressing the repair work.

**(b)** The failure to get access to all properties for investigation into the cause of the damage.

**(c)** The failure to obtain quotes for the work.

**(d)** The failure to consult and communicate properly with the homeowners in relation to the damage, the need for access to support the insurance claim and the instruction of remedial work.

## **Code complaints**

**68.** As discussed with the parties at the CMD and the hearing the Tribunal is not satisfied that the Applicant notified the Respondent of complaints under 2.7, 6.4, 6.6 and 7.2 of the Code. Section 17(3) of the 2011 Act requires this notification. The Tribunal has therefore only considered the complaints under OSPs 2, 4, 11 and Section 2.1 of the Code

## **OSP 11 - You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.**

**69.** This complaint is conceded by the Respondent. The Tribunal notes that the Respondent failed to comply with this section of the Code in relation to the following: -

(a)The stage 1 complaint dated 13 July 2023.

(b)The stage 2 complaint dated 2 October 2023.

(c)The request for an update sent by email on 30 June 2023.

**70.**In her email of 26 May 2023, the Applicant referred to an email sent to the Property Manager on 17 May 2023 and said that she had not received a reply. However, neither party provided a copy of this email, and the Tribunal therefore makes no finding in relation to it. The Applicant also claimed to have made numerous phone calls and sent other emails but in the absence of any details or evidence regarding these, the Tribunal is not satisfied that a breach of OSP 11 is established for the period December 2022 to 26 May 2023.

**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 the 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.**

**71.**The Respondent concedes that communication has been far from “good”. The Property Factor failed to notify the homeowners about the stairwell damage for six months after it was brought to their attention, provide the homeowners with all relevant information and consult properly with them in relation to the structural repair work. They provided minimal information about the action that they were taking and did not fully explain the issues, the need for access to establish the insurance claim and the options available.

**OSP 2 – You must be honest, open, transparent and fair in your dealings with homeowners**

**72.**In the notification letter the Applicant states “At no point has James Gibb advised or passed on the quotes to homeowners for the repairs”. The Applicant’s evidence was somewhat confused in relation to this complaint and also the alleged breach of OSP 4. It appears that she believes that the Respondent obtained quotes but failed to pass them on. During the hearing the Applicant also said that the Respondent failed to provide her with information requested about their efforts to get access

**73.**The Tribunal is satisfied that the Respondent did not obtain quotes for the remedial work. In January 2024, they obtained two quotes for project management and tendering and requested funds from the homeowners for the more competitive estimate. Prior to this they obtained “indicative costs” from RM. These were sent to the Applicant by email on 12 July 2023. The email makes it clear that the costs were not a quote or estimate. An earlier email sent

on 20 June 2023 suggests that the Respondent had previously obtained but no longer held a “fee proposal”. However, this email indicated that a further copy of the proposal had been requested and when this was sent out on 12 July 2023, the nature of the proposal was made clear.

74. For the reasons previously outlined the Tribunal is of the view that the Respondent ought to have obtained quotes. However, they did not do so, and the Tribunal is not persuaded that a breach of this section has been established in relation to the correspondence issued to the Applicant.

#### **OSP 4 – You must not provide information that is deliberately or negligently misleading or false.**

75. In terms of the notification letter this complaint is similar to the previous one. The Applicant refers to the email of 14 June 2023 which says that the Respondent was getting costs and states that this was false because they already had them. For the reasons outlined in the previous paragraph, the Tribunal is not persuaded that a breach has been established in relation to this complaint.

#### **Proposed Property Factor Enforcement Order**

76. The Applicant lodged a schedule of loss in support of the application and updated this prior to the hearing. She is seeking an order for payment of the sum of £25,273.96. There are essentially three aspects to the schedule. Firstly, the Applicant is seeking compensation for the financial losses she claims to have suffered due to the Respondent’s failures. These comprise the lost rental income from the property, the Council tax she has had to pay and utilities. Secondly, she wants to be reimbursed for her legal costs and the engineers reports that she instructed. Lastly, the Applicant seeks an award for distress and inconvenience and a refund of factors fees.

#### **Rent, Council Tax and utilities**

77. The Applicant seeks to recover her losses from the date that the property became vacant until the date of the hearing. As previously indicated, the Tribunal’s consideration of the application is restricted to the events and alleged failures which pre-date the lodging of the application. Losses incurred after that date should be the subject of separate proceedings.

78. The Tribunal is satisfied that the Respondent was probably unable to re-let the property. She appears to have been told this by two separate letting agents. As the property almost certainly does not meet the repairing standard at the present time, this advice is probably correct. However, the claim for rent and associated costs is highly speculative. The Tribunal notes the following

(a) The Applicant did not intend to re-let the property. She intended to sell it. While the property was being made ready to sell and was on the market, the Applicant would not have been in receipt of rental income and would have had to pay the

utilities. There is also no way to predict how long it would have taken to sell.

- (b) If she had changed her mind and decided to re-let the property, the Applicant may have had to carry out some internal refurbishment and would have had to find a new tenant. She may not have been able to rent it for the same figure as before.
- (c) The Applicant has, for the most part, taken no steps to mitigate her loss. As Section 2.1 of the Code points out, the responsibility for maintaining the common parts of the building rests with the owners. The Applicant failed to respond to an email from the Respondent on 14 June 2022 until December 2022. Between December 2022 and May 2023, she appears to have done little (or nothing) to pursue the Respondent. Only when the property became vacant did she become actively involved. However, this involvement did not extend to speaking to the other owners/residents at the property or calling a meeting to try to progress matters. Furthermore, she does not appear to have attempted to sell the property in its present condition.
- (d) The Applicant does not dispute the Respondent's claim that repairs in the past have not been carried out because the owners would not agree to them or pay their share. The Respondent produced a series of letters going back to 2014 which relate to repairs that did not take place. In January 2024, when asked to pay a share of the cost of instructing RM to project manage the repair work, only one of the owners paid. The other seven, including the Applicant, did not do so. It therefore seems likely that if the Respondent had obtained and issued quotes in August or September 2023, most of the owners would not have agreed to the work.
79. The Tribunal is therefore not persuaded that the PFEO should include a sum of money which would compensate the Respondent for these alleged losses and outlays or that she has established that the sums specified in the schedule accurately reflect any losses that she has experienced.

#### **Legal costs and engineer reports.**

80. The Applicant's solicitor acknowledged that this aspect of the claim was weak. He pointed out that access to some flats within the block had now been obtained following a letter from him. However, he accepted that the Tribunal's power to award legal expenses is limited.
81. Rule 40 of the Procedure Rules 2017 states, "The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of the case has put the other party to unnecessary and unreasonable expense", The Rule also states that the award of expenses is limited to the sum "required to cover any unnecessary or unreasonable expense". The Tribunal is not persuaded that the Applicant has established that an award should be made in terms of this Rule. The Respondent's conduct of the case has been entirely satisfactory. They attended both the CMD and hearing, lodged submissions and documents

when directed to do so and cooperated in the preparation of a joint minute. They made concessions when these were appropriate. Furthermore, the Applicant's decision to instruct a solicitor was her own choice. Most parties involved in proceedings under the 2011 Act are unrepresented. The process is free, and the specialist knowledge of the Tribunal members is in place to assist parties to present their case.

**82.** The Applicant has obtained two reports from Leslie Plummer Associates. The first is dated 7 February 2024 and states "our brief is limited to items which affect the mortgageability of the property". It therefore appears that the principal reason for this report was to assess whether the flat can be sold. The second report is dated 12 August 2024 and appears to have been instructed with a view to identifying the cause of the damage, although the writer does not appear to reach a definite conclusion on that issue. Neither report was instructed with the agreement of the Respondent or the other owners in the block. The appropriate course of action would have been to call a meeting of the owners and/or discuss the issue with the Respondent. However, the Tribunal notes that the reports have been passed to the Respondent to see if they will assist with the insurance claim. If the Respondent uses the reports in connection with either the instruction of repairs or the negotiations with the loss adjusters then it would seem reasonable to expect the Respondent to include the costs of obtaining the reports in future factoring invoices, ingather the other owners' shares and reimburse the Applicant. However, at this stage the value of the reports has not been established. Having secured access arrangements, the Applicant could have notified the Respondent and allowed them to arrange for RM and/or BELFOR to re-attend, rather than arrange for another engineer to become involved.

**83.** The Tribunal is not satisfied that the PFEO should include the Applicant's legal expenses or the cost of the engineer's reports.

#### **Distress and inconvenience and Factor's fees.**

**84.** Neither party provided the Tribunal with copies of any invoices for factoring charges. The schedule of loss appears to seek re-payment of 50% of the monthly charge of £150. However, this monthly charge must include the common insurance and other maintenance costs as the development schedule appears to indicate that the management fee per property is £131 per annum. The schedule is undated, so it is possible that this sum has increased. However, it seems unlikely that the current management fee per house has risen to £150 per month and the Respondent indicated at the Hearing that the management fee was roughly £40 per quarter. The Tribunal is satisfied that the Applicant has had a very poor service from the Respondent. It therefore seems appropriate that the whole of the management fee for the period February 2022 to December 2023 should be repaid. However, there is no reason why the factoring charges themselves, for insurance and maintenance of the common areas, should be repaid.

**85.** The Tribunal is also satisfied that the Applicant experienced considerable inconvenience between May and December 2023. During this period, she was

in regular communication with the Respondent who failed to respond to some of her enquires and complaints and failed to progress the repair work. As previously indicated, the Tribunal is of the view that the Applicant herself could have done more in connection with the repairs. However, it is appropriate that she be compensated for the inconvenience she experienced. The sum of £750 is awarded.

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:

Josephine Bonnar, Legal Member and Chair

4 October 2024