Housing and Property Chamber
First-tier Tribunal for Scotland

Decision

Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

Reference number: FTS/HPC/PF/23/3240

Re: Flat 9, Newton Gardens, 50 Newton Street, Greenock, PA16 8SQ ("the Property")

The Parties:

Mr Alastair Walker, 26 Duncan Green, Livingston, EH54 8PR, Trustee of the late Catherine McDonald Millan ("the Applicant")

Morison Walker Property Management Ltd, 23 Patrick Street, Greenock, PA16 8NB
("the Respondent" and 'the Property Factor")

Tribunal Members:
Martin J. McAllister, Solicitor, (Legal Member)
Ahsan Khan, (Ordinary Member)
(the "tribunal")

Decision

I The Respondent has breached the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors 2021.

II The tribunal proposes to make a property factor enforcement order requiring the Respondent to pay the sum of £50 to the Applicant.

Background

1. This is an application by Mr Walker in respect of the Property in relation to the Respondent's actings as a property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act).

2. The application alleges that the Respondent has failed to comply with Sections 1,2,9 and 12 of the Overarching Standards of Practice, ("OSP"), Sections 1.5,1.5B (4),1.5D (14),2.6,4.4,4.9,6.3,6.6,6.7 and 7.2 of the 2021 version of the Property

Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code"). It also states that the Applicant considers that the Property Factor has not carried out the property factor's duties in terms of the Act. The application was dated 30 October 2023 and was accepted by the Tribunal for determination on 13 November 2023. The application was accompanied by a number of documents.

3. At the hearing on 18 November 2024, the Applicant conceded that some of the alleged breaches of the Overarching Standards of Practice were dealt with in other alleged breaches of the Code. He also withdrew the alleged breaches of paragraphs 1.5B (4), 1.5D (14) and 4.4.

4. In the course of evidence on 18 November 2024, Mr Walker said that the Property Factor had breached paragraph 4.7 of the Code and that he had drawn the matter to its attention. Mr Walker said that this had not been included in his application because breach of it could only occur after an application had been submitted to the Tribunal. Mr McPhail and Mrs Gallacher accepted that there had been a breach and that staff had sent Mr Walker correspondence seeking payment of the factoring account after the Property Factor had notice that an application had been submitted. Mr McPhail and Mrs Gallacher indicated that the Property Factor had no issue in the tribunal considering this alleged breach of the Code.

5. A case management discussion was held by teleconference on 28 February 2024 and, subsequent to that, a Direction was made in terms of Rule 16 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017. Written submissions were made by each party.

Hearings

6. Evidence was heard over two days in Glasgow Tribunal Centre. The hearing on 2 July 2024 was adjourned after some evidence had been heard and evidence was concluded on18 November 2024. The Applicant was present and the Respondent was represented by Mrs Florence Gallacher and Mr Gordon McPhail.

Submissions

7. Mr Walker said that there had been procedural irregularities in connection with the decision-making. He said that the consent forms relied on by the Respondent were not part of any decision-making procedure contained within the title provisions. A meeting was required and one was not convened. He said that the procedure was flawed "all the way through" and he was not involved as he should have been.

8. Mr Walker said that, because of the irregularities, he should not be held liable for any costs arising from decisions that were arrived at which were not in conformity with the provisions in the title.

9. Mr Walker said that the issues caused by the Respondent's failure to comply with the Code and property factor's duties had caused great distress to Raymond Millan. Mr Walker had been involved in a great deal of work and stress had been caused by the Respondent's failures.

10. Mr Walker said that it was part of the property factor's duties for the Respondent to raise with homeowners any issues with the decision-making process as soon as it had been alerted to potential issues.

11. Mrs Gallacher said that the Respondent had managed the development since it had been built. She said that repairs and renewals had always been dealt with on a "consent" basis." She said that the owners got on well and that the Respondent had never had to call a meeting of owners. She said that the normal process was that owners would decide matters, the Respondent would be approached in relation to the owners' instructions and it then obtained quotations and ingathered funds, where appropriate.

12. Mrs Gallacher said that the Respondent had not known about Mrs Millan's death until Mr Walker had advised of it by email. She said that Mr Walker's letter to fellow homeowners fully explained his position and also stated that Raymond Millan was responsible for all costs. The letter detailed what Mr Walker considered were deficiencies in the decision-making process and no owners approached the Respondent after they had received the letter to advise that they did not want to proceed as previously confirmed in the consent forms.

13. **Findings in Fact**

13.1 The Applicant, as Trustee in the estate of Mrs Catherine Millan, is co-proprietor of the Property.

13.2 Mrs Catherine Millan died on 9 May 2022.

13.3 The Property is occupied by Mr Raymond Millan, the son of Mrs Catherine Millan. He is a liferenter.

13.4 The Property is a flatted dwellinghouse contained in a development of nine flats ("the development").

13.5 The proprietor of the Property has a legal responsibility for paying a one ninth share of repairs and renewals of the common parts of the development.

13.6 The Applicant and Mr Raymond Millan have an informal agreement in relation to responsibility for common repairs.

13.7 The internal part of the development contained a carpet which was thirty six years old.

13.8 The carpet was renewed in 2023.

13.9 The external parts of the development include hard and soft landscaping which require to be maintained.

13.10 The cost of the carpet replacement has been paid by the owners of the development with the exception of a one ninth share.

13.11 The Respondent has paid a one ninth share of the cost of the carpet replacement and seeks repayment from the Applicant.

13.12 The Respondent was property factor for the development until 8 December 2023.

13.13 The Respondent is no longer a registered property factor.

13.14 The title deeds of the development set out a process for its proprietors to make decisions about repairs and renewals of its common parts.

13.15 The Respondent never attended meetings of the proprietors of the development.

13.16 Proprietors of the development required the Respondent to obtain quotations for replacement of the carpet and for a garden maintenance contract.

13.17 In connection with the replacement of the carpet and the appointment of the gardening contractor, the proprietors of the development did not follow the relevant provisions set out in the title deeds for decision-making.

13.18 The Applicant was not involved in the decision- making process in respect of the carpet replacement or the gardening contract.

13.19 The Respondent was not involved in the decision-making process in respect of the carpet replacement or the gardening contract. When homeowners decided to obtain quotations for both matters, the Respondent received instructions to obtain them.

13.20 The Respondent carried out the instructions of the majority of proprietors of the development to obtain quotations for replacement of the carpet and for a contract for the garden maintenance work.

13.21 Mr Raymond Millan is a vulnerable person.

13.22 In connection with the carpet replacement and gardening contract, the Respondent issued consent forms to the proprietors of the development.

13.23 The consent forms were not part of the decision-making process for the carpet replacement or garden maintenance contract.

13.24 Mr Raymond Millan signed consent forms stating that he did not want the carpet to be replaced or the gardening contract to be entered into and these were received by the Respondent on 12 April 2023.

13.25 Prior to his mother's death, Mr Raymond Millan had signed consent forms in respect of other works to the common parts of the development.

13.26 The Respondent was aware of Mrs Millan's death on 19 May 2023.

13.27 By 19 May 2023, the Respondent had the consent of the majority of homeowners in the development to proceed with the carpet replacement and the garden maintenance contract.

13.28 The respondent received funding from eight homeowners in respect of the carpet replacement.

13.29 On 6 June 2023, the Applicant had a telephone conversation with Mrs Florence Gallacher, an employee of the Respondent. In the telephone conversation, the Applicant advised Mrs Gallacher that he considered that the Respondent had not complied with the title provisions on the development because a meeting of proprietors had not been called.

13.30 The Applicant wrote to the proprietors of the development on 15 June 2023. *Inter alia,* the letter gave notice of a meeting to be held on 27 June 2023.

13.31 On 19 June 2023, the Applicant wrote to the proprietors of the development which, *inter alia,* cancelled the meeting which he had convened for 27 June 2023.

13.32 In his letter of 19 June 2023, the Applicant stated that he did not consider that he was liable for any costs arising from the instructions given to the Respondent in relation to the carpet replacement and gardening contract because the decision-making was not in accordance with the title conditions for the development.

13.33 At no time did the Respondent give advice to the proprietors of the Development in connection with decision- making in respect of the carpet replacement and the garden maintenance contract.

13.34 The Applicant was present at a meeting of proprietors which had taken place on 17 October 2023. The meeting had been called to choose the colour of the carpet. At the meeting, the Applicant did not raise any issue with regard to any deficiencies in the decision-making process.

13.35 On 6 June 2024, the Respondent sought payment of £739.98 from the Applicant. The payment sought was in connection with matters involved in the Applicant's application to the Tribunal. By this date, the Respondent was aware of the application to the Tribunal.

Matters not in Dispute

14. Parties agreed that there are certain matters not in dispute.

15. The Property is a second floor flat in a development of nine flats which was constructed around thirty six years ago.

16. The Property belonged to Mrs Catherine Millan who died on 9 May 2022.

17. In terms of Mrs Millan's Will dated 14 June 2017, a liferent was created. The Property was to be conveyed to Mr John Millan and Mrs Katrina Walker (the children of Mrs Millan) but was burdened with a liferent in favour of Mr Raymond Millan, her son.

18. Mr Alistair Walker, the Applicant, and his wife, Mrs Katrina Walker were appointed the executors and trustees of Mrs Millan and their title to the Property, as trustees, was registered in the land Register of Scotland on 7 August 2023.

19. In terms of the title, the owner of the Property is obliged to pay a one ninth share of maintenance and repairs to the common parts which are defined in the title.

20. There is carpeting in the development which, in terms of the title, constitutes part of the common parts. The carpeting is in the entrance hallway, stairs and the landings in the first and second floor. The original carpeting (fitted when the development was constructed) was replaced in 2023.

21. The Respondent has paid the Applicant's share of the carpet replacement and is seeking recovery from the Applicant.

22. The Respondent had been property factor for the Property since the development was completed. It had ceased to be property factor on 8 December 2023, upon its sale of the goodwill of its business to Newton Property Factors who are the current property factors for the development.

23. Mr McPhail confirmed that the Respondent is no longer a registered property factor since the sale to Newton and is "winding down" its factoring business and that this includes recovering debt owed to it. He confirmed that, at the time of the sale of the business, the Respondent retained responsibility for collecting any debts owed by homeowners prior to the sale.

Responsibility for Repairs

24. Submitted to the tribunal was an undated statement signed by Mr Raymond Millan which stated *inter alia* "…..I also understand that I bear the burden of the property meaning that I am responsible for all outgoings such as costs for services, Council Tax and any factor fee and costs for common repairs for Newton Gardens."

25. A Letter of Wishes was signed on the same date as Mrs Millan signed her Will and stated *inter alia* "……*I would envisage that the residue of my estate is to be held in trust and administered by the Trustees for the benefit of my son, Raymond, during his lifetime and specifically to be used for the upkeep and maintenance of my said property."*

26. Mr Walker was asked to comment on the apparent conflict between the terms of the statement signed by Mr Raymond Millan and the Letter of Wishes signed by Mrs Catherine Millan.

27. Mr Walker said that his brother-in law, Raymond Millan who is aged sixty, is a vulnerable person who has lived in the Property since it was built, originally with his parents, thereafter with his mother, and now on his own.

28. He explained that the letter of wishes had been signed by Mrs Millan when she made the Will and that she anticipated that, upon her death, there would be funds in the Trust (created by the Will) to pay for any repairs required to the Property. Mr Walker said that there were no funds in the Trust and that his mother-in law's funds had been exhausted by care costs and the legal costs incurred since her death in connection with administration of her estate and matters concerning the Trust. He said that he accepted, as Trustee, that the Trust bears the responsibility for paying for repairs. He explained that Mr Raymond Millan had insufficient funds to pay large bills as he was a recipient of state benefits and that it would be he and his wife who would require to "subsidise" the Trust.

29. Mr Walker said that the unsigned statement by Mr Raymond Millan was signed by him on the same date that his mother signed the Will and that this was done so that he had an understanding that, when he was the liferenter, he would have to pay bills for the Property.

30. It was put to Mr Walker that perhaps the Property was unsuitable for Mr Raymond Millan in financial terms if the Trust had no funds to meet repairs. Mr Walker said that his brother- in-law had lived there for thirty six years and that it would be unsettling for him to move. The Property was convenient as it was across the road from a bowling club where Mr Millan is a member. Mr Walker said that bowling was a major interest of his brother- in -law. He said that Mr Millan would be very upset if he was moved and that it would not be in his interests for this to be done.

Response to Direction

31. There was a discussion at the hearing on 22 July 2024 about responses to the Direction. The Applicant had submitted a copy of Mrs Millan's Will and had also made a written submission about the applicability of the Tenements (Scotland) Act

2004. The Applicant said that the Respondent had been required to submit copies of meetings of the homeowners in the Development and he commented that none had been submitted. Mrs Gallacher said that the property factors never attended meetings of homeowners and that the tribunal had the only Minutes which the Respondents have a copy of.

Applicant's Overarching Position

32. Mr Walker states that he is not responsible for costs incurred in relation to the carpet replacement or in relation to the gardening contract. Mr Walker said that his position is that what he described a "sub group" of owners "had got together with the factors in order to take advantage of Raymond." He said that the owners had knowingly got together to impose costs for maintenance when they knew that he had not been invited to a meeting at which the issues had been discussed. He said that these costs had been imposed which did not comply with the conditions of the title deeds and without due discussion and consent. Mr Walker said that the relevant legislation, namely the Tenement (Scotland) Act 2004, had not been followed and that the conditions contained with the title deeds had been ignored by the Respondent.

33. Mr Walker said that a major part of his application concerned replacement of a carpet which he considered to be unnecessary and that a garden maintenance contract had been entered into without the necessary procedures being followed and that the cost for the contract was higher than it needed to be.

34. Mr Walker said that the Respondent's position is that it followed common practice when it dealt with the carpet replacement and gardening contract. Mr Walker said that there was no such common practice.

35. Mrs Gallacher said that the Respondent dealt with the issues of the carpet and the gardening contract in the same way it had previously dealt with issues of expenditure for the Development. She said that Mrs Doherty, a homeowner in the Development had approached the Respondent and had said that owners had agreed that the carpet should be replaced and that a contractor would be needed for ground maintenance.

36. Mrs Gallacher explained that, in relation to the garden maintenance contract, the owners had previously looked after matters themselves. She said that Mr Dalgleish, one of the owners had been primarily responsible for doing the work but that, after his death, the homeowners wanted a contractor to take responsibility for gardening.

37. It was not in dispute that what the Property Factor did when receiving information that works were required by the homeowners was to issue what it termed a "consent form" to all the homeowners. The form would ask owners to indicate whether they were in agreement that certain works be done or a certain contract be entered into.

38. In evidence, Mrs Gallacher and Mr McPhail said that the forms gave comfort to the Property Factor that it could proceed with actioning the request of the homeowners

if a majority of them returned “positive consent forms.” Mr Walker was clear that he believed the forms to have no legitimacy in respect of decision making notwithstanding that the Property Factor may consider them to be a useful tool.

39. The tribunal had sight of letters to homeowners which enclosed consent forms. The tribunal also had examples of consent forms which had been signed by homeowners and consent forms for previous works.

40. Mrs Gallacher said that the Property Factor received consent forms for the carpet replacement and the garden maintenance. Mrs Gallacher said that she believed that consent forms were more effective than meetings because sometimes these can be poorly attended.

41. Mrs Gallagher said that, in respect of the carpet replacement, the Respondent was put in funds by all the homeowners with the exception of the Applicant.

42. Mrs Gallacher conceded that the process was not necessarily in accordance with the provisions of the title of the Property but said that the Property Factor had no involvement in the decision making. Owners made the decisions and then instructed the Property Factor to execute them.

43. Mrs Gallacher said that the consent forms had been sent to Mrs Millan because the Property Factor had been unaware of her death. She said that Mrs Doherty had told the Respondent that a meeting of homeowners had been held and that they wanted the carpet replacement and gardening contract to go ahead. She said that the Respondent did not have sight of any minutes in relation to these instructions and she said that she believed that no minute was taken.

44. The tribunal had sight of three letters addressed to Mrs Millan at the Property. One was dated 30 January 2023 and referred to a consent form in respect of obtaining quotes for carpet replacement. One was dated 28 March 2023 and referred to two quotations received for the carpet replacement: £4460 and £4430. Both were exclusive of VAT. A further letter was dated 29 March 2023 and referred to a consent form in respect of two quotations with had been received for garden maintenance: £1092 and £500. The letter gave some details of the work each contractor proposed. The higher quotation was for a more intensive regime of visits and work.

45. Mrs Gallacher referred to consent forms signed by Mr Raymond Millan which were both received by the Property Factor on 12 April 2023. These are in respect of the gardening contract and the carpet replacement. Mr Millan had signed them indicating that he did not want a contract to be entered into with regard to garden maintenance and he did not want the carpet to be replaced. Mrs Gallacher said that it was not unusual for Raymond to sign a consent form and she referred to one which he had signed on 17 July 2018 in relation to a contract for cleaning.

46. Mrs Gallacher said that the Property Factor was aware of Mrs Millan’s death from Mr Walker’s email to it of 19 May 2023. In that email, Mr Walker states *“As executor as the estate of Catherine Millan, I can tell you again that Mrs Millan passed away*

on 9/5/22." Mr Walker said that he had telephoned the Property Factor after his mother in law's death and had advised it of the situation.

47. Mrs Gallacher said that she is aware that Mr Walker's position is that he telephoned and advised the Respondent of Mrs Millan's death. She said that the Respondent does not accept this. She said that telephone calls are logged and that there was no record of such a call.

48. Mrs Gallacher referred to the two quotations for gardening work. She said that the owners wanted the more expensive contractor because the visits during the growing season would be of a greater frequency. She said that the majority of owners wanted to accept the quotation from H. Murdoch.

49. Mr Walker accepted that the carpet was the one fitted by the original developer and he conceded that the carpeting in the ground floor was "filthy." He said that, in the upper floors, the carpet was in good condition and he said that other options should have been explored. He said that cleaning should have been attempted and consideration should have been given to partial replacement which would have involved renewing the carpet on the ground floor.

50. Mrs Gallagher said that the Respondent assumed that Raymond Millan was the owner of the Property, or had the necessary authority, as he had signed the consent forms.

51. Mrs Gallacher said that she had a telephone discussion with Mr Walker on 6 June 2023 in which he said that he intended to call a meeting of owners because the provisions of the title had not been followed. Mr Walker submitted a note which he had taken of the telephone conversation. The note reflects the overarching position of Mr Walker that the procedure for the re-carpeting and gardening contract had not been in compliance with the provisions of the title. It is useful to set out some of the content of the note which has been prepared by Mr Walker. In the note, Mr Walker is referred to as AW and Mrs Gallacher is referred to as FG:

    - *AW made it clear that Raymond Millan is liable to pay for all costs relating to Flat 9 Newton Gardens however he does not have the means to pay for the charges presented by Morison Walker in respect of the gardening work or re-carpeting.*
    - *FG was not familiar with the title deeds for Newton Gardens and would have to look up specifics.*
    - *AW requested the FG point out in the Title Deeds that a majority decision is final and binding on all owners. FG was not able to do so.*
    - *AW pointed out that Morison Walker had not adhered to the Title Deeds in that a meeting had not been held by the proprietors to agree a majority decision to be properly reached.*
    - *FG agreed that owners should call a meeting.*
    - *FG pointed out that it is common practice to get a majority decision by letter. I would like to point out that other Title Deeds may allow for "common practice" however the Title Deeds for Newton Gardens are very clear and*

need to be adhered to. FG stated that if AW was not happy with "common practice", then a meeting should be called.

- *AW said that he would convene a meeting, have a discussion with other proprietors as per the Title Deeds to reach agreement on what instruction is to be given to Morison Walker in terms of the gardens and re-carpeting.*
- *AW stated that once a meeting had been held and agreements reached as per the Title Deeds, all owners will be bound by that agreement.*
- *FG agreed to proceed on the basis of holding a meeting of the proprietors to agree instructions.*
- *AW confirmed that he would proceed with convening a meeting of the proprietors and would try and have instructions for Morison Walker by the end of the month covering the gardening and re-carpeting.*
- *AW stated that Morison Walker had taken instructions from individual proprietors in the past and this did not adhere with the Title Deeds.*
- *AW insisted that any further instruction must adhere to the Title Deeds and any instruction to Morison Walker needs to be based on a majority decision from a meeting of the proprietors.*

52. Mr Walker said that the note which he had submitted reflected his recollection of the call. He said that on 8 June 2023, he sent an email to Mrs Gallacher confirming that he hoped to hold a meeting of owners in the near future and to provide her with "*instruction before the end of the month*." Mr Walker prepared letters for each homeowner which were posted through their letterboxes. He said that the posting had been carried out by Raymond Millan.

53. The Applicant sent owners a letter dated 15 June 2023 in relation to *"maintaining carpets in the common areas and the ornamental gardens of Newton Gardens".* The letter stated *inter alia "It is a condition of the Title Deeds of each of the properties comprising Newton Gardens that a meeting is held to agree how to instruct the Factor with respect to these (the carpet and gardens) and any other issues. A meeting will be held on Tuesday 27th June to ensure that the Factors are properly instructed in compliance with the conditions of the Title Deeds…… Given the cost of these issues, it is important that all owners are present to make their views known and to vote for how they wish the Factor to be instructed."*

54. Mrs Gallacher said that Mrs Doherty, one of the owners, had told her that Mr Walker's letter had been received but that the owners did not want to attend a meeting because the matter of replacement of the carpeting had been decided by a majority and because the Respondent had been put in funds by eight out of nine owners.

55. Mrs Gallagher said that she thought that when Mrs Doherty spoke to her, the owners were aware that Mrs Millan had died but were unaware of who the new owner was. Mrs Gallacher said that her impression was that the owners were unhappy that the carpet replacement had been put on hold when they had paid for it.

56. Mr Walker said that Raymond had told him that Mrs Doherty had spoken to him and told him that, if Mr Walker didn't pay, the owners would take him to court. Mr

Walker said that, when he heard this, he "pulled" the meeting. He confirmed that he did not attend.

57. Mr Walker wrote a further letter to fellow owners on 19 June 2023. In the letter he stated that he had wanted to call a meeting to discuss the carpet and the gardening contract but had been unaware that owners had previously held a meeting. The letter addressed a number of issues. It stated that Raymond Millan is a tenant in the Property who is responsible for all costs in relation to it. The letter gave details of Raymond Millan's limited income and ability to meet costs for the Property over which he has no control. The letter set out the concerns of Mr Walker with regard to the decision -making process undertaken by owners including the short notice, lack of record of what was discussed and the fact that he was not given the opportunity to attend. It stated that the process was not in accordance with the provisions of the title deeds.

58. The letter states that owners are *"unfairly imposing such high costs on a vulnerable individual"* and that there are no funds in the estate to meet these. The letter goes on to state *"….Given that the decision to instruct the Factor did not adhere to the conditions of the Title Deeds, I do not believe that the imposed charges are binding."*

59. Mr Walker's letter states that *"One of the owners has since indicated that it is their intention to take the Estate of Mrs Millan to court. This puts a completely different complexion on any discussion. Given these circumstances, I withdraw the call for a meeting unless the other owners wish a meeting to proceed."*

60. In evidence, Mr Walker said that he could not countenance his attendance at a meeting of owners against a background of possibly being the subject of legal action. He said that Mrs Doherty, an owner, had mentioned court action to Raymond Millan who had been upset by this.

61. On 6 September 2023, the Respondent wrote to Mr Walker as executor of Mrs C. Millan's Estate. The letter states: *"The Title Deeds stipulates that common repairs will be instructed by majority of owners at a meeting convened on seven days written notice. The Title does not stipulate how many owners from a quorum and the meeting which is quite concerning……We understand that on receipt of our letters and estimates (relating to the carpet and garden maintenance) an owner called a meeting to discuss both the Carpet and the Garden Maintenance although 7 days' notice was not given…….Our decision to instruct the Garden Maintenance was based on the returned consent forms duly signed by the majority of owners and not as a result of any decision made at the meeting. "*

62. Mr Walker said that this letter demonstrated the wrong approach which had been taken by the Respondent. A properly constituted meeting of owners was able to make decisions about repair or replacement of common parts. He said that consent forms were irrelevant and that the Respondent should not have taken decisions and actions based on them.

63. The tribunal was referred to a minute of a meeting of owners which had taken place on 17 October 2023 and which had been submitted by the Respondent. The

minute is signed “Margaret Doherty.” Mr Walker confirmed that he had attended the meeting which had been called to choose the colour of the carpet. The conclusion of the meeting was that the carpet contractor would require to provide larger samples so that a decision could be made. The minute referred to Mr Walker stating that he was abstaining from any decision to choose a carpet.

64. In evidence, Mr Walker said that, at the meeting which he had attended on 17 October 2023, he had been asked “ten times” what his preference was with regard to the colour for the carpet. He had said that he did not care. Mr Walker said that he did not raise other matters at the meeting. He said that the atmosphere was such that he could not raise the issue of the deficiencies in procedures. He said that, at the meeting, there had been no proposal and no vote and that he was “badgered” to make a decision. He said that it was a hostile atmosphere and it would not have been possible for him to raise other matters such as the defects in process. He said that his attendance was also against a background of a threat of legal action.

65. Mr Walker said that there had been redecoration carried out in 2015 and that he recalled discussing matters with his father-in law at the time. He said that, since 2017, five properties had been sold and that another two had changed ownership. He said that in 2015 there had been different people involved. He said that, initially, his father-in law had not been in favour of redecoration but that meetings of owners had been held and there had been a vote in favour of getting the works done. Mr Walker said that, in the case of that work, the provisions of the title deeds had been followed. He said that the Respondent followed the instruction given by the homeowners in 2015 and that consent forms were not required by the title deeds.

66. Mr Walker said that he accepted that he would be bound by a majority decision taken by owners at a properly called meeting. He said that he never had been given the opportunity to make his views known to the other owners.

67. Mr Walker said that he did not know that Raymond Millan had signed the consent forms and that he had not discussed matters with him. He said that the other owners were aware of the vulnerability of his brother-in law. He also said that he was sure that the owners would have known of the death of Mrs Millan when they decided to replace the carpet.

68. Mr Walker said that no owner had replied to his letter of 15 June 2023 other than a telephone call from Brian Collins, son of one of the owners who had told him that he thought that a meeting should take place.

69. Mr Walker said that there was no consent form in relation to the gutter cleaning and Mrs Gallacher said that one was unnecessary because the total cost was under the ceiling of £400 which is allowed for in the written statement of services.

Mr Walker disputed that the written statement of services should supplant the provisions of the title in this regard.

70. Mr Walker said that, when the Respondent realised there were issues about procedural irregularities, it had an opportunity to put matters "back on track." He said it could have indicated to owners that its processes had been defective and a meeting could have been called at that time.

71. Mr Walker conceded that, had there been a properly constituted meeting of owners which determined that the carpet was to be replaced, he would have been bound by its decision.

72. Mr Walker said that, if the Respondent put such a reliance on consent forms, it should have verified that Raymond Millan could sign them. Mrs Gallacher said that he had signed such forms in the past.

73. Mrs Gallacher said that, at no time, was the Respondent acting against one particular owner and that it cannot force owners to attend a meeting. Mr McPhail said that the Respondent cannot force an owner to attend a meeting and he said that what the Respondent did was follow the instructions of the majority of homeowners. These instructions were confirmed by the majority of homeowners signing consent forms and then, in relation to the carpet, providing the Respondent with necessary funding.

The Tenements (Scotland) Act 2004 and the Title Provisions of the Property

74. The Applicant's arguments in relation to alleged breach of the Code and failure to comply with the property factor's duties rely greatly on the Tenement (Scotland) Act 2004 ("the 2004 Act") and the relevant provisions of the Title of the Property. It is useful to consider these matters before dealing with the detail of the alleged breaches of the paragraphs of the Code.

The Title

75. The title of the Property is registered in the Land Register of Scotland under title number REN44593. The relevant section relating to common repairs is contained within the Feu Disposition by Carvill C. and E. Limited to John Millan and Catherine McDonald Millan registered on 26 January 1988 (Item 3 in the Burdens Section). It sets out that the owner will be responsible for a one ninth share of the cost of repairing or renewing various common parts. The Applicant accepts that, included in common parts is the carpet in the common hallway and stairs.

76. Page D5 of the Burdens Section gives details of how decisions are to be made by homeowners in relation to common repairs:

77. *Declaring that "common repairs" which include repairs to the mastic seal between the frames are to be instructed by a majority number of proprietors of the dwellinghouses in the said block of dwellinghouses (counting one vote for each*

dwellinghouse owned) at a meeting of said proprietors convened on seven days written notice given by any one of the proprietors (each dwellinghouse if owned by more than one person to be deemed for the purpose of any such meeting to be owned by one proprietor only) or by the factors aftermentioned to the remaining proprietors of the said block of dwellinghouses (which notice can be dispensed with on the agreement of all proprietors of the block of dwellinghouses).

78. The deed goes on to refer to appointment of factors to be by homeowners at a meeting called as previously referred to and sets out provisions relating to insurance and other matters.

The 2004 Act

79. The 2004 Act is designed to assist owners of properties in tenements. It sets out statutory provisions with regard to exclusive and common ownership and introduces the concept of scheme property. Its provisions provide assistance where there are deficiencies in deeds and where matters arise which cannot be resolved by reference to the deeds alone. It introduces the Tenement Management Scheme to act as a default management scheme for all tenements in Scotland and it provides a structure for the maintenance and management of tenements if this is not provided for in the title deeds.

80. Section 4 of the 2004 Act

Application of the Tenement Management Scheme

(1) The Tenement Management Scheme (referred to in this section as "the Scheme"), which is set out in schedule 1 to this Act, shall apply in relation to a tenement to the extent provided by the following provisions of this section.

(2) The Scheme shall not apply in any period during which the development management scheme applies to the tenement by virtue of section 71 of the Title Conditions (Scotland) Act 2003 (asp 9).

(3) The provisions of rule 1 of the Scheme shall apply, so far as relevant, for the purpose of interpreting any other provision of the Scheme which applies to the tenement.

(4) Rule 2 of the Scheme shall apply unless—

(a) a tenement burden provides procedures for the making of decisions by the owners; and

(b) the same such procedures apply as respects each flat.

(5) The provisions of rule 3 of the Scheme shall apply to the extent that there is no tenement burden enabling the owners to make scheme decisions on any matter on which a scheme decision may be made by them under that rule.

(6) Rule 4 of the Scheme shall apply in relation to any scheme costs incurred in relation to any part of the tenement unless a tenement burden provides that the entire liability for those scheme costs (in so far as liability for those costs is not to be met by someone other than an owner) is to be met by one or more of the owners.

(7) The provisions of rule 5 of the Scheme shall apply to the extent that there is no tenement burden making provision as to the liability of the owners in the circumstances covered by the provisions of that rule.

(8) The provisions of rule 6 of the Scheme shall apply to the extent that there is no tenement burden making provision as to the effect of any procedural irregularity in the making of a scheme decision on—

(a) the validity of the decision; or

(b) the liability of any owner affected by the decision.

(9) Rule 7 of the Scheme shall apply to the extent that there is no tenement burden making provision—

(a) for an owner to instruct or carry out any emergency work as defined in that rule; or

(b) as to the liability of the owners for the cost of any emergency work as so defined.

(10) The provisions of—

(a) rule 8; and

(b) subject to subsection (11) below, rule 9,

of the Scheme shall apply, so far as relevant, for the purpose of supplementing any other provision of the Scheme which applies to the tenement.

(11) The provisions of rule 9 are subject to any different provision in any tenement burden.

(12) The Scottish Ministers may by order substitute for the sums for the time being specified in rule 3.3 of the Scheme such other sums as appear to them to be justified by a change in the value of money appearing to them to have occurred since the last occasion on which the sums were fixed.

(13) Where some but not all of the provisions of the Scheme apply, references in the Scheme to "the scheme" shall be read as references only to those provisions of the Scheme which apply.

(14) In this section and section 4A, "scheme costs" and "scheme decision" have the same meanings as they have in the Scheme.

Tenement Management Scheme Rules 6 and 9

Validity of scheme decisions

6.1 Any procedural irregularity in the making of a scheme decision does not affect the validity of the decision.

Liability for scheme costs where procedural irregularity

6.2 If any owner is directly affected by a procedural irregularity in the making of a scheme decision and that owner—

(a) was not aware that any scheme costs relating to that decision were being incurred, or

(b) on becoming aware as mentioned in paragraph (a), immediately objected to the incurring of those costs,

that owner is not liable for any such costs (whether incurred before or after the date of objection), and, for the purposes of determining the share of those scheme costs due by each of the other owners, that owner is left out of account.

Giving of notice

9.1 Any notice which requires to be given to an owner under or in connection with this scheme may be given in writing by sending the notice to—

(a) the owner, or

(b) the owner's agent.

9.2The reference in rule 9.1 to sending a notice is to its being—

(a) posted,

(b) delivered, or

(c) transmitted by electronic means.

Giving of notice to owner where owner's name is not known

9.3 Where an owner cannot by reasonable inquiry be identified or found, a notice shall be taken for the purposes of rule 9.1(a) to be sent to the owner if it is posted or delivered to the owner's flat addressed to "The Owner" or using some other similar expression such as "The Proprietor".

9.4 For the purposes of this scheme—

(a) a notice posted shall be taken to be given on the day of posting, and

(b) a notice transmitted by electronic means shall be taken to be given on the day of transmission.

Decision Making Process

81. The tribunal considered it useful to set out its position with regard to the decision-making process in relation to the carpet replacement and gardening contract.

82. The provisions of the title are clear. It provides for a procedure for decisions relating to common repairs and replacement of parts of common property. A meeting of proprietors (homeowners) should be convened on seven days' written notice given by any one of the proprietors. The title also contains a provision that the property factor can convene a meeting.

83. In relation to a meeting or meetings for the carpet replacement and garden contract, there is no dispute. No such properly convened meeting was held. In relation to the process for deciding on repairs or replacement of common parts, the title has adequate provision without the necessity of invoking the terms of the 2004 Act. What occurred was that an owner approached the Respondent and advised that her fellow owners had decided that the carpet should be replaced and that quotations for a gardening contractor should be obtained.

84. The Respondent acted upon the request of owners as communicated to it by Mrs Doherty. It then sent consent forms to the homeowners. The tribunal agreed with Mr Walker that such forms are not a replacement for the proper procedure for obtaining consent for works. The tribunal accepted the argument of the Respondent that such forms gave comfort to it and enabled it to proceed to obtain quotations etc. Arguably a minute from a properly constituted meeting would provide the same comfort.

85. Mrs Millan died on 9 May 2022 and the issues with the carpet replacement and gardening contract occurred after this date. Mr Walker's clear position is that, as executor and ongoing trustee of Mrs Millan, he and his wife should have been involved in the decision- making process.

86. Matters however are not straightforward. It is to be expected that the other homeowners would have known about the death of Mrs Millan but the tribunal had no evidence to support that. Mr Walker's position is that he had telephoned the Respondent and advised of her death. Mrs Gallacher's position was that the Respondent received no such telephone call and that it was first aware of Mrs Millan's death from Mr Walker's email of 19 May 2023. The tribunal could come to no view on the matter. It is perhaps significant that factoring invoices addressed to Mrs Millan would have been sent to her between May 2022 and 2023. Matters were further complicated by the fact that Raymond Millan had returned consent forms signed by him after his mother's death and had signed similar forms on his mother's behalf before her death.

87. Mr Walker accepted that ultimately the Trust was responsible for costs in respect of the Property but had written to his fellow homeowners on 19 June 2023 stating

that Raymond Millan was a tenant in the property and responsible for all costs in relation to it. In the note Mr Walker prepared following his telephone conversation with Mrs Gallacher on 6 June 2023, he stated that he had made it clear to her that Raymond Millan *"is liable for all costs relating to 9 Newton Gardens however he does not have the means to pay for the charges presented by Morison Walker in respect of the gardening work."*

88. The tribunal accepted that it appeared to be a matter of agreement between Raymond Millan and his mother's trustees that he would be responsible for paying costs in respect of the Property and that he had limited income. That does not alter the fact that the trustees had responsibility in law to meet the costs of common repairs and it is surprising that the Applicant advised others that Raymond Millan was a tenant who had responsibility for paying for costs in respect of the Property.

89. For reasons hereafter stated, the tribunal did not have to determine if Rules 6 and 9 of the Tenement Management Scheme had been engaged but it is useful to provide comment.

90. Whether the homeowners of the development should have used the provisions of Rule 9.3 of the Tenement Management Scheme would depend, as a matter of fact, if they did not know the owner of the Property when there were discussions about the carpet and the gardening contract. The matter is somewhat academic since there was no evidence that there had been a meeting of owners in compliance with the provisions of the title.

91. The owners of the other properties in the development instructed works to be done and it is possible that between the Applicant and his fellow homeowners there are issues of recovery and that the Applicant may rely on the provisions of Rule 9.3.

Limit of the Tribunal's Role

92. The Tribunal is a creature of statute and, in relation to applications before it, is limited to determining whether a property factor has failed to comply with the Code or failed to carry out the property factor's duties.

93. The limitation of the Tribunal's role was explored in Richardson, Kenny, Thompson, Rooney and MacTaggart and Residential Management Group Scotland Ltd UTS/AP/23/0009-UTS/AP/23/0013. The question for the Upper Tribunal was whether the First-tier Tribunal erred in law in "deciding that it did not have the jurisdiction to determine the final amount owed by the applicants to the property factor."

94. Sheriff Kelly stated at paragraph 14: *"The FTS (the First-tier Tribunal) does not have jurisdiction to deal with every dispute between property factors and homeowners. The jurisdiction given to it is delineated by statute and relates to applications made by homeowners for a decision about whether there has been a failure on the part of a property factor to perform its duties or comply with the code of conduct. It is provided in section 19 what the FTS must decide upon in connection with such an application. It requires to decide whether there has been*

a failure and thereafter whether to make a PFEO (property factor enforcement order)….. this is a jurisdiction exclusive to the FTS (section 19 (4).”

95. In the instant case, the tribunal has to determine whether the actings of the Respondent amount to a possible breach of the Code or a failure to carry out the property factor’s duties. In relation to the homeowners’ failure to comply with the provisions of the title in relation to decision-making by not convening a meeting, the Respondent had no part in this and the tribunal will be making no finding on its culpability in this regard. It will consider whether there was non-compliance with the Code or failure to carry out the property factor’s duties once the Respondent had been made aware that the title provisions had not been followed.

96. The tribunal would also make no finding in relation to whether the Applicant has a liability for the costs of the carpet replacement and gardening contract. That is a matter between the Applicant and the other homeowners of the development. The Respondent, as agent for the homeowners will require to come to a view as to where it seeks recovery of the sums owed to it: from the Applicant or the other homeowners.

Alleged Code breaches

OSP1. **You must conduct your business in a way that complies with all relevant legislation.**

97. Mr Walker’s position was straightforward. He said that the Respondent had not complied with the 2004 Act and should have used it to “plug the gaps” in the title provisions. He said that the Respondent should also have used the Act where the identity of an owner was unknown. He said that the owners have an obligation to follow the title deeds and legislation but the PF is obliged to ensure that it is receiving a valid instruction and then act on it.

98. The Respondent’s position was that it was acting as agent of the homeowners and that the consent forms gave it the authority to take steps on behalf of homeowners, particularly where seven out of nine homeowners had initially agreed to the carpet replacement and then subsequently eight owners had put the Respondent in funds. It also stated that it followed the procedure which had previously been adopted in relation to works in the development.

99. This overarching standard of practice deals with how the Respondent conducts its business. A group of homeowners had decided that the carpet was to be replaced and that quotations were to be received from a gardening contractor. The tribunal accepted that the provisions of the title had not been followed in relation to the decision-making but the Respondent had not been involved at that stage. Whilst the consent forms were not part of the decision-making process, they had been used as a matter of course for the Respondent to have confidence that it could proceed with certain actions.

100. The tribunal did consider whether the Respondent, being aware, at least by 19 May 2023, that there were potential issues with the process of decision- making,

was in breach of this OSP. It determined that, at that stage, having approval of eight owners and funding from them, it was not in breach. It was acting as agents for the majority of homeowners. Whilst not in breach of OSP1, it may well have been wise for the Respondent to alert the homeowners to the issues raised by Mr Walker and, in not doing so, may have failed to carry out the property factor's duties. This will be considered in due course.

OSP2. You must be honest, open, transparent and fair in your dealings with homeowners

101. Mr Walker said that there were issues with transparency and that no records existed of how instructions passed between owners and property inspectors. Mr Walker said that the other owners knew that Raymond Millan was not the owner of the Property. He said that "he was not prepared to pay for mistakes made by others."

102. Mr Walker said that he had not been treated fairly by the Respondent which should have been doing what was correct and following the appropriate legislation.

103. The Respondent's position was that it had been transparent and fair and that it did not know until May 2023 that Mrs Millan had died and the involvement of Mr Walker.

104. The tribunal heard no evidence from the Applicant which cast doubt on the Respondent's honesty.

105. The tribunal noted Mr Walker's position that there had been a lack of transparency by the Respondent in relation to record keeping. The tribunal accepted the Respondent's position on how the Property had been managed since it had assumed responsibility for it. Homeowners approached it in relation to certain works and it confirmed the position by distributing consent forms. It may be that Mr Walker had issues about the process but the tribunal considered that it was transparent.

106. The tribunal found that there was no evidence of the Respondent being unfair in its dealings with the Applicant or in failing to act in a transparent manner.

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 condition or provisions of the agreed contract service, before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where there is an agreed level of delegated authority, in writing with homeowners, to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies). This written procedure must be made available if requested by a homeowner.

107. Mr Walker's position was that the Respondent had not complied with this paragraph of the Code because of the procedural irregularity in connection with consent for the relevant work to be done and the contract to be entered into. He

also said that there was no written procedure to consult. The Respondent's position was that there is no written procedure other than the issuing of consent forms, a procedure which had been in place and had been used for many years.

108. The tribunal considered that this paragraph of the Code relates to work or services to be charged for by a property factor and which are outwith the core service provided for in the written statement of services. There was no evidence that the Respondent charged or attempted to charge for its provision of services outwith the core service.

109. Arguably the Respondent, on behalf of homeowners, did seek payment for the carpet and the gardening contract. It did have a procedure (the consent forms) but, in relation to decision- making, the title conditions set out the process to be adopted. The Respondent did not use this process but it was not involved in any decision- making. It acted as agent of the homeowners and accepted instructions to obtain quotations for the carpet and gardening. The decision-making was done by a majority of homeowners prior to instructions being given to the Respondent.

4.7 If an application against a property factor relating to a disputed debt is accepted by the First-tier Tribunal for consideration, a property factor must not continue to apply any interest, late payment charges or pursue any separate legal action in respect of the disputed part of the debt during the period from when the property factor is notified in writing by the First-tier Tribunal that the application is being considered and until such time as they are notified in writing of the final decision by the First-tier Tribunal or the Upper Tribunal for Scotland (if appeal proceedings are raised).

110. The application had been accepted for determination on 13 November 2023. On 29 December 2023, the Tribunal wrote to the Respondent and advised it that an application had been accepted for determination. On 6 June 2024, the Respondent wrote to the Applicant seeking payment of £739.98. Mr Walker said that this was that sum which is in dispute and, in respect of which, he had submitted an application to the Tribunal.

111. The Respondent accepted that it had sought payment from the Applicant after it had been made aware of the application having been made to the Tribunal. Mrs Gallagher said that this had been an error and, as soon as the Respondent realised this, it had stopped any further letters going to the Applicant which were seeking payment.

112. The tribunal determined that the Respondent had failed to comply with paragraph 4.7 of the Code.

4.9 A property factor must take reasonable steps to keep homeowners informed in writing of outstanding debts that they may be liable to contribute to, or any debt recovery action against other homeowners which could have implications for them, while ensuring compliance with data protection legislation.

113. Mr Walker said that the Respondent sent a letter to the homeowners of the development on 6 September 2023. He said that this was after he had raised a complaint with the Respondent. He said that the letter misrepresented the position because it did not state that he was refusing to pay because of the procedural irregularities in the decision-making process. Mrs Gallacher said that the Respondent's letter did not require to state this because Mr Walker had written to the other owners and advised them of what he considered were the procedural irregularities and stating that he did not consider that he had liability to pay.

114. Mr Walker said that the other owners should have been given the whole story and told that he would not have liability to pay "if his complaint was upheld."

115. The tribunal considered the terms of the letter of 6 September 2023. It considered the letter to be reasonable in all the circumstances. Mr Walker had already advised owners of his position.

116. The tribunal determined that the Respondent had not breached this paragraph of the Code.

6.3 A property factor must have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention.

117. Mr Walker said that there was a lack of clarity with regard to procedures with regard to the Respondent being advised of matters requiring repair, maintenance or attention. He said that he would expect there to be written procedures.

118. Mrs Gallacher said that the matter was dealt with in the written statement of services.

119. The tribunal noted that there is a section in the written statement of services headed *"Repairs/Maintenance."* There are the following provisions: "*As and when instructed by the Homeowner, WPML will instruct or carry out repairs /maintenance to the common parts, on behalf of all homeowners, as long as the anticipated cost of any one item, at the time when it was instructed, will not exceed £400……It is the Homeowners' responsibility to notify MWPML in a timely manner of any common property requiring repair, maintenance or attention of any kind. This should be done either by telephone, writing, email or visiting the office."*

120. The tribunal heard no evidence of any breach of this paragraph of the Code. The written statement of services set out a procedure for homeowners to notify the Respondent of any matters requiring attention.

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

121. Mr Walker said that the Respondent offered no range of options in connection with the carpet in the common property. He identified two possibilities which the thought should have been considered in addition to replacement. He said that, notwithstanding the age of the carpet, it was "pristine" in the upper floors and there would have been the option of replacing the ground floor section. He said that cleaning the carpet should also have been explored. He said that the Respondent has not demonstrated why it chose complete replacement.

122. Mrs Gallacher said that the Respondent was only involved once a majority of homeowners had determined that they wanted a new carpet. She said that the Respondent had been asked to obtain quotations. Mr McPhail said that, by the time the Respondent had become aware of the Applicant's involvement and his concerns, eight out of nine homeowners had not only confirmed to the Respondent that they wanted to proceed with replacement of the carpet but had also placed the Respondent in funds. He said that he did not consider it appropriate for the Respondent, at that stage, to try and undo what the majority of homeowners had decided. He also said that, at that point, Mr Walker was communicating with homeowners about his concerns.

123. The tribunal determined that there had been no breach of this paragraph of the Code.

6.7 It is good practice for periodic property visits to be undertaken by suitable qualified/trained staff or contractors and/or a planned programme of cyclical maintenance to be created to ensure that a property is maintained appropriately. If this service is agreed with homeowners, a property factor must ensure that people with appropriate professional expertise are involved in the development of the programme of works.

124. Mrs Gallacher said that the Respondent did undertake property visits. Mr Walker said at no time had the Respondent indicated that the carpet needed to be replaced. Mrs Gallacher said that the Respondent would only reports matters which required repair or which posed a health and safety issue. Mr Walker said that the carpet replacement had not been flagged up in any inspection by the Respondent and it was only being done because eight owners "wanted to replace a perfectly good carpet. "

125. The tribunal determined that there was no evidence that the Respondent had breached this paragraph of the Code.

7.2 When a property factor's in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed in writing.

126. In its email to the Applicant on 29 September 2023, the Respondent stated: *"As far as we are concerned the invoice sent to you is correct. In our opinion there is no dispute. We are acting on the instructions of the majority of owners. Non payment will incur late payment charges."*

127. Mr Walker said that this demonstrates a failure of the Respondent to recognise that he had a live complaint against it. The tribunal had some sympathy with the Applicant's position in this regard but the letter from the Respondent also refers to its knowledge that an application had been submitted to the Tribunal. On one view, the Respondent considered that, since there was no dispute, the complaints process had been exhausted. The said letter was a culmination of correspondence between the parties and it is clear from considering this as a whole, that the Applicant and the Respondent had been engaging with each other. On the one hand, Mr Walker considered that there had been deficiencies in decision-making which he held the Respondent responsible for and, on the other hand, the position of the Respondent was that it was acting on the instructions of the majority of owners.

128. On the balance of probabilities, the tribunal did not consider that there had been breach of this paragraph of the Code.

Property Factor's Duties

129. Mr Walker said that the Respondent had failed to carry out the property factor's duties in not following the provisions of the title in connection with the decision making in respect of the carpet replacement and the gardening contract.

130. Mr Walker's secondary position was that, having the procedural irregularities drawn to its attention, the Respondent should have "put matters back on track" by advising the proprietors to comply with the provisions of the title.

Discussion

131. The tribunal considered that, although there were complexities with the application, the concerns of the Applicant were focused on issues arising from the carpet replacement and the acceptance of the quotation in respect of garden maintenance.

132. For reasons outlined earlier, the tribunal does not find that the Respondent was involved in any of the decision-making of the proprietors. The homeowners should have called a meeting in compliance with the provisions of the title. The

Respondent accepted instructions as agent of the majority of homeowners and, in respect of the carpet replacement, received funding from eight of them.

133. In hindsight, once homeowners realised that there had been a deficiency in the decision- making, they could have convened a meeting and invited Mr Walker to attend so that he had the opportunity to give his views. Eight owners had committed funds for replacement of the carpet. Despite any persuasive powers which Mr Walker might consider himself to have, the tribunal did not consider it likely that the homeowners would have voted not to replace the thirty six year old carpet. For the reasons previously given, that is something the tribunal did not require to make a determination on. Mr Walker was fair in stating that, if a properly convened meeting had been held and if he had been given the opportunity to attend, he would have been bound by the majority decision of the meeting.

134. The Respondent accepted that it had breached paragraph 4.7 of the Code.

135. The tribunal did have sympathy for the Respondent. It had followed its tried and tested procedure of consent forms. They had worked in the past and had been utilised after owners had determined what they wanted to do. On 19 May 2023, at the latest, the Respondent was aware of the death of Mrs Millan and, over the next few weeks, because of the representations of Mr Walker, it could have had no doubt that he considered the decision-making process to have been flawed. The Respondent's position was that it had the consent forms and funding which gave authority for it to proceed.

136. The tribunal also appreciated that the Applicant had been distressed by the course of events. His brother in law's welfare was clearly of great importance to him and it was evident that he took his role as trustee as an important obligation.

137. The tribunal considered whether the Respondent, as agent of the homeowners, had a duty to advise homeowners that there may possibly be an issue in it proceeding with the instructions given to it. It would have been aware of a potential issue after Mr Walker had contacted it. On balance, the tribunal considered that the Respondent was not obliged to raise the matter with homeowners after Mr Walker had told it that, in his view, the decision-making process had been flawed. At the time, the Respondent had been made aware that the Applicant intended to write to homeowners and give his views on what had occurred and the failure to hold a meeting to determine matters. The Respondent therefore had no need to contact homeowners on the matter. In this regard, the tribunal determined that the Respondent had not failed to carry out the property factor's duties.

138. The tribunal considered that the matter of raising the issue with the homeowners was somewhat academic. Had the Respondent raised the matter with the homeowners and, as a consequence, they decided to pause until a meeting could be convened, the result would very probably have been the same: the carpet would be replaced and the garden maintenance contract would have been entered into.

139. The tribunal had to consider an appropriate proposed property factor enforcement order. The Respondent no longer manages the development and no

longer trades as property factor. The breach of the Code requires to be marked. It is not appropriate for a property factor to seek payment of funds which are the subject matter of an application.

140. **The tribunal determined that a proposed property factor enforcement order be issued requiring the Respondent to pay the sum of £50 to the Applicant.**

141. **In terms of section 19 (2) of the 2011 Act, in any case where it is proposed to make a property factor enforcement order, the Tribunal must give notice of the proposal to the property factor, and allow parties to make representations to it.**

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.

Martin J. McAllister,
Legal Member
18 December 2024