Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/PF/23/4521. FTS/HPC/PF/24/1454, FTS/HPC/PF/24/2449 and FTS/HPC/PF/24/2731

Property: Flat 1/2, 2 Seres Court, Clarkston, Glasgow G76 7PL ("the Property")

The Parties:-
Sir Adrian Shinwell and Lady Lesley Shinwell, Flat 1/2, 2 Seres Court, Clarkston, Glasgow G76 7PL ("the homeowners")

Charles White Limited, registered in Scotland (SC212674) and having their Registered Office at 14 New Mart Road, Edinburgh EH14 1RL ("the property factors")

Tribunal Members:
Mr George Clark (Legal Member/Chairman) and Mrs Frances Wood (Ordinary Member)

Decision
The Tribunal decided that the property factors have failed to comply with OSP4, OSP6 and Section 2.7 of the Property Factors Code of Conduct effective from 16 August 2021 and have failed to carry out the property factor's duties. The Tribunal proposes to make a Property Factor Enforcement Order.

Background

1. By application, dated 14 December 2023, the homeowners sought a Property Factor Enforcement Order against the property factors under the Property Factors (Scotland) Act 2011. They alleged failures to comply with OSPs 1, 2, 3, 4, 6, 8, 11 and 12 of the Property Factors Code of Conduct effective from 16 August 2021 ("the Code of Conduct"). Their complaint also related to a failure to carry out the Property Factor's duties. This application was given the Tribunal reference number PF/23/4521.

2. The homeowner's complaints, very briefly summarised, were that the property factors had issued 7 bills, all of which were wrong, that they had failed to check that a meeting held on 26 June 2023 was quorate, that the Minutes of that meeting were incorrect, that they had entered into a contract with a lift maintenance company despite the fact that the meeting had not authorised them to do so, that they had mistakenly told the homeowners that they were subject to a specific set of regulations regarding independent inspection of the lift in the Block, that they had renegotiated the contract with the existing lift maintenance company without authority and that they had failed to notice that the Invoices from that company had resulted in a double charge for the month of February 2023. These issues had constituted failures to comply with the Code of Conduct, the Deed of Conditions and the property factors' Written Statement of Services.

3. The homeowners provided with the application a copy of their letter of complaint to the property factors. They sought an explanation for the property factors' use of contractors based in Kirkcaldy, for modest/jobbing works, which caused owners to be charged for travel time as well as time on the job. The homeowners included details of seven Common Charges accounts which had been incorrect and which, had they paid them, would have cost the homeowners an additional £214.07. The property factors had wrongly identified the boundary fence to the back garden, and a lamppost, as common property, charging the homeowners a share of repair and maintenance. After challenge, these charges had been reversed. They had also wrongly advised that a specific cost arising from the proposed maintenance of Lift Common Parts would fall to be split amongst all owners responsible for the lifts in Blocks 1 and 2. They negligently failed to consider and check that a meeting of 26 June 2023 was quorate. In entering into a contract with Caledonian Lift Services Limited ("CLS"), they negligently conjoined the interest and liabilities of Blocks 1 and 2.

4. The homeowners also complained about the process by which a meeting had been called for 22 November 2022 to discuss the property factors' proposal to move from charging owners quarterly in arrears to payment in advance, based on annual budgets. The Tribunal did not consider this matter further as the meeting did not in fact take place.

5. In relation to the meeting of 26 June 2023, the homeowners stated that 4 owners from the first and second floors of 2 Seres Court had attended, but only two such owners from 1 Seres Court. No attempt had been made to determine whether the meeting was quorate. Attendees from each Block needed to be sufficient to form a quorum. There was a quorum in respect of 2 Seres Court but not in respect of 1 Seres Court. The Tribunal did not consider further this aspect of the complaint, as any failing had no bearing on the homeowners, who live at 2 Seres Court. It would be for the owners of 1 Seres Court to take this up with the property factors.

6. The homeowners complained to the property factors about the Minutes of the meeting, which stated that the owners had agreed to transfer the lift contract

to CLS. They had not agreed to that. They had asked for clarification on three issues. Such clarification had not been provided by the date of commencement of the contract. The contract had conjoined the interests of 1 and 2 Seres Court, creating joint and several liability, in direct contravention of Clause 2.1.4 of the Deed of Conditions. In addition, at the meeting, the property factors had advised of the need for an independent inspection of each lift twice a year. Their contention was that the Lifting Operations and Lifting Equipment Regulations 1998 ("LOLER") applied to the Blocks. No explanation had been given as to why, after nine years, the owners were being told that these inspections were required. The property factors had failed, despite numerous requests, to provide statutory authority for their contention that LOLER applied to a passenger lift in a block of flats. The homeowners stated that the Work Equipment Regulations 1998 ("PUWER") might apply. They were happy to meet their statutory obligations and responsibilities but wished a suitably qualified professional to clarify their obligations and responsibilities.

7. The homeowners were also disputing charges recorded in the Common Charges account of 1 June 2023 as being due to Otis Limited for lift maintenance from 1 February 2023 to 31 July 2023. This included a double charge for February 2023, as the charge for that month had already been applied in the previous Common Charges account. A lengthy exchange of emails with the property factors had followed. The contention of the homeowners was that the property factors had in fact renegotiated the Otis contract without the owners' knowledge or consent, from a 5-year contract due to terminate on 31 August 2023 to a 3-year contract from 1 February 2023. At the meeting on 26 June 2023, the owners had been told that Otis were allowing them to terminate their contract without any fee. The owners had assumed this to be a reference to the original contract, as they had no knowledge of the 2023 contract. The reality was that the property factors and Otis had agreed to walk away from the 2023 contract, as Otis were unable to implement it in relation to their e-View system. None of this was explained at the meeting, and the property factors, when asked in an email of 1 August 2023 for documentation to support a suspected renegotiation of the 2018 contract, responded that there had been no renegotiation. The homeowners' contention was that the reality was that it had been terminated and replaced with a new contract, without reference to or approval by the owners.

8. The letter of complaint to the property factors also referred to a letter of waiver emailed by the property factors to owners on 10 August 2023, in which the property factors set out that they had advised owners of the need for fire risk assessments, had sought approval at a meeting of owners, that the owners had voted against the proposal and that, as a result, the property factors were seeking waiver of any liability for any consequences arising from the failure to carry out a Fire Risk Assessment. The homeowners contended that there had been no meeting at which such advice was given and no such vote. The homeowners had declined the invitation to return the waiver form. On 22 August 2023, the property factors had sent out a replacement form, which advised that the property factors had explained the duty of care that owners have to have independent inspections carried out in accordance with

LOLER, that the homeowners had voted against authorising the property factors to carry out inspections in accordance with LOLER, referred to a quorate meeting of the residents of Blocks 1 and 2 Seres Court and sought an acknowledgement that the property factors had fulfilled their duty of care and sought absolution of all responsibility for the consequences of not acting in accordance with LOLER. The view of the homeowners was that there was no such advice or vote, The owners had merely asked for more information and statutory authority as to why additional inspections were required over and above the six maintenance visits each year. The property factors' approach to this matter had created irritation and anxiety.

9. The homeowners wanted a refund of fees paid to the property factors since 16 August 2021, and the Tribunal to consider ordering a refund for all proprietors. The also wanted solatium of £5,000 to be paid to a charity of their choice, for the anxiety, upset and aggravation to them at a time in their lives when they should be entitled to take things easier and enjoy the peace and quiet of their own home.

10. On 29 January 2024, the property factors stated in written representations that they had answered the homeowners' complaints in full in accordance with their complaints procedure. They did not feel they needed to add any further evidence, as the homeowners had provided, within their evidence documents, all the correspondence on which the property factors would be relying.

11. On 28 October 2024, the property factors submitted more detailed representations. In relation to the lift maintenance contract, they said there had been service level and billing issues with Otis. CLS were offering a more competitive rate for the contract, with no additional charge for a GSM system to be fitted (Otis were quoting £500 for this). The property factors felt that CLS provided a better service at a more competitive price (£360 per quarter as opposed to £514.19 for Otis). The property factors' Associate Director, Robyn Rae, had been at the meeting on 26 June 2023 and there were no objections to the contract moving to CLS, so it was activated, effective from 1 July 2023. They accepted that the Minutes had not detailed the flat numbers of those present and that the Minutes would be amended. They added that the meeting was quorate and that it did give them authority to enter into the contract with CLS.

12. The property factors acknowledged that there had been multiple errors in their Invoices, but they had apologised on each occasion and had rectified them. This is a complex Development with complex title deeds and, whilst that did not excuse the errors, it had meant that some charges had gone out wrongly. They had now put in place extra steps to check bills are accurate before they go out, and their new Senior Client Relationship Manager has received full training regarding the title deeds for the Development. The property factors' position was that, whilst they accepted the obligations under the 2021 Code to carry out services with skill and diligence and to ensure staff had the relevant training and skill and whilst they endeavoured to provide a high quality, smooth management service, that does not mean that

no administrative or human errors will ever be made. Any errors in billing, including those relating to misinterpretation of the title deeds, had been corrected and no information provided by them had been deliberately negligent or misleading.

13. The property factors had invited all owners to a meeting on 22 November 2022 to discuss moving to quarterly bills based on expected annual expenditure. They provided the Tribunal with a copy of their letter to owners of 4 November 2022, inviting them to the meeting. The homeowners had made it clear that they would not be giving the property factors any money "up front" and had questioned the notice given and raised a number of other procedural concerns, so the property factors cancelled the meeting and are still billing quarterly. The property factors pointed out that the Development consists of two phases. Phase 1 was built by Applecross Developments and Phase 2 by Mactaggart & Mickel. There are shared burdens relating to common property, but neither title indicates how a joint meeting of owners of the two Phases is to be called. They had, therefore, reverted to the Title Conditions (Scotland) Act 2003, which provides for two weeks' notice of meetings.

14. In relation to Lift Engineering Insurance, the property factors stated that they operate best practice with all development lifts that they manage, in accordance with LOLER and PUWER and, as such, recommend an independent lift inspection is carried out twice a year and that an engineering policy is put in place. This was communicated to owners at the meeting on 26 June 2023. Owners requested more information which was issued with a mandate to be signed by the owners to exclude that service. A further reminder was sent on 6 September 2023, and the property factors confirmed to the homeowners on 4 January 2024 that, as they had not received the signed form from everyone, they had put the policy in place. They provided a copy of an Inspection Services leaflet from Deacon Insurance Brokers relating to Blocks of Flats Insurance. The leaflet indicated that it is a legal requirement for lifts in blocks of flats to be inspected every 6 months by an independent competent person, not being the person responsible for lift maintenance. It also made reference to LOLER. In addition, the property factors provided a copy of their letter to owners of 6 September 2023 "regarding independent lift inspections in accordance with LOLER". It enclosed another copy of their Waiver form and advised that, unless they received a signed copy from all owners by 26 September 2023, they would put the proposal in place.

15. The property factors apologised for any errors, inconvenience or miscommunication that had happened, but everything specified in the complaint had been resolved. No factor would ever guarantee that there will never be any errors, All they can do is to learn from previous situations and try their best to resolve any issues as best as possible.

16. On 28 November 2023, the property factors issued an amended version of the Minutes from the meeting of 26 June 2023. They listed the flats represented and stated that the meeting was quorate in respect of decisions

on the lifts and set out the provisions of Section 2.1.5, Third of the Deed of Conditions to the effect that such matters shall only be determined where necessary by a majority of the Lift Common Parts, a quorum being at least two-thirds of those proprietors.

17. At a Case Management Discussion, held on 16 April 2024, the Tribunal Members were made aware that the homeowners had made a further application to the Tribunal, and it was suggested that the Tribunal might wish to conjoin the applications. The homeowners told the Tribunal that, in addition to the second complaint, there were two further applications in course of being made to the Tribunal, and it was agreed that it would be logical to conjoin the present and second applications. The property factors were content with this approach. Subsequent to the Case Management Discussion, the Parties agreed that all four applications should be conjoined.

18. The Tribunal noted that there was a clear factual dispute in relation to the meeting of 26 June 2023. The Minutes indicated that all owners present had approved the property factors' recommendation to enter into a lift maintenance contract with another company. The homeowners, however, were contending that this was not the decision reached at the meeting. The Tribunal, therefore, issued a Direction, inviting the Parties to provide such further evidence as they wished in support of their respective positions, including, should they so choose, Affidavits from others who had attended the meeting. There had also been a suggestion in the case papers that the Minutes of the meeting had been subsequently corrected, and the Tribunal directed the property factors to provide a copy of the corrected Minutes.

19. The Tribunal continued the case to a further Case Management Discussion and issued a Direction on 16 April 2024.

20. On 17 April 2024, the homeowners provided further documentation, including copies of the Minutes of the meeting of 26 June 2023 sent out by the property factors on 5 July 2023 and revised versions sent on 28 and 30 November 2023.

21. In response to the Direction, the homeowners provided 5 Affidavits, all dated 6 May 2024. One was from the homeowner, Sir Adrian Shinwell himself and there were two from owners of flats at 1 Seres Court and two from owners at 2 Seres Court. All of the owners' Affidavits stated that, although there was no vote at the meeting on 26 June 2023, if the property factors confirmed a number of points raised at the meeting, there would be no reason not to take out the contract that the property factors were recommending, moving from OTIS to CLS. The property factors had stated that OTIS were prepared to allow the owners to walk away from the contract without penalty, as there had been service issues. The points raised by owners related to whether the cost would be fixed for the duration of the CLS contract, whether owners would be charged in arrears and whether the insurance cover would be as comprehensive as that provided under the OTIS contract. The property factors were also to confirm whether there would be an additional cost for providing owners with the SIM card they would require in order to access the

lifts. All those providing Affidavits stated that there was no mention of whether the meeting was quorate. The homeowner, in his Affidavit, stated that, having been away from home at the beginning of July 2023, he returned to discover that CLS had taken over the maintenance contract on 1 July 2023, without the property factors having responded to the queries and concerns raised at the meeting.

22. As required by the Tribunal's Direction, the property factors provided a copy of the Minutes of the Meeting of 26 June 2023. Their covering letter to owners, dated 28 November 2023, with which they enclosed the Minutes, apologised for an earlier version not having made it clear that the meeting was quorate. The version of the Minutes sent with the letter of 28 November 2023 stated that the meeting was quorate in respect of the lift, but not in respect of Any Other Business. The Minutes indicated that the property factors had confirmed that the CLS costs included the SIM cards and would be fixed for the full term of 3 or 5 years if the owners agreed the contract. One owner had asked about the comprehensive nature of the proposed insurance and the property factors said they would share full details. The Minute then states: "Owners all agreed to the 5-year contract with Caledonian, RG advised supporting documents would be sent out." These were to include details of the statutory requirement to have BES inspections and cover in place, as the property factors had said the inspections were independent and "as per LOLER".

23. On 6 May 2024, the property factors made further written submissions. They referred the Tribunal to their second stage response to the homeowners' complaint and stated that it contained at least three apologies. They also wished to highlight that, despite their not receiving a majority approval to the cover being put in place and, therefore, placing cover as they said they would in their letter of 6 September 2023, when they received the homeowners' complaint, they lapsed the policy, and no cover is now in place. They had advised owners that the cover and inspections should be put in place as best practice.

24. The property factors attached a copy of their first stage response to the complaint, in which they stated that they have a duty of care to follow regulations. legislation and health and safety requirements but, that being said, they could not force owners to proceed with something they did not want to proceed with. Accordingly, due to the nature and requirements of the independent inspections, they needed all owners responsible for the lifts to sign a waiver to confirm that they acknowledged the legislation and requirements but did not wish to proceed with the independent inspections despite the information provided. They had previously advised owners that unless they had signed acknowledgements from all owners by 26 September 2023, they would put the inspections in place. They only received three out of six responses from the owners of Block 2.

25. The homeowners responded, on 30 May 2024, to the submissions of the property factors. They stated that the Minutes lodged by the property factors were the second version of three. A third version had been issued on 30

November 2023. It confirmed that the Meeting had been quorate for Block 2 in respect of the lifts, but not for Block 1. Separately, the homeowners said that the apologies offered were not the ones they were seeking. Specifically, they had yet to receive an admission from the property factors that LOLER does not apply to their Block. In referring to having “lapsed” the policy, the property factors had overlooked the fact that they had no authority to take out the policy in the first place. LOLER refers to the need for examination and inspection of lifts. It does not require an Engineering Insurance Policy to be taken out. As the homeowners had previously told the property factors that they did not want the Engineering Insurance Policy, they considered that the letter of 6 September 2023 was clumsy, unprofessional, unnecessary and intimidatory.

26. On 30 October 2024, the homeowners provided further documentation, including a letter from the property factors of 18 December 2023, being their second stage response to the complaint. They apologised for any upset or confusion the matter of LOLER had caused residents. They stated that they use LOLER and PUWER as best practice on all lifts they maintain. The legislation covers the safe use of the lift for people at work and that this can include, but is not limited to, the property factors’ staff, contractors and delivery drivers. They apologised that this cover had not previously been in place. It had only been established during a recent audit and any developments that did not have the cover were approached and asked to put it in place. They also apologised for the offence that the mandate (waiver) had caused. It was to ensure that in future no recourse could be taken against the property factors as managing agents for not having this cover in place. They confirmed that they had received mandates back from three of the six owners at 2 Seres Court, that they could have the policy lapsed and that this is what they would do unless they received a majority response in favour of keeping the policy by 22 December 2023. They sincerely apologised for the frustration or upset this matter had caused.

27. On 4 November 2024, the homeowners lodged further documents, namely Invoices and Common Charges Accounts which post-dated the application. As such they could not be considered by the Tribunal, but the homeowners said that the purpose was to show that, despite their representations regarding introducing extra steps to ensure the accuracy of their accounts, the property factors remained incapable of understanding and abiding by the title deeds, especially the Deed of Conditions.

Second application

28. In a second application, dated 2 April 2024, the homeowners alleged failures to comply with OSPs 1, 2, 3, 4, 6, 7, 8 and 12, with Sections 2.1, 2.2, 3.5, 18.1 and 18.7 of the property factors’ Written Statement of Services (“WSS”) and Section 5.5 of the Code of Conduct. This application was given the Tribunal reference number PF/24/1454.

29. The complaint was that the property factors put in place an insurance policy in respect of independent lift inspections, despite receiving written

instructions that the owners did not give their authority for the property factors to do so. The homeowners also contended that the property factors had attempted to force owners to sign a waiver of liability form, making the owners feel that they were being harassed or intimidated into agreeing to the policy and that the policy had been put in place because they had not received a mandate (the waiver of liability form) from the owners instructing them not to do so. Owner approval was not granted, nor does LOLER apply to lifts in private dwellings. The homeowners complained that owners, a number of whom are vulnerable individuals, felt they had been harassed and intimidated into agreeing to the policy.

30. The homeowners wanted the property factors to admit that LOLER does not apply to private housing, an apology for lack of competence and for the bullying tone of their email of 6 September 2022, and compensation.

31. The response of the property factors was that they have a duty of care to follow regulations, legislation and health and safety requirements, but that they could not force owners to proceed, so, in view of the nature and the requirements for independent inspections, they needed all owners responsible for the lifts to sign a waiver to confirm that they acknowledged the legislation and requirements but did not wish to proceed with the independent inspections despite the information provided. They told owners that if they did not have a signed acknowledgment by all owners by 26 September 2023, they would put the inspections in place. They received only 3 of 6 forms back, signed. They did not force owners to do anything. They simply advised them of the options and asked them to make an informed decision.

Third Application

32. In a third application, dated 30 May 2024, the homeowners alleged failures to comply with OSPs 2, 3, 4, 5, 6 and 7, Section 1.2 of the WSS and Sections 2.6, 2.7 and 7.1 of the Code of Conduct. This application was given the Tribunal reference number PF/24/2449.

33. The complaint related to a contention that the property factors had not consulted with homeowners in advance of making changes to their WSS for 2024, had failed to highlight in their Newsletter of December 2023 that the changes were substantive, material and potentially prejudicial to the interests of the owners, had failed to provide, contemporaneously, for clarity and comparison, an easily accessible version of their WSS 2023, had failed to upload the 2024 version of the WSS until 9 January 2024, nearly six weeks after the date of the Newsletter, had failed until 7 February 2024 to advise where the 2024 WSS could be found online, and, accordingly, had failed to display the honesty, openness, transparency and fairness required of them.

34. The homeowners wanted the property factors to apologise for getting it wrong, compensation for upset and lost time, and a written undertaking to consider in the future the potential impact of their actions.

35. The property factors made written representations on 28 October 2024. The stated that, on 1 December 2023, they issued a quarterly Newsletter, which notified owners of their upcoming amendments to the WSS for 2014. This was issued more than 4 weeks in advance of the changes taking effect on 1 January 2024.The revised WSS was made available to owners on 9 January 2024, via their client portal. The Appendix to the full WSS issued on 9 January 2024 included the changes made. As all this happened within 4 weeks of the changes taking effect, the property factors did not feel they had breached Section 1.2 of the Code of Conduct.

36. They commented that the homeowners had referred to the property factors as being discriminatory, as the Code of Conduct is an online document, and not all owners may have access to it. The Code of Conduct is a Scottish Government document, so the complaint was not relevant as against the property factors. Additionally, the application is specific to the homeowners, who do have access to the Code of Conduct and WSS online.

37. The property factors did not consider the changes made to the WSS in 2024 to be substantial, but, in any event, they had complied with the requirement to provide copies of the WSS within 3 months of the changes.

38. The property factors did not feel that they needed to provide a legal or statutory justification of their ability to update their terms of business (WSS) as it is normal practice for businesses to set their own terms of business and the customer can choose to continue giving them their business or take it elsewhere. They noted that they had had no other objections to the changes and no motion to move the business elsewhere. Their contention was that they had not displayed any evidence of the breaches.

Fourth Application

39. In a fourth application, dated 17 June 2024, the homeowners alleged failures to comply with OSPs 2, 3, 4 and 8 and Sections 18.1 and 1.2 of the WSS. This application was given the Tribunal reference number PF/24/2731.

40. The complaint was that, after the issue of their December 2022 Newsletter, which contained, in an Appendix, updates to the WSS for 2023, but prior to 8 February 2023, the property factors made changes to the Appendix. No notice of these changes was given, before or after the event, so no consultation could take place. The owners did not find out about the changes until December 2023, by which time the 2023 version of the WSS had been archived and was not accessible to owners via the property factors' Portal.

41. The homeowners wanted an apology from the property factors for their conduct, a written undertaking to be open, honest and transparent, and compensation for stress and wasted time.

42. The property factors made written representations on 28 October 2024. They stated that they had given sufficient notice for updates in accordance with the Code of Conduct and referred to their Stage 2 response to the complaint, in

which they told the homeowners that they do not need to have agreement of homeowners before they make changes to their WSS. They choose, as a courtesy, to notify owners in advance of changes, but the Code of Conduct does not compel them to do so. They accepted that the 2023 WSS had been added to the wrong section of the portal and apologised for that administrative error. They noted that the homeowners had acknowledged receiving a paper copy of the 2023 WSS. The Code of Conduct says that property factors should make available the latest WSS and does not oblige them to provide copies of older versions. They acknowledged an oversight in that the update to the WSS sent as part of their December 2022 Newsletter was different to the actual changes made to the 2023 version but repeated that they are not obliged to inform homeowners in advance of any changes to the WSS. In their view, the changes were small, and they were on the portal for owners to access. Owners who do not have access to the portal are welcome to request a written copy of the latest WSS. They had not deliberately misled or provided false information to owners. The Appendix to the 2023 WSS clearly stated all the changes they had made and was available for all owners to see. They did not agree that at any stage they had failed to comply with the Code of Conduct.

Case Management Discussion

43. A Case Management Discussion was held by means of a telephone conference call on the morning of 12 November 2024. The homeowners were present. As Sir Adrian Shinwell alone spoke on behalf of himself and his wife as the homeowners, he is referred to as “the homeowner” in the paragraphs which follow. The property factors were represented by their Associate Director, Robyn Rae.

44. In relation to the first complaint (**FTS/HPC/PF/23/4521**), the proceedings began by considering the Minutes of the Meeting of 26 June 2023. Ms Rae told the Tribunal that she was at the meeting and that it was agreed to move the lift maintenance contract to a new provider. The homeowner responded that he had lodged 5 Affidavits, but the property factors had not lodged any Affidavits, merely their working notes of the meeting. Ms Rae said that the latest version of the Minutes is correct. She had apologised for the errors made in earlier versions and was not denying that they were incorrect. Lift servicing is a core service, and the property factors had found a better service at a lower price. The property factors’ position was that they did not need to have the meeting before making the change, but they had called the meeting as they thought a discussion with the owners would be useful. The third version of the Minutes, sent on 30 November 2023, reflected the property factors’ belief as to what was said at the meeting.

45. The discussion then turned to consideration of the complaint regarding errors in quarterly bills. The property factors said that errors were corrected when they were pointed out, but the homeowner complained that there had been incompetence, negligence and a failure to properly interpret the Deed of Conditions, but the property factors simply put this down to “human error”. They had also said that they had out in extra steps to ensure invoices were

checked before they went out and the homeowner challenged them on when this had happened. They responded that it was after they received the second complaint from the homeowner, but that an individual had ignored them. That person's employment had been terminated. This, they said, explained why there had been further errors in the accounts issued since the second complaint.

46. In relation to the complaint about the property factors' proposal to change their method of billing to an annual budgeting system, the homeowner told the Tribunal that he had not known until the property factors stated it in their written representations of 28 October 2024 that all owners in Phase 1 and Phase 2 of the Development had been invited to the meeting of 4 November 2022 to discuss the proposal. There is no overlap between Phase 1 and Phase 2 in respect of common property, apart from a playpark and the entrance wall to the estate. This, he said, reinforced his argument that the property factors are not competent in terms of understanding Deeds of Conditions. They did not understand the concept of joint and several liability and entered into contracts which were contrary to the interests of their clients, the owners.

47. The homeowner referred to the lift maintenance contract with Otis as a "complete shambles". The original contract was meant to run for 5 years from 1 September 2018 to 31 August 2023, but the property factors replaced it with a new contract for 3 years starting on 31 January 2023. This had been done without the owners' authority having been sought. He referred to a credit note of 5 April 2023 from OTIS, a copy of which he had provided to the Tribunal, which stated "Contract renegotiated". The property factors responded that the terms of the contract were not changed. The date was extended, to align with the rest of their portfolio. The homeowner insisted that it was not a variation to align dates, it was a new contract, and he referred the Tribunal to a quote from OTIS to provide the service, that quote being valid from 1 February to 31 May 2023. The property factors added that, as OTIS were unable, due to a shortage of parts, to fulfil part of the contract, they walked away from it and CLS were appointed in their place.

48. In relation to the lift inspections related to insurance, the property factors told the Tribunal that they follow best practice. Postmen, engineers and tradesmen use the lift. It is not just a passenger lift for residents. The property factors were not saying that the inspections were mandatory. They were saying it is best practice to include them. The homeowner accepted that the Tribunal would not pronounce on whether LOLER applies to lifts in a block of flats. His objection was that the matter had been raised at the meeting of 26 June 2023, when he had asked for the statutory justification for the proposal. He alleged that the property factors were pushing compliance with LOLER because that would increase the premium, on which they were receiving 20% commission. They had a vested interest. All he had asked for was openness and transparency.

49. The property factors told the Tribunal that the cost of the cover was quoted in two parts, namely biannual inspections and the policy to cover major

malfunctions. They received 20% commission on policy premium but not on the cost of the biannual inspections. The homeowner said that this was not true, and he referred the Tribunal to the property factors' response of 29 November 2023 to his second stage complaint, in which they stated "CWL receive 20% commission on the BES inspections premium". He also referred to a letter, included in his written representations, that he had received from the insurance brokers, confirming that the property factors had asked them to place an engineering insurance and inspection policy for the Block, as they had identified that this is something they should have been arranging for owners all along, and that they then asked the brokers to cancel the policy. The property factors had, however, in their letter to the homeowners of 18 December 2023, talked of "lapsing" the policy if they did not receive a majority response in favour of keeping it in place. The response of the property factors was that they did not know what goes on between insurance brokers and suppliers.

50. In relation to the second complaint (**FTS/HPC/PF/24/1454**), the homeowner told the Tribunal that he had nothing to add to his written representations. The substance of the issue is the subject of a complaint to the Financial Ombudsman against the insurance brokers, as appointed agents of the property factors, who had, contrary to the interests of the owners, put a policy in place with their brokers and then tried to bully/intimidate owners to sign up to something that they said was required, based on a marketing leaflet from the brokers.

51. In relation to the third complaint (**FTS/HPC/PF/24/2449**), the homeowner said that the property factors had a certain delegated authority in relation to emergency work, but that they had changed that to "award themselves" the authority to carry out all routine maintenance. The owners had never given their permission to the property factors to extend their delegated authority, which was now unlimited. They can do what they want.

52. The property factors responded that they gave four weeks' advance notice before the changes to the WSS took place, and they received no objections from any other owners. The property factors were open to feedback from owners. They added that the Code of Conduct does not require them to give advance notice of changes to the WSS.

53. In relation to the fourth complaint (**FTS/HPC/PF/24/2731**), the discussion was mainly about the detailed changes made in the 2023 WSS, and not the manner in which they were implemented, which was the substance of the complaint.

54. There was then discussion as to whether a full evidential Hearing was required. The homeowner worried whether the Tribunal was satisfied in relation to all matters of fact. There were also 7, perhaps 8 witnesses that he would require to call to prove matters of fact. For their part, the property factors were content for the decision to be made on the basis of the written representations and the Case Management Discussion. The homeowner said that his witnesses would include a number of employees and Directors of the

property factors and an employee of OTIS, all of whom would be witnesses to matters of fact. He was asking the Tribunal to issue a Direction for witnesses to attend and the Case Management Discussion ended with the Tribunal advising the Parties that it would either decide the applications on the evidence before it or would adjourn the case to a full Hearing.

Findings of Fact

i. The homeowners are the proprietors of the Property, which is a flat in a modern block, part of Phase 2 of a development at Williamwood, Clarkston, comprising Blocks 1 and 2 Seres Court, Clarkston. The Property is in Block 2 Seres Court, which consists of 9 flats.
ii. The property factors, in the course of their business, manage the common parts of the block of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
iii. The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
iv. The property factors were registered on The Scottish Property Factor Register on 7 December 2012, their present registration being on 18 April 2016.
v. The homeowners have notified the property factors in writing as to why they consider that the property factors have breached the Codes of Conduct under the Act.
vi. The homeowners made four applications to the First-tier Tribunal for Scotland Housing and Property Chamber under Section 17(1) of the Act. They are dated 14 December 2023, 2 April 2024, 30 May 2024 and 17 June 2024.
vii. The core services provided by the property factors include Lift Servicing.

Reasons for Decision

55. Rule 17 of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 provides that the Tribunal may do anything at a Case Management Discussion which it may do at a Hearing, including making a Decision. The Tribunal considered, therefore, as a preliminary matter, whether it should determine the applications on the basis of the evidence before it, or whether. In the interests of justice. a full evidential Hearing was required. The view of the Tribunal was that a Hearing would not be necessary. The homeowners had provided many hundreds of pages of written representations and documentation and there were no matters of fact on which the Tribunal felt that further evidence was required. The Tribunal would not be prepared to compel witnesses to attend, as it would not be proportionate in all the circumstances of the applications.

56. The Tribunal had before it a large number of documents, provided by both Parties. It would be impracticable to refer in this Decision to every adminicle of evidence, but, in arriving at its Decision, the Tribunal took into account all evidence, oral and written and all supporting documents presented to it.

57. The homeowners' complaints in relation to all four applications are made under a large number of OSPs and Sections of the 2021 Code of Conduct. Rather than set them out *ad longum* beside each head of complaint, the Code of Conduct is appended to this Decision and referred to for its terms.

58. The Tribunal considered first the complaint **FTS/HPC/PF/23/4521**, the main elements of which had been the lift maintenance contract, errors in quarterly billings, the proposal to move from quarterly billing in arrears to an annual budgeting system, and the question of lift engineering insurance.

59. The Tribunal noted that the property factors said there had been service level and billing issues with OTIS. In their view, CLS were offering a more competitive rate for the contract with no additional cost for a GSM system to be fitted (OTIS were quoting £500 for this). The property factors put to a meeting on 26 June 2023 a proposal to move from OTIS to CLS. The dispute that arose related to what was decided at the meeting. The homeowners were adamant that approval was not given, as a number of questions had been raised to which the property factors were to respond. The homeowners produced five Affidavits to the effect that there was no mention of whether the meeting was quorate and there was no vote, but all stated that, if the property factors confirmed a number of points, there would be no reason not to move from OTIS to CLS. The homeowners then discovered that the property factors had placed the contract with CLS with effect from 1 July 2023, without having answered the points raised at the meeting.

60. The property factors' position was that all the owners present agreed to the proposal to appoint CLS. This was stated in all three versions of the Minutes. There were Affidavits from 5 of the 7 owners who attended the meeting to the effect that no vote was taken, but that there was agreement that there would be no reason not to switch providers once the owners had answers to a number of questions. They also contended that lift maintenance was part of the core service and that they did not need to consult on a change of provider.

61. The Tribunal agreed that lift maintenance forms part of the property factors' core services as set out in Section 3 of their WSS. Accordingly, provided they were satisfied that a new provider would provide an equivalent service at no additional cost, the property factors could have proceeded without calling a meeting. They did, however, decide to call a meeting, so became bound by its outcome. The Tribunal decided, on the balance of probabilities, that the property factors had not obtained unconditional agreement to enter into a contract with CLS. The Tribunal accepted that they had acted in good faith and had believed they had obtained authority to proceed, but in that belief they were mistaken. The Tribunal's view was, however, that it had been an honest mistake. The property factors also did not take steps to answer the questions that had been raised. Accordingly, the Tribunal **upheld** the homeowners' complaint that the property factors had **failed to comply with OSP6**, which obliges property factors to carry out the services they provide to homeowners using reasonable care and skill. They should have realised that they did not

have authority to sign a contract until the queries raised at the meeting had been answered. **The Tribunal did not regard the property factors' actions as failing to comply with OSPs 2, 3, 4, 8 or 11**. They had made an honest mistake. They had not failed to provide information in a clear and accessible way, had not provided information that was deliberately or negligently misleading or false, there was no evidence that they had failed to ensure their staff were aware of relevant provisions in the Code, and this element of the issues being considered did not include the complaints handling procedure.

62. The Tribunal noted that three versions of the Minutes of the Meeting of 26 June 2023 had been produced. Minutes are a contemporaneous record of discussions and decisions, and it is always open to anyone who does not regard them as accurate or complete to seek amendments. They are not finalised until approved at a subsequent meeting. The homeowners pointed out that they failed to identify who attended the meeting and did not confirm that the meeting was quorate. The property factors amended them accordingly. The property factors did not agree that there had not been agreement to switch from OTIS to CLS, so did not amend the Minutes in this regard. The Tribunal noted that the first version was sent out on 5 July 2023, shortly after the meeting, but, after the homeowners raised issues with the Minutes, the property factors did not send out the amended version until 28 November 2023. The view of the Tribunal was that **this constituted a failure to comply with OSP6 and with Section 2.7 of the Code of Conduct**. The property factors had not carried out their service in a timely way (OSP6) and had not responded to the homeowners' enquiries within the timescales confirmed in their WSS, in which they state that they will endeavour to respond to both electronic and paper correspondence within five working days. (Section 2.7 of the Code of Conduct).

63. The Tribunal considered the homeowners' contention that the property factors had, without consent, renegotiated the contract with OTIS. They provided a copy of a lift maintenance contract with OTIS, the schedule to which indicated that it was due to start on 1 February 2023 and that it would last for 3 years, at a cost to the owners of 2 Seres Court of £1,714 per annum. The previous cost had been £1,319 per annum. The property factors said that it was a mere extension to enable its expiry date to be aligned with their contracts for other developments. The Tribunal noted that the property factors had written to the homeowners on 24 November 2022, stating that they were proposing a 3-year extension to the maintenance contract with OTIS, who were going to provide, free of charge, their OTIS Connect e-View GSM system. The Tribunal decided that, as the document contained all the terms of the contract, the price was increased and a new service was scheduled to be provided, it was a new contract and not a mere extension of the existing one. I any event, it did not appear to the Tribunal that the owners had been prejudiced, as they were to receive an additional service and the annual cost would, in all probability have risen anyway under the existing contract, which permitted annual increases. In the event, the new contract was terminated with effect from 30 June 2023. The Tribunal did not identify any evidence to suggest that the actions of the property factors were deliberately designed, as the homeowners suggested, to "cover up" the fact that they had entered into a new contract, but it was clear that their

communication was poor. In an email of 10 August 2023, they told the homeowners that there had been “no renegotiation” and that the increase imposed by OTIS were only in accordance with Clause 3.1. The property factors must have been referring to the original contract, as they were saying there had been no renegotiation. This was regarded by the Tribunal as negligently misleading and, therefore, **a failure to comply with OSP4**. The Tribunal did not find sufficient evidence to hold that it was deliberate or dishonest. There was no evidence that information had not been provided in a clear and easily accessible way, that the property factors had failed to respond to enquiries and complaints, that they had not ensured all staff were aware of relevant provisions in the Code and of the property factors’ legal requirements, or that they had communicated with homeowners in any way that was abusive, intimidating or threatening**. Accordingly, the complaints in relation to OSPs 2, 3, 6, 8, 11 and 12 were not upheld.**

64. The Tribunal noted that there had been errors in bills issued to the homeowners, but also that, when identified, they had been corrected. Accordingly, whilst it is incumbent on the property factors to take whatever steps are required to improve the accuracy of their billing and the homeowners are entitled to consider whether, given a succession of errors, they would wish to continue with the property factors, the Tribunal did not find that they had failed to comply with the Code of Conduct in relation to the bills. The homeowners submitted on 4 November 2024 a further bill which, they stated, contained errors, but it was dated after the date of the application, so, whilst it might inform owners in a decision as to whether to continue with the property factors, in the light of their statement that they had introduced extra steps to ensure billing was accurate, it was not a matter that the Tribunal could take into account. **The homeowners’ complaints under various Clauses of the WSS, the Deed of Conditions, and OSPs 2, 4,6 and 8 were, accordingly, not upheld**.

65. The Tribunal did not uphold the complaint regarding the property factors’ intimating to the homeowners their desire to change from quarterly billing in arrears to an annual budgeting system. The Deed of Conditions provides that the factor shall provide a statement of all common charges on a half yearly basis “or on a monthly. quarterly, annual or other basis as the Proprietors may determine at a Proprietors Meeting”. The property factors were entitled to propose the change, and called a meeting for that purpose, but, following opposition expressed by the homeowners, the property factors had cancelled the meeting at which the proposal was to be discussed and the change had not been made. The Tribunal held, therefore, that they **had not failed to comply with the Deed of Conditions, their WSS or with OSPS4, 6 and 8.**

66. The Tribunal regarded the communication by the property factors relating to lift engineering insurance as confusing to owners. They had initially indicated, as recorded in all versions of the Minutes of the meeting of 26 June 2023 that there was a requirement to have biannual lift inspections “as per LOLAR (sic)”. At that meeting, the owners sought further information, as some were questioning whether LOLER applied to lifts in residential blocks. The property factors did not answer that question, their response being to issue a form of

waiver for owners to sign, essentially absolving the property factors of any liability for any consequences of the owners not being prepared to put in place the policy that they had recommended. In their response to the homeowners' complaint, the property factors did not maintain the position that there was a statutory (LOLER) requirement for the insurance and inspections, but said that they use LOLER (and PUWER) as best practice on all lifts they maintain.

67. The view of the Tribunal was that, if the property factors regarded complying with LOLER standards as best practice, they were entitled to seek to protect themselves when the owners were not prepared to go along with their view that these standards should be applied and a policy put in place. The Tribunal did not regard the issuing of the waiver as threatening or intimidatory. The property factors had, however, misled the owners in suggesting that the policy was a requirement. They were entitled to say they followed best practice and that that involved putting a policy in place, but that was not the reason given to owners at the meeting of 26 June 2023. The owners were given the clear impression that they had no option but to take out the policy. The Tribunal accepted that the misrepresentation may not have been deliberate, but determined that the property factors had not explained the basis on which they believed insurance should be put in place and had not clarified the position when asked to do so. Accordingly, **the Tribunal upheld the complaints under OSP4 and OSP6**, to the extent that the information was negligently misleading, and the property factors had not used reasonable care and skill to ensure their explanations to the homeowners were accurate and timely. There was no evidence to support the homeowners' allegation that the property factors had been trying to augment their income through receiving commission on the policy premium and the Tribunal did not hold that the error was deliberate. They cannot be expected to have specialist knowledge in this highly technical area, and they followed the advice of their brokers as constituting best practice. The Tribunal **did not uphold** the complaints under OSPs 1, 2, 3 or 8. The property factors' only error had been in suggesting the policy was a requirement, rather than saying they wished to follow best practice. The Tribunal made no finding as to whether LOLER applies to residential blocks of flats.

68. The Tribunal then considered the second application **FTS/HPC/PF/24/1454**. The complaint related to the insurance policy in respect of independent lift inspections, an allegation that the property factors had attempted to force owners to sign a waiver of liability form, making the owners feel that they were being harassed or intimidated into agreeing to the policy, and that the policy had been put in place because they had not received a mandate from the owners instructing them not to do so. Some of the issues raised in this application were considered by the Tribunal under FTS/HPC/PF/23/4521. The property factors were endeavouring to follow what they regarded as best practice, and the Tribunal had held that they were entitled to look to protect their position when they did not receive sufficient support for their proposal. They could not know whether a majority of the owners affected would respond, and the view of the Tribunal was that it was not unreasonable for them to state in their letter to the owners of 6 September 2023 that, if they did not receive a signed copy of the letter of waiver by 26 September 2023, they would put the

policy in place. Their proposal had not been accepted by a sufficient number of owners and they were entitled to protect themselves against any future claim that they had failed in their duty of care by not ensuring the policy was in place. The Tribunal did not accept that the owners had been harassed or intimidated

69. The Tribunal noted the homeowners' comments that a number of the owners are elderly and vulnerable, but did not regard that as relevant to the application, as the application could relate only to the property factors' conduct towards the homeowners and it was clear that they did not regard themselves as vulnerable.

70. Having taken into account all the evidence before it, the Tribunal **did not uphold** any of the complaints under application FTS/HPC/PF/24/1454.

71. The Tribunal then considered applications **FTS/HPC/PF/24/2449** and **FTS/HPC/PF/24/2731 t**ogether. They both related to changes to the property factors' WSS and, in particular, to the fact that the owners were not consulted, nor was their approval sought, before the changes were implemented. The factual background was that, in a Newsletter in December 2022, the property factors advised owners of upcoming changes to their WSS. They did the same for their 2024 WSS in a Newsletter of December 2023. The changes were then incorporated into amended versions of the WSS on their client portal, although the property factors accepted and apologised for an administrative error which had meant that the 2023 changes were not initially uploaded to the correct section of the portal.

72. The Tribunal's view of both applications was that the homeowners have fundamentally misunderstood the right of property factors to amend their WSS. They are entitled to do this at any time and do not require to consult with or seek prior agreement from homeowners in advance. The WSS is a statement of the terms on which they are prepared to continue to do business with the owners, whose options are either to continue with the property factors or to decide that they are not prepared to accept the changes and to give notice to terminate the contract. In the present case, the property factors, as a courtesy, told owners in December of changes that would become effective on 1 January, but their obligation in terms of Section 1.2 of the Code of Conduct is "to take all reasonable steps to ensure a copy of the WSS is provided to homeowners at the earliest opportunity (in a period not exceeding three months) where substantial change is required to the terms of the WSS". Section 2.2 of the Code provides that "Information and documents can be made available in a digital format, for example on a website, a web portal, app or by email attachment". There is also a general requirement for property factors to provide hard copy of the WSS on request.

73. The Tribunal's view was that the property factors had failed in their duties in only one respect, namely initially putting the 2023 changes on the wrong section of the portal. They had apologised for this, and the Tribunal was satisfied that the homeowners had not been prejudiced by the failure.

74. Having considered carefully all the evidence before it, the Tribunal **did not uphold any part of the homeowners' complaints in applications FTS/HPC/PF/24/2449 or FTS/HPC/PF/24/2731.**

Property Factor's Duties

75. In the first two applications, the homeowners contended that the property factors had failed to comply with various sections of their WSS. The Tribunal had found that the property factors had failed in three respects to comply with OSP6, namely the requirement to carry out the services they provide using reasonable care and skill in a timely way. Insofar as they related to delay in responding to issues raised about the Minutes of the meeting of 26 June 2023, these also amounted to a failure to comply with Section 18.4 of the WSS on response times. In respect of misleading information regarding the need for lift maintenance insurance, the failure under OSP6 was also a failure to comply with Section 2.1 of the WSS, in which the property factors say they will carry out their services "with reasonable skill and diligence. The incorrect assumption that they had authority from the meeting to switch the lift maintenance contract from OTIS to CLS was also a failure to comply with Section 2.1 of the WSS, as were the two findings of failures to comply with OSP4, which involved providing information that was misleading or false.

Property Factor Enforcement Order

76. Having decided that the property factors had failed to comply with OSP4 and OSP6 and had failed to carry out the property factor's duties, the Tribunal then had to determine whether to make a Property Factor Enforcement Order.

77. The view of the Tribunal was that the property factors' failures were not of a particularly serious nature. The Tribunal did not consider that the property factors had deliberately misled the homeowners or had failed to act in good faith. They appeared to have made an honest mistake in assuming they had agreement at a meeting on 26 June 2023 to change lift maintenance providers. The delay in providing corrected Minutes was lengthy but had not had any significant impact beyond causing frustration and inconvenience to the homeowners and, whilst they had misled owners into thinking the lift maintenance insurance was a requirement, rather than best practice, the policy had been cancelled following the homeowners' complaints. They had made a number of accounting errors, but had apologised and had corrected them when they became aware of them. The Tribunal had decided that the OTIS contract for 3 years from 1 February 2023 was a renegotiated contract, but it appeared to represent good value for the owners and, as it was part of the core service the property factors were not obliged to have made owners aware of it. It was the fact that they had misrepresented it as an extension which had caused them to fall foul of the Code of Conduct.

78. The Tribunal was aware that the homeowners have expended a huge amount of time and energy on their complaints and applications and that this must have caused them great stress and concern, but a significant number of their complaints had not been upheld and the Tribunal had to consider this when

deciding whether any compensation should be paid to them. The Tribunal did not consider that a refund of factoring fees was appropriate, as the property factors had, throughout, provided services to the homeowners which went far beyond the lift maintenance and insurance. Errors in quarterly bills had been corrected and there was no actual loss. The homeowners had sought an admission from the property factors that LOLER does not apply to residential blocks of flats. The Tribunal, however, did not make a finding on that matter, so could not order the property factors to make such an admission. The Tribunal had also determined that the tone of communication with owners was not bullying, so was not prepared to order the property factors to apologise.

79. The Tribunal was of the view that the homeowners are entitled to some financial compensation for the anxiety and stress and the amount of time they have had to devote to their complaints, but had to take into account that a significant number of their complaints have not been upheld. Having carefully considered all the facts and circumstances, the Tribunal decided that it would make a Property Factor Enforcement Order and that the sum of £250 by way of compensation would be fair, reasonable and proportionate.

80. The Tribunal's Decision was unanimous.

Right of Appeal
In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

George Clark

_____ **24 January 2025**

Legal Member

Appendix

Code of Conduct

Overarching Standards of Practice

The following are the overarching standards of practice that property factors should apply in carrying out their work:

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

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

OSP3. You must provide information in a clear and easily accessible way.

OSP4. You must not provide information that is deliberately or negligently misleading or false.

OSP5. You must apply your policies consistently and reasonably.

OSP6. You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.

OSP7. You must not unlawfully discriminate against a homeowner because of their age, disability, sex, gender reassignment, being married or in a civil partnership, being pregnant or on maternity leave, race including colour, nationality, ethnic or national origin, religion or belief or sexual orientation.

OSP8. You must ensure all staff and any sub-contracting agents are aware of relevant provisions in the Code and your legal requirements in connection with your maintenance of land or in your business with homeowners in connection with the management of common property.

OSP9. You must maintain appropriate records of your dealings with homeowners. This is particularly important if you need to demonstrate how you have met the Code's requirements.

OSP10. You must ensure you handle all personal information sensitively and in line with legal requirements on data protection.

OSP11. You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

OSP12. You must not communicate with homeowners in any way that is abusive, intimidating or threatening.

Some of these points are expanded in the later sections of the Code.

Section 1: Written Statement of Services

N.B. Section 1 covers the contents of the written statement of services (WSS) only. The provisions relating to service standards are covered in the later sections of the Code.

1.1 A property factor must provide each homeowner with a comprehensible WSS setting out, in a simple, structured way, the terms and service delivery standards of the arrangement in place between them and the homeowner. If a homeowner makes an application under section 17 of the 2011 Act to the First tier Tribunal for a determination, the First-tier Tribunal will expect the property factor to be able to demonstrate how their actions compare with their WSS as part of their compliance with the requirements of this Code.

1.2 A property factor must take all reasonable steps to ensure that a copy of the WSS is provided to homeowners:

- within 4 weeks of the property factor:-
    - agreeing in writing to provide services to them; or
    - the date of purchase of a property (the date of settlement) of which they maintain the common parts. If the property factor is not notified of the purchase in advance of the settlement date, the 4 week period is from the date that they receive notification of the purchase;
    - identifying that they have provided misleading or inaccurate information at the time of previous issue of the WSS.
- at the earliest opportunity(in a period not exceeding 3 months) where:
    - substantial change is required to the terms of the WSS.

Any changes must be clearly indicated on the revised WSS issued or separately noted in a 'summary of changes' document attached to the revised version.

1.3 At all other times, a copy of the latest WSS must be made available by the property factor on request by a homeowner.

How the Code applies to different types of land ownership

1.4 The requirements in relation to the content of the WSS will depend on who owns the land which is factored. Unless otherwise stated, section 1.5 below will apply to all property factors. However, if land is owned by a land maintenance company or a party other than a group of home owners, Section 1.6 on Authority to Act applies rather than Section 1.5 A.

1.5 The WSS must make specific reference to any relevant legislation and must set out the following:

A. Authority to Act

(1) a statement of the basis of the authority the property factor has to act on behalf of all the homeowners in the group[3]. Property factors operating under a custom and practice arrangement with no formal appointment should clearly indicate this arrangement to homeowners in the WSS. Where this is the case, homeowners and property factors may wish to consider formalising their appointment;

(2) where the property factor has purchased the assets of another property factor, a clear statement confirming whether the property factor has taken on the outstanding liabilities of the previous property factor, and any other implications of the takeover for homeowners;

(3) where applicable, a statement of any level of delegated authority, for example the financial thresholds for instructing works and the specific situations in which the property factor may decide to act without further consultation with homeowners.

B. Services Provided

(4) the core services that the property factor will provide to homeowners. This must include the target times for taking action in response to requests from homeowners for both routine and emergency repairs and the frequency of property visits (if part of the core service);

(5) the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a 'menu' of services) and how these fees and charges are calculated and notified to homeowners.

C. Financial and Charging Arrangements

(6) the management fee charged by the property factor, including any fee structure and also the property factor's policy for reviewing and increasing or decreasing this management fee;

(7) what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services that each homeowner is responsible for. This is likely to be set out in the title deeds for the property. If management fees are charged at a flat rate rather than as a proportion, then this should be clearly stated;

(8) any arrangements relating to payment by homeowners towards a deposit, float or floating fund, confirming the amount, payment process and repayment policy (at change of ownership or where the service is terminated by homeowners or by the property factor) (see section 3 of the Code: Financial Obligations);

(9) any arrangements for collecting payment from homeowners for sinking or reserve funds, specific projects or cyclical maintenance, confirming amounts and payment process;

(10) the timing and frequency of billing and by what method homeowners will receive their bills;

(11) how the property factor will collect payments, including timescales and methods (clearly stating the payment methods available to homeowners). Any charges relating to late payment must clearly state the period of time after which these charges would be applicable (see Section 4 of the Code: Debt Recovery);

(12) the property factor's debt recovery procedure which must be made available on request (see section 4 of the Code: Debt Recovery).

D. Communication and Consultation

(13) how homeowners can access information, documents and policies/procedures that they may need to understand the operation of the property factor;

(14) procedures and timescales for responding to enquiries and communications received from homeowners in writing and by telephone (including details of the property factor's standard working hours);

(15) the property factor's complaints handling procedure[1];

(16) the property factor's privacy notice and their registration details with the Information Commissioner's Office's Data Protection Public Register.

E. Declaration of Interest

(17) a declaration of any financial or other interests which the property factor has in the common parts of property and land to be managed or maintained, for example as a homeowner (including where the property factor is an owner or acting as a landlord but not where it is undertaking letting agency work in respect of a property[2]). If no interest is declared, then this must be clearly stated.

F. Information about the 2011 Act and the duties it places on property factors.

(18) this will include the duty to Register, the use of a Property Factor Registered Number and the duty to comply with the Code.

G. How to End the Arrangement

(19) clear information on when and how a homeowner should inform the property factor of an impending change in ownership of their property (including details of any reasonable period of notice which is required by the property factor to comply with its duties under this Code. This information should also state any charges for early termination/administration costs;

(20) clear information that homeowners may (by collective or majority agreement or as set out in their title deeds) terminate or change the service arrangement including signposting to any relevant legislation, for example the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. This information should include any "cooling off" period or period of notice;

(21) a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could include any requirement for the provision of a letter of authority, or

similar, from the majority of homeowners to confirm their instructions on the information they wish to be shared.

G (20) and (21) do not apply to situations where homeowners do not own factored land.

The following requirements apply where the land is owned by a land maintenance company or a party other than the group of homeowners

1.6 The WSS must make specific reference to any relevant legislation and must set out the following in terms of authority to act:

A. Authority to Act

(1)a statement of the legal basis of the arrangement between the property factor and the homeowner;

(2)a description of the use and location of the area of land to be maintained, including a map where possible (this information must be updated to reflect any changes):

- within 4 weeks of the change;
- within 4 weeks of the property factor identifying that they have provided misleading or inaccurate information at the time of previous issue; or
- at the earliest opportunity (in a period not exceeding 3 months) where substantial change is required.

Section 2: Communication and Consultation

2.1 Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes and promoting mutual respect. It is the homeowners' responsibility to make sure the common parts of their building are maintained to a good standard. They therefore need to be consulted appropriately in decision making and have access to the information that they need to understand the operation of the property factor, what to expect and whether the property factor has met its obligations.

2.2 Factors are required to comply with current data protection legislation when handling their client's personal data, and to ensure that this information is held and used safely and appropriately.

The Code requires that:

2.3 The WSS must set out how homeowners can access information, documents and policies/procedures. Information and documents can be made available in a digital format, for example on a website, a web portal, app or by email attachment. In order to meet a range of needs, property factors must provide a paper copy of documentation in response to any reasonable request by a homeowner.

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

2.5 A property factor must provide a homeowner with their contact details, including full postal address with post code, telephone number, contact e-mail address (if they have an e-mail address) and any other relevant mechanism for reporting issues or making enquiries. If it is part of the service agreed with homeowners, a property factor must also provide details of arrangements for dealing with out-of-hours emergencies including how a homeowner can contact out-of-hours contractors.

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.

2.7 A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in their WSS. Overall a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.

2.8 A property factor must take all reasonable steps to ensure that their property factor registered number is included in any document sent to a homeowner.[3]

2.9 Where another property factor is due to take over the management of property and land owned by homeowners; the outgoing property factor must co-operate (within the limits of their authority to act and data protection legislation) with the new, formally appointed, property factor (and vice versa), to supply each other with information about the land and properties to be factored and contact details for homeowners. This could be achieved via a letter of authority from the majority of homeowners to confirm their instructions to the outgoing property factor and list the information they wish to be shared.

2.10 Where the property factor has purchased the assets or otherwise been introduced to homeowners by the existing property factor, the letter of introduction should include a clear statement that homeowners are responsible for choosing and appointing their property factor and are not obliged to take up the offer of services.

Section 3: Financial Obligations

3.1 While transparency is important in the full range of services provided by a property factor, it is essential for building trust in financial matters.
Homeowners should be confident that they know what they are being asked to pay for, how the charges were calculated and that no improper payment requests are included on any financial statements/bills. If a property factor does not charge for services, the sections on finance and debt recovery do not apply.

3.2 The overriding objectives of this section are to ensure property factors:

- protect homeowners' funds;
- provide clarity and transparency for homeowners in all accounting procedures undertaken by the property factor;
- make a clear distinction between homeowners' funds, for example a sinking or reserve fund, payment for works in advance or a float or deposit and a property factor's own funds and fee income.

3.3 All property factors should be aware of the threat of money laundering and must comply with all relevant legislation and guidance to minimise the risk that they and their business will be used to launder the proceeds of crime.

3.4 A property factor must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial statement showing a breakdown of charges made and a detailed description of the activities and works carried out which are charged for.

3.5 If homeowners decide to terminate their arrangement after following the procedures laid down in the title deeds or in legislation, or the property factor decides to terminate the arrangement, a property factor must make the financial information that relates to their account available to the homeowners. This information must be provided within 3 months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

3.6 Unless the title deeds specify otherwise, a property factor must return all funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill, following a change of property factor.

3.7 In cases where a property changes ownership, the property factor must confirm the process for repaying any funds that are due and presenting the final financial information relating to the account. This must be provided within 3 months of the property factor being made aware of the actual date of change in ownership (the date of settlement) unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services or the property factor has not been provided with the specified period of notice informing them of the change in ownership).

3.8 A property factor must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on the sale of the property).

In order to protect homeowner funds, if the property factor is a housing association or a local authority:

3.9 Homeowners' floating funds must be accounted for separately from the property factor's own funds, whether through coding arrangements or through one or more separate bank accounts.

3.10 In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account or accounting structure must be used for each separate group of homeowners.

All other property factors:

3.11 Homeowners' floating funds must be held in a separate account from the property factor's own funds. This can either be one account for all its homeowner clients or separate accounts for each homeowner or group of homeowners.

3.12 In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest-bearing account must be opened in the name of each separate group of homeowners. A property factor must only transfer funds from one such account

3.13 to another in line with the arrangements in any agreement with homeowners to do so.

Section 4: Debt Recovery

4.1 Non-payment by some homeowners may affect provision of services to others, or may result in other homeowners in the group being liable to meet the nonpaying homeowner's debts in relation to the factoring arrangements in place (if they are jointly liable for such costs). For this reason it is important that homeowners are made aware of the implications of late payment and property factors have clear procedures to deal promptly with this type of situation and to take remedial action as soon as possible to prevent non-payment from escalating.

4.2 It is a requirement of section 1 of the Code (written statement of services) that a property factor informs homeowners of any late payment charges and the property factor's debt recovery procedure is made available to homeowners.

4.3 Any charges that a property factor imposes in relation to late payment by a homeowner must not be unreasonable or excessive and must be clearly identified on any relevant bill and financial statement issued to that homeowner.

4.4 A property factor must have a clear written procedure for debt recovery which outlines a series of steps which the property factor will follow. This procedure must be consistently and reasonably applied. This procedure must clearly set out how the property factor will deal with disputed debts and how, and at what stage, debts will be charged to other homeowners in the group if they are jointly liable for such costs.

4.5 When dealing with customers in default or in arrears difficulties, a property factor should treat its customers fairly, with forbearance and due consideration to provide reasonable time for them to comply. The debt recovery procedure should include, at an appropriate point, advising the customer that free and impartial debt advice, support and information on debt solutions is available from not-for-profit debt advice bodies.

4.6 A property factor must have systems in place to ensure the monitoring of payments due from homeowners and that payment information held on these systems is updated and maintained on a regular basis. A property factor must also issue timely written reminders to inform a homeowner of any amounts they owe.

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).

4.8 On request, a property factor must provide homeowners with a statement of how service delivery and charges will be affected if one or more homeowners does not pay their bills.

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.

4.10 A property factor must be able to demonstrate it has taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging other homeowners (if they are jointly liable for such costs). This may include providing homeowners with information on options for accessing finance e.g. for major repairs. Any supporting documentation must be made available if requested by a homeowner (subject to data protection legislation).

4.11 A property factor must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice to the homeowner of its intention to raise legal action (see also section 4.7).

Section 5: Insurance

5.1 A property factor must have, and maintain, an adequate professional indemnity insurance policy, and ensure that it is appropriate for its level of income and type of services offered. This applies to a property factor that is a local authority or housing association unless it is able to arrange equivalent protections through another route. Details of the policy (including name of provider, policy number and summary) or equivalent protections must be made available if requested by a homeowner who wishes to verify the policy is in place.

5.2 Property factors may wish to make homeowners aware of their statutory duty to insure against prescribed risks, such as fire or flood (see section 18 of the Tenements (Scotland) Act 2004, and the Tenements (Scotland) Act 2004 (Prescribed Risks) Order 2007 (SSI 2007/16)).

If the agreement with homeowners includes arranging any type of buildings or contents insurance, the following standards will apply:

5.3 A property factor must provide an annual insurance statement to each homeowner (or within 3 months following a change in insurance provider) with clear information demonstrating:

- the basis upon which their share of the insurance premium is calculated;
- the sum insured;
- the premium paid;
- the main elements of insurance cover provided by the policy and any excesses which apply;
- the name of the company providing insurance cover; and
- any other terms of the policy.

This information may be supplied in the form of a summary of cover, but full details must be made available if requested by a homeowner.

5.4 Homeowners must be notified of any substantial change to the cover provided by the policy.

5.5 A property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit that is paid to them or anyone in control of the business or anyone connected with the factor or a person in control of the business, in connection with the policy. They should also disclose any financial or other interest that they have with the insurance provider or any intermediary. A property factor must also disclose any other charge they make or apply for arranging such insurance.

5.6 If applicable, a property factor must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly. This information must be made available if requested by a homeowner. If homeowners are responsible for submitting claims on their own behalf (for example, for work that is not on common parts), a property factor must take reasonable steps to supply to homeowners all information that they reasonably require in order for homeowners to be able to do so.

5.7 A property factor must take reasonable steps to keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves if required.

5.8 On request, a property factor must be able to demonstrate how and why they appointed the insurance provider, including an explanation where the factor decided not to obtain multiple quotes.

5.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available to homeowners on request.

Property Revaluations for Buildings Insurance:

5.10 A property factor must notify homeowners in writing of the frequency with which property revaluations will be undertaken to establish the building reinstatement valuation for the purposes of buildings insurance. It is good practice for re-valuations to be undertaken at least every 5 years and sums assured reviewed in other years using the BCIS Rebuilding Cost Index. The property factor must adjust this frequency of property revaluations if instructed to do so, in line with the arrangements in any agreement with homeowners.

Where Public Liability Insurance is Required

5.11 On request, a property factor must provide homeowners with clear details of the costs of public liability insurance, how their share of the cost was calculated, and the terms of the policy and the name of the company providing insurance cover.

Section 6: Carrying out Repairs and Maintenance

6.1 This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.

6.2 Property factors may also agree, by contract, to instruct that specific maintenance duties are undertaken by specialist contractors on behalf of homeowners which contribute to fire safety. For example, the requirement in fire safety law to maintain any measures provided in communal areas for the protection of firefighters e.g. firefighters lifts, rising fire mains etc, or to ensure that common areas are kept free of combustible items and obstructions.

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

6.4 Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.

6.5 If emergency arrangements are part of the service provided to homeowners, a property factor must have procedures in place for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for providing contractors access to properties in order to carry out emergency repairs, wherever possible.

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.

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.

6.8 A property factor must take reasonable steps to appoint contractors who have public liability insurance.

6.9 If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) must be made available if requested by a homeowner.

6.10 A property factor must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit that is paid to them or anyone in control of the business or anyone connected with the factor or a person in control of the business, in connection with the contract.

6.11 A property factor must disclose to homeowners, in writing, any financial or other interests that the property factor has with any contractors appointed by them.

6.12 If requested by homeowners, a property factor must continue to liaise with third parties i.e. contractors, within the limits of their 'authority to act' (see section 1.5A or 1.6A) in order to remedy the defects in any inadequate work or service that they have organised on behalf of homeowners. If appropriate to the works concerned, the property factor must advise the property owners if a collateral warranty is available from any third party agent or contractor, which can be instructed by the property factor on behalf of homeowners if they agree to this. A copy of the warranty must be made available if requested by a homeowner.

Section 7: Complaints Resolution

Property Factor Complaints Handling Procedure

7.1 A property factor must have a written complaints handling procedure. The procedure should be applied consistently and reasonably. It is a requirement of section 1 of the Code: WSS that the property factor must provide homeowners with a copy of its complaints handling procedure on request.

The procedure must include:

- The series of steps through which a complaint must pass and maximum timescales for the progression of the complaint through these steps. Good practice is to have a 2 stage complaints process.
- The complaints process must, at some point, require the homeowner to make their complaint in writing.
- Information on how a homeowner can make an application to the First-tier Tribunal if their complaint remains unresolved when the process has concluded.
- How the property factor will manage complaints from homeowners against contractors or other third parties used by the property factor to deliver services on their behalf.
- Where the property factor provides access to alternative dispute resolution services, information on this.

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.

7.3 A property factor must not charge homeowners for handling complaints unless this is explicitly provided for in the property titles.

7.4 A property factor must retain (in either electronic or paper format) all correspondence relating to a homeowner's complaint for a period of at least 3 years from the date of the receipt of the first complaint.

7.5 Where a property factor has taken over the management of property and land owned by homeowners from another property factor, the previous property factor must co-operate with the current property factor (and vice versa) to ensure the exchange of all necessary or relevant information. This can include, information about outstanding complaints. Where information about an unresolved issue that was the subject of a complaint has been shared with the new, formally appointed factor, they have the option, if they so choose, to progress this complaint rather than starting a new one.

7.6 Complaints that have arisen in connection with issues that arose during the appointment of a previous property factor should be dealt with by that property factor. Any unresolved issues that require to be addressed can be raised with the new, formally appointed property factor if the continuing failure is present after their appointment. This will be dealt with as a new complaint in accordance with their complaints handling procedure.