Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 19(1)(a) of the Property Factors (Scotland) Act 2011

Case reference: FTS/HPC/PF/21/0124

Re:- 3/1 397 Great Western Road, Glasgow G4 9HY

The Parties:-

Okay Limited, having a registered office at Summit House, 4-5 Mitchell Street, Edinburgh EH6 7BD
("the Applicant")

and

James Gibb Property Management Ltd, 65 Greendyke Street, Glasgow G1 5PX
("the Respondent")

Tribunal Members:

Richard Mill (legal member) and Sara Hesp (ordinary member)

Decision

The Tribunal unanimously determined that the respondent has failed to comply with sections 2.5, 6.1 and 6.4 of the Code of Conduct for Property Factors ("the Code"), and in all other respects has adhered to the Code. The Tribunal also unanimously determined that the respondent has complied with their property factor duties. A Property Factor Enforcement Order ("PFEO") is necessary due to the respondent's breaches of the Code.

Background

By application received on 18 January 2021, the applicant complains about the respondent having breached the Code, together with their property factor duties. The sections of the Code highlighted are 1, 2, 5, 6 and 7. The alleged failure in duties is said to relate to the respondent's failure to maintain, manage and repair the communal areas of the building.

Documentation submitted into evidence

The written application by the applicant is accompanied by a number of additional documents. The entirety of the applicant's originating bundle is paginated 1-175.

In response to a Direction issued by the Tribunal, the applicant subsequently lodged a copy of the relevant title deeds.

The respondent lodged a detailed written submission, together with a substantial bundle of appendixes numbered 1- 17, and paginated 1-158, under cover of letter dated 21 April 2021.

The written application does not specify the individual sections of the Code which are complained about. However, upon scrutinising the written complaints previously made by the applicant to the respondent, and intimation of the complaints formally for the purposes of Section 17(3) of the Act, it is identified that the sections of the Code complained about are 2.5, 5.4, 5.5, 6.1, 6.4 and 6.9.

Procedure and hearing

The Tribunal actively case managed the application and regulated both procedure and the production of documents by the parties.

A hearing on the application had been scheduled to take place on 29 March 2021. The respondent applied for a postponement. This request was granted with the Tribunal fixing a fresh timetable for the lodging of documents by the respondent. The applicant was also requested to produce additional documentation.

The evidential hearing took place by teleconference on 29 April 2021 at 10.00 am. Dr Meenee Khanna, who is a Director of Okay Limited represented the interests of the applicant. She was accompanied by her husband for part of the hearing. The respondent was represented by Mr David Gray of BTO Solicitors LLP. In attendance from the respondent's organisation was Mr Nic Mayall, Managing Director (Operations) and Ms Melissa Robertson, Development Manager.

Preliminary matters

i. The application was submitted to the Tribunal by Dr Meenee Khanna. The heritable proprietor of the property is Okay Limited. Dr Meenee Khanna is a Director of Okay Limited but is not the homeowner and accordingly does not have the right to bring the application in her own name. In the circumstances, the Tribunal allowed the application to be amended under Rule 32 of the First-tier Tribunal for Scotland (Housing & Property Chamber) Rules of Procedure 2017. The applicant was amended to Okay Limited. This was with the consent of the respondent.

ii. Okay Limited previously owned both flats 3/1 and 3/2, 397 Great Western Road, Glasgow G4 9HY. Flat 3/2 was sold in February 2020. The application which is brought before the Tribunal complains about the actions of the respondent in respect of both flats. The applicant was not the homeowner of

flat 3/2 at the time this application was made to the Tribunal. With the agreement of the respondent the Tribunal found that it had jurisdiction in respect of both flats following the decision of the Upper Tribunal by Sheriff Deutsch in Shields and Another -v- Housing and Property Chamber. The applicant was the homeowner at the time the complaints relate to.

The applicant's general complaints

All of the applicant's complaints arise from what is said to be the respondent's failures to respond to and address water ingress at the property. It is further complained that continuing water ingress has led to a further deterioration in the condition of the property including dry rot.

The applicant asserts that the respondent has failed to maintain, manage and repair the communal areas of the building.

Findings in Fact

1. The relevant properties are flats 3/1 and 3/2, 397 Great Western Road, Glasgow G4 9HY ("the properties"). The heritable proprietor of the properties is Okay Limited, a company registered under the Companies Act 1985, having its registered office at 4-5 Mitchell Street, Edinburgh, EH6 7BD. Dr Meenee Khanna is a director of Okay Limited and accordingly has a right and interest to bring these proceedings before the Tribunal on behalf of Okay Limited.

2. The properties are adjoining top floor flats, on the third floor at 397 Great Western Road, Glasgow, which form part of the tenement block 393-401, odd numbers only, Great Western Road, Glasgow ("the tenement"). In terms of the relevant title the properties are each burdened with paying a one-tenth share of the cost of maintaining in good order and repair the relevant common parts of the tenement 393-401 Great Western Road, Glasgow. The block consists of six flats and four commercial units on the ground floor (two of the commercial units have been combined into one). Flat 3/2 was sold by the applicant in February 2020.

3. The relevant titles of the properties appointed Grant and Wilson, Property Agents and Factors, as the property factor. The business of Grant and Wilson was acquired by James Gibb Property Management Limited, the respondent, on 2 March 2015. The respondent has been the property factor for the properties since that date.

4. The respondent is a registered property factor – No PF000103. A Written Statement of Services, together with a Development Schedule has been issued to the applicant and all other relevant owners.

5. In terms of the Development Schedule, the respondent's authority to act, for non-emergency repairs, is £350 plus VAT per job. At section 06 of the Development Schedule the respondent undertakes to carry out routine property inspections on a bi-annual basis.

6. The applicant's concerns regarding water ingress to the top floor properties commenced in March 2015, specifically flat 3/1 then.

7. The applicant purchased the properties in or about 1995 and has historically let out the properties using KPM Residential Ltd, Letting Agents, Glasgow ("KPM").

8. The respondent was first notified of an escape of water by the applicant in flat 3/1 in March 2015. This was reported by the tenants. In particular water was entering the property from a hole in the ceiling in the kitchen and additionally through a crack in the bedroom wall. The respondent timeously instructed an unknown contractor to make investigations. Their actions in this respect were confirmed by email to the applicant's managing agents, KPM, on 23 March 2015. The respondent was advised by said contractor that the water ingress was not from the common parts of the tenement, but was in fact an internal leak. The applicant was advised to instruct their own repairs. The respondent acted in good faith by conveying to the applicant the opinion of their contractor regarding the issue.

9. The applicant subsequently identified an escape of water in flat 3/2 in April 2015. Cracks had appeared in the wall through which water was entering the property. This was reported by the tenants. The respondent also believed on the basis of the opinion of their contractor that the problem was a private one related to the individual flat as opposed to a common repair issue.

10. The applicant commissioned their own report from Anchor Limited in August 2015, after an unexplained delay of a number of months. This report was commissioned due to the respondent's assertion that the problem was private, not common. This report was passed to the respondent. This report highlighted that flat 3/2's window mastic had lost its effectiveness due to the effect of corroded and damaged stonework. The The applicant has failed to evidence taking responsibility for repairing the failed window mastic which, according to the respondent's own contractor who visited the property in or about March 2015, and highlighted again by Anchor Limited, was the direct cause of water ingress. The respondent was required to advance the stonework issues but had no responsibility for the window defect. The applicant has not instructed repairs to the windows at either of the top floor flats.

11. On the basis of the Anchor Limited report, the respondent instructed its contractors to attend the block and also requested internal access from KPM. The respondent's contractors, JLG Slating, unblocked an internal downpipe in December 2015. In order to conduct further investigations direct access was required from the applicant's properties, which involved access from both flats 3/1 and 3/2. Access was delayed and not granted until 21 January 2016 but on attendance the respondent's contractors were unable to gain access internally.

12. In January 2016 KPM raised an urgent request with the respondent for remedial work to be undertaken to the block. A piece of stone had become

detached from the building and there was a risk to pedestrians. The required work was undertaken timeously by the respondent.

13. In January 2016 the respondent was advised for the first time that other flats in the same block, being the two flats, 2/1 and 2/2, both on the second floor, were also suffering from water ingress. Further investigations were instructed and further repairs were made to the tenement in 2016 on the instructions of the respondent. On around 17 June 2016, Clark Grant Roofing and Maintenance Limited, sealed a section of gutter. On or around 3 August 2016, JLG Slating, cleared the front gutters and refitted slipped tiles.

14. Over 2015 and 2016 the respondent reacted to a number of issues raised regarding the condition of the roof and stonework leading to water ingress in properties at the homeowner's property and adjoining properties.

15. Reports of water ingress to the tenement were again received by the respondent in 2017. Clark Grant Roofing and Maintenance Limited were instructed by the respondent to conduct a more detailed extensive survey which was completed in June 2017. This was for the purpose of undertaking more widespread repairs to the tenement given the number of ad hoc repairs which had been carried out over the course of around the last 2 years. This survey highlighted a total of ten issues. It was reasonably anticipated by the respondent and all relevant others that the identification and resolution of that range of issues would solve all problems encountered with ingress at the properties and tenement. The respondent then sourced a number of quotes and collected funds from the proprietors of the tenement to undertake the recommended works. AGM Roofing and Construction Ltd were instructed to undertake the repairs and these were completed by April 2018 to the satisfaction of the applicant.

16. Despite the works undertaken and completed by April 2018, further reports of water ingress were subsequently reported to the respondent.

17. Dry rot was first identified in the properties by the applicant, and reported to the respondent, in or about September 2018. The respondent proceeded to instruct a quote from Wise Property Care (originally instructed by the applicant) in September 2018 for dry rot works. The survey was completed on 18 October 2018. The respondent subsequently sourced quotes for the dry rot works required as recommended and received those quotes in January and February 2019. The dry rot works were ultimately instructed and carried out by Alliance Timber and Damp Specialists. A competitive quote had also been obtained by Richardson & Starling. Alliance was appointed as contractor and began to undertake repairs between November 2019 and December 2019.

18. The respondent obtained three quotes for repair works to the stonework between February and June 2019 and identified a preferred contractor. Not all proprietors of the tenement made payment of their requisite share for the proposed and recommended repairs. In particular the commercial units on the ground floor of the tenement did not contribute. Attempts were made to

use the missing shares scheme provided by Glasgow City Council to cover the missing share, but that was unsuccessful. Glasgow City Council had previously provided funds for missing shares regarding the commercial units in the block and those funds have never been repaid.

19. Given the potential extensive works required to the tenement with high costs to be allocated to each flat and each commercial unit, Glasgow City Council recommended that a full and extensive Condition Report of the building was prepared and that potentially with a view to securing grant funding or heritage trust funding. It was also suggested by Glasgow City Council that it may be worth the committed owners, including the applicant, in the tenement repaying the outstanding missing share contributions previously paid by Glasgow City Council which would enhance any subsequent such application being made to them. This was on the basis that the outstanding sums in respect of the previous missing shares scheme payment were minimal compared with the likely cost of any future missing shares application. The outstanding missing share funds due to Glasgow City Council were not however repaid.

20. The respondent commissioned a full Building Condition Report which was obtained from Helix Building Consultancy. This Condition Report is dated 28 August 2020. This is an extensive document extending to some 28 pages which also has appended to it numerous photographs to support and evidence their findings. It was noted that the front roof slope drains into a lead and felt lined stone wallhead gutter. This has been originally lead lined and has been surfaced over as a remedial repair at some point in the past with roof felt which has reduced the capacity of the wallhead gutter. Also raised is the possibility that there was a previous internal rainwater downpipe from the wallhead gutter which has been removed. The capacity to remove water from the wallhead gutter has been reduced due to the provision of the felt and possibly also as a consequence of the removing of the previous internal rainwater downpipe. It is most likely that these works were carried out some significant time ago, well before the respondent assumed responsibility for factoring the block. This assessment and opinion of Helix is a likely significant contributing factor to water ingress into the two top flats in the block, namely 3/1 and 3/2. The respondent had not been advised of this detail by any of the previous former contractors instructed to attend the property of which there had been many. Helix advised the respondent that the position of the crack towards the outer face of the reveal/rybat stones to the window on the front elevation of the tenement, as it adjoins the roof section, would suggest that it is unlikely that this particular crack is a source of significant water ingress. In their opinion it was more likely that the mastic sealant to the perimeter of the window opening was debonded from the face of the window frame causing a source of water ingress giving rise to the contribution or cause of the internal decay. This issue of a failure of the window mastic, a private issue had first been raised with the applicant in 2015 but not attended to.

21. The necessary works highlighted by Helix have still not been instructed. Matters are at the stage of the respondent consulting with all relevant proprietors in order to obtain their consent to the extensive works and the

commitment to pay their respective share of the costs (with or without grant funding or heritage trust funding). To date there has not been a commitment or response by many of the proprietors of the tenement. The respondent is currently considering next steps to seek to engage all proprietors but cannot be responsible for the delay and failure of proprietors to engage.

22. There has been a high level of correspondence between the applicant (in particular with Dr Khanna and her managing agents, KPM) and the respondent since 2015 in relation to issues at the property and within the tenement as a whole. The respondent has responded to the majority of these communications in a professional timely manner and consistent with their own service standards as set out within their Written Statement of Services. There have been an unspecified number of occasions where this has not been the case and the respondent has failed to deal with that applicant's inquiries and complaints timeously.

23. The respondent has a procedure in place for submitting an insurance claim on behalf of homeowners and information regarding such process is readily available to homeowners on request and on the respondent's website. There was a period throughout which it was anticipated that the applicant required to make an insurance claim in respect of the damage to their own properties and the respondent provided additional information as required to assist the applicant in pursuing that claim.

24. There are procedures in place to allow homeowners to notify the respondent on matters which require repair and maintenance or attention. The report of such matters can be logged with the respondent by telephone. The respondent does not routinely keep a record of all telephone calls, despite actioning telephone calls received. The respondent does not undertake to adhere to any specific timescales in respect of non-routine repair and maintenance issues, which the applicant's concerns almost exclusive relate to.

25. The respondent's record keeping in respect of works undertaken to the tenement and the contractors involved is partial. A less than full record of inquiries made on behalf of all relevant homeowners and the scope of such work undertaken and by whom is not available.

26. The respondent has failed to adhere to their own commitment in terms of the Development Schedule to carry out bi-annual inspections and to thereafter prepare a programme of works. No evidence of bi-annual inspections has been produced.

Reasons for Decision

The Tribunal was satisfied that it had sufficient detailed evidence upon which to reach a fair determination of the application.

The Tribunal's decision is based upon the Tribunal's detailed findings in fact which were established on the basis of the documentary and oral evidence.

The applicant's primary complaints arise from duty complaints.

In order to establish a breach of reasonable care and fulfilment of the respondent's duties, the applicant requires to establish:

- When the damage to the building (stoneworks) was caused and when the symptoms of dry rot manifested;

- Establishing the cause of the damage to the building;

- That the respondent was aware of the nature and extent of the damage to the building (stoneworks) and was aware of the dry rot, but chose (even by omission) not to act;

- That a property factor of ordinary competence acting with normal skill and care would have instructed works prior to when the respondent in fact did.

The applicant would require to establish (ie prove by credible and reliable evidence) causation to the required standard of proof, which is a balance of probabilities. The applicant would require to establish that it is more likely than not that the respondent's acts and omissions have actually caused damage to the properties and the tenement and led to the claimed losses. The applicant has fallen far short of evidencing this.

The applicant has failed to produce any independent expert opinion evidence supporting its allegations of professional negligence on the part of the respondent.

The Tribunal finds that on the basis of its primary findings in fact that the decay to the tenement including stonework deterioration and dry rot is the consequence of wear and tear over many years.

The Tribunal is satisfied that from 2015 the respondent has taken seriously the applicant's complaints regarding water ingress and did instruct relevant contractors to attend at the tenement. There is sufficient documentary evidence, supported by the respondent's witnesses at the hearing, to this effect. The Tribunal finds all this evidence credible and reliable. It is however surprising that the respondent has not been able to provide a full and accurate schedule of the specific dates that reports of problems at the properties (and the tenement at large) were reported to them, the dates that relevant works were instructed, the identity of the contractors used, and the actual works undertaken and when they were completed. This would be a reasonable expectation for any homeowner and the inability to provide this clear evidence made the Tribunal's task of assessing and evaluating the evidence much more difficult. On balance however, the Tribunal was satisfied that concerns regarding the condition of the property were explored, contractors were instructed and recommended works were undertaken.

There is no doubt that, for some time, the respondent's approach was reactionary in nature as opposed to being proactive. This however is not in any way unusual in terms of a property factor's performance in managing a traditional tenement building

which over time requires significant investment into the upkeep of the common parts. It is understandable that a property factor will seek to carry out the most cost efficient repairs, carrying out only the work which is necessary, and most expeditiously in order to save costs to all proprietors. There has been a historical problem in the tenement regarding the commitment of all of the relevant heritable proprietors to commit to more widespread common repairs. It would not be reasonable nor usual to expect the property factor to have commissioned such a detailed Condition Report such as the Helix Report back in 2015. Deterioration of the stonework and the lead wallhead gutter is most likely to have been ongoing for many years.

As can be seen from the Tribunal's findings in fact, the respondent instructed numerous contractors to attend at the block to seek to remedy the problems which had been reported. As time progressed matters became more focused, and the trigger for the more extensive widespread report was the identification of dry rot which was not reported to the respondent prior to September 2018. The only reason dry rot was detected at that time was due to disruptive works being undertaken by the fitting of a new kitchen in one of the applicant's properties which had exposed the problem.

The manner in which dry rot manifests itself is very unpredictable. It is a condition which may have started many years ago and has simply been exacerbated by more recent water ingress or, alternatively, it may have only commenced much more recently and developed and worsened at great pace. Whilst the cause of the dry rot is more likely than not to have been water ingress to the properties and the tenement at large, there is no evidence upon which the Tribunal can find and conclude that dry rot has been occasioned and is attributable to any act or omission of the respondent.

The respondent has accepted that at times their response to communications with the applicant have fallen below their own expected standards. Similarly, the respondent accepts that there were, at times, some delays in informing the applicant and other homeowners of the progress of required works at the tenement. Again, the respondent has been candid regarding their shortcomings in this respect.

Aside from the fact that there is no clear evidence to establish that the respondent has failed in any particular way, thus causing damage to the property, either in terms of the roof, stoneworks or dry rot, there is also a reasonable likelihood that more extensive damage has been caused to the internal parts of the tenement by failed window mastic in the properties which is a private, not a common matter, for which the respondent is not responsible. This was a matter first raised with the applicant in 2015 when complaints of water ingress were first reported to the respondent. The respondent's first contractor engaged to evaluate the situation, raised the failed window mastic of the windows which would be a matter for the individual property owner ie the applicant. Despite this having been raised by the respondent's own contractor in early 2015 and conveyed to the applicant, and it having been raised again by Anchor in their report, specifically commissioned by the applicant, Dr Khanna was unable to advise the Tribunal whether the defect in the window mastic had ever been attended to. The Tribunal found this very surprising. The applicant has employed an agent in Glasgow, KPM, to manage the properties and no evidence was produced from that source as to any inspections or condition reports,

and consequential works undertaken to the property which would include the issue of the defective windows.

It is unclear when the last major overall and renovations of the entire tenement was carried out, but it is likely to have been decades ago. The block was built in or about 1880. Dr Khanna and her sister purchased, by way of their company, flat 3/1 in 1995. It is unknown when precisely flat 3/2 was purchased. They chose to commence business as a commercial residential landlord operating under the umbrella of a limited company. Any commercial landlord must expect, like any homeowner, to invest funds in the renovation and upkeep of such a tenement building over time. The costs involved in maintaining and renewing common parts of a substantial tenement building such as the one in which the applicant's properties are comprised would be expected to be substantial over a 25 to 30 year period or thereby. It is commonplace to find the type of decay and resulting problems faced by the applicant in such tenements. It is also extremely common in tenement blocks to find a lack of commitment on the part of all relevant owners to meet the required costs. Individuals and businesses such as the applicant purchase such properties knowing these commitments and risks. The financial impact is softened by the exponential growth in property prices which has been seen over most recent decades. The respondent cannot be held to account and found responsible for these costs and the failure of the owners themselves to commit to ongoing extensive repairs and renewals.

The fact that the respondent has failed to keep good historical recordkeeping, and by their own admission do not log or record all telephone calls which come in, is clearly a practice which should be improved and ultimately is likely to be the respondent's own benefit in resisting unfounded complaints against them. In that regard the Tribunal would expect the respondent to review their practices and to provide additional staff training in these areas. As well as long-term efficiencies and benefits for the respondent such practices will undoubtedly assist homeowners such as the applicant who seek full transparent clarification regarding the history of the respondent's actions. The respondent's failings in these respects however do not amount to a breach of their property factor duties. The Tribunal was satisfied that concerns and complaints raised with the respondent are addressed and actioned. The difficulty is limited to the respondent being able to clearly evidence this. It is their administration which has fallen short not their primary actions. The inability of the respondent to provide comprehensive and accurate information, due to poor record keeping, has undoubtedly led to frustration and mistrust on the part of the applicant.

The poor quality of the respondent's own recordkeeping was well evidenced by the inability of either of the respondent's witnesses to provide any clarity or specification regarding the bi-annual property inspections which the respondent has undertaken to carry out as specified within the Development Schedule. Conflicting statements have been made to the applicant over time regarding these inspections which previously stated to the applicant in communications that a copy of the relevant reports from such inspections could be made available. A letter was issued to the applicant previously from a staff member of the respondent advising such reports can be made available. The respondent's position at the hearing was that there is no formality to the inspections, there is no need for a written record of such inspections and that any such information is for the respondent's own internal use

only. The Tribunal finds these explanations inconsistent and conflicting with earlier statements on behalf of the respondent's organisation and that such statements lack credibility. The Tribunal was unable to conclude with any certainty that the bi-annual inspections have been carried out at all, but this is clearly an additional area where the respondent would benefit from making clear recordings of bi-annual inspections which they undertake to carry out and to convey the findings to all relevant homeowners.

The applicant seeks to recover losses under a number of heads of claim which arise from the suggestion that the respondent significantly breached their duties to remedy the source of the water ingress at the property which caused significant further damage and, indeed, dry rot. The Tribunal has found that the applicant has failed to evidence that the respondent has failed in their duties and, as such, the Tribunal finds that the respondent is not liable for the losses which the applicant seeks.

The applicant seeks to recover the costs incurred from the works undertaken by Alliance in 2019, which it paid for as the works were private in nature. If the cause of the damage to the stonework and dry rot was due to wear and tear, then the repairs made to the applicant's properties would have been required with or without any action on the part of the respondent. In other words the respondent would not have caused the applicant's loss. If the respondent is so liable, then the respondent can only be liable for exacerbation of the damage which had already occurred to the applicant's properties and the common parts of the tenement. The Tribunal finds that the cause was wear and tear. The respondent is not liable to the applicant for these costs.

The applicant seeks payment for loss of rent between June 2018 and November 2019 in the sum of £13,500. Insufficient evidence has been produced of that loss. No copy of any relevant leases between the applicant and tenants during that period or any other has been lodged. No evidence setting out the total payments made to the applicant in respect of rent received has been produced. No Notices to Quit confirming that dates upon which tenants vacated the property have been produced. In any event the Tribunal finds that the damage to the properties is due to wear and tear and that the respondent cannot be found liable for such claimed losses.

The applicant seeks to recover losses incurred as a consequence of paying Council tax. This is linked to the suggestion that there has been a loss of rent and in the absence of tenants occupying the property the applicant has been responsible for relevant Council tax payments. No evidence has been produced of these losses or the amounts involved. Again, the Tribunal finds that the damage to the properties is due to wear and tear and that the respondent cannot be found liable for such claimed losses.

The applicant seeks to recover personal travel expenses and costs. The applicant is Okay Limited. It is a commercial enterprise. Its business is in the ownership and rental of residential properties. It would be reasonably foreseeable and expected that travel expenses and costs would be incurred by such an organisation in the administration of its business and affairs. No vouching has been provided in respect of the travel costs and other expenses, such as hotel stays. In any event, the applicant has instructed an agent to deal with the management of the property, being

KPM Residential Limited, and as such it appears to the Tribunal to have been unnecessary for any officeholder of the applicant's company to travel personally. Any such travel was through choice. In any event the Tribunal finds that the damage to the properties is due to wear and tear and that the respondent cannot be found liable for such claimed losses.

The applicant seeks to recover the sum of £228 for a survey requested by Glasgow City Council. Both the applicant and respondent instructed a number of surveys from other organisations and there was no specific requirement for the applicant to undertake the instruction of the survey from Glasgow City Council. In any event the Tribunal finds that the damage to the properties is due to wear and tear and that the respondent cannot be found liable for such claimed losses.

The applicant seeks to recover compensation from 'emotional stress'. The applicant is Okay Limited. A Limited Company cannot make a claim for emotional stress. The Tribunal has found that the respondent has not breached their property factor duties and is not liable for any claimed losses arising from any such breach. The applicant, limited company or not, is not entitled to any such compensation in any event.

The Tribunal proceeded to consider the alleged breaches of the Code. It was accepted on behalf of the applicant at the hearing that the complaints about section 1 of the Code were erroneous and therefore not considered further by the Tribunal. Six discrete sections of the Code were put at issue.

> 2.5 : "You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response time should be confirmed in the Written Statement of Services."
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> There has been significant communication and correspondence between the respondent and the applicant and its managing agents, KPM, throughout the last few years. This correspondence relates to both flats 3/1 and 3/2. The applicant has not specified which particular enquiries and complaints have not been dealt with within prompt timescales. Nonetheless the respondent, by their own admission, having reviewed their own files concluded that whilst the vast majority of the correspondence had been responded to in a timely manner, consistent with their own service standards, there were a number of occasions when this had not been the case. In the circumstances, the Tribunal had little difficulty in concluding that the respondent had breached this section of the Code.
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> 5.4 : "If applicable, you must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check the claims are dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example for private or internal works) you must supply all information that they reasonably require in order to be able to do so."

At the hearing it was accepted on behalf of the applicant that there is a procedure in place for submitting insurance claims. It was submitted that the identification of the relevant procedures was confusing and lacking. The Tribunal finds otherwise and that there is a clear policy in place which is well publicised and available for all homeowners. The applicant's additional complaint is that conflicting information was given regarding the identity of the insurer. The identity of the insurer has changed over time. No clear evidence was produced to the Tribunal to evidence that the identity of the particular insurance company at the time the applicant sought to use their services was incorrectly given. Similarly no clear documentary evidence was provided to support the applicant's complaint that the respondent had failed to provide necessary additional information as requested to enable its claim to be made. This complaint was not established by the applicant to the required standard.

5.5: "You must keep homeowners informed of the progress of their (insurance) claim to provide them with sufficient information to allow them to pursue the matter themselves."

The applicant's complaints as submitted to the Tribunal at the hearing did not make a relevant complaint regarding the respondent's failure to adhere to this section of the Code.

6.1 "You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required."

There is no doubt that the respondent has procedures in place to allow homeowners to notify them of matters which require repair, maintenance or attention. Notification can be made by telephone, email or letter. All such communications will be attended to. The applicant's complaints in this respect generally were in respect of the respondent's asserted failure to comply with their own Written Statement of Services and in particular the Written Statement which was in operation in June 2016 which set out response times for routine repairs at paragraph 4.5.1. There is no clear specification by the applicant as to which particular repair was being relied upon in respect of the respondent's response time. Instead a more generic and blanket approach was taken to the suggest that the respondent had failed to abide by the terms of the Written Statement which ultimately requires the respondent to provide quotations for any repair to the homeowners committee/association within 14 days of the request. It seemed to the Tribunal that such a tight timescale was rather unusual and would be unlikely to be met. The respondent has since changed their Written Statement of Services. In any event, there is no homeowners committee or association for the tenement. Moreover however, the type of issues / repairs which were raised by the applicant to the respondent do not fall under the category of 'routine repairs' and accordingly, in all of the circumstances, the Tribunal found that the 14 day time period to provide quotes for the repairs which the applicant was raising with the respondent, were inapplicable. Otherwise the

respondent has established that they were reacting to concerns and issues raised with them and seeking to react to them and arranged appropriate repairs and alternate quotes where necessary.

The respondent themselves have however accepted that there were occasions when confusion arose partly due to the fact that the applicant owned historically two flats within the building and reports were being received that it was unclear about which flat was being complained of. Again this is indicative of an administrative failing on the part of the respondent. There is therefore an acceptance that at times information regarding progress of work was not conveyed clearly to the applicant and that therefore there was a breach of this section of the Code. In the circumstances the Tribunal found that this section of the Code had been breached.

6.4 : "If the core service agreed with homeowners include a period of property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works."

The agreement in place with the applicant and homeowners clearly does not include any planned programme of cyclical maintenance. This type of programme would include for example, a schedule of repainting the common close at regular intervals. That type of arrangement does not apply here. The Development Schedule however gives a clear undertaking by the respondent to carry out bi-annual property inspections. As earlier referred to within this decision, it is entirely unclear as to when such property inspections have been carried out by the respondent and what the findings of such inspections were. The core service however does include periodical property inspections and the obligation under this section of the Code is that the respondent must therefore prepare a programme of works. No programme of works has been prepared in accordance with bi-annual inspections. Upon discussion at the hearing it was accepted on behalf of the respondent that this section of the Code had been breached. The Tribunal, in fairness, finds that given the number of occasions that multiple contractors were attending at the tenement, that additional property inspections may have been thought unnecessary and an additional programme of works would similarly have been considered to be unnecessary. There was no clarity of thought over this issue however by the respondent's witnesses. Given the Tribunal's other findings it is unlikely that the failure of the respondent to adhere to this section of the Code had any material impact at all upon the condition of the building.

6.9 : "You must pursue the contractor or supplier to remedy the defects and any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor."

The applicant has failed to specify which contractor or supplier instructed by the respondent has provided any inadequate work or service. Roofing and other building work carried out on the property since the respondent assumed responsibility as property factor in 2015, has been reactionary in an attempt to remedy difficulties arising efficiently at low costs. The nature of the building and roofing works undertaken could not be expected to give rise to a

complaint that the identified problems continue to subsist. Contractors are not realistically going to give warranties for such work. Identified defects to the building are due to wear and tear and are extensive. Matters are complicated as highlighted by the comprehensive Condition Report prepared by Helix in August 2020. The respondent does obtain collateral warranties from contractors in relevant circumstances.

In summary the Tribunal found that although the respondent did not breach their property factor duties, that three discrete sections of the Code of Conduct have been breached. Despite the Code having been breached, the Tribunal is clear that these breaches have made no material difference to the damage which is evident within the property and the costs which are required to remedy them. Nonetheless, the breach of the Code of Conduct by the respondent is a breach of the obligations and implied contract between the applicant and the respondent. In the circumstances, it is reasonable that the applicant be recompensed for this.

The applicant is a limited company and cannot make a claim for emotional stress. It is acknowledged that Dr Khanna (and her fellow director who is her sister) have become emotionally involved in the difficulties faced at Flat 3/1, and previously Flat 3/2. However, as aforementioned, they are Directors of a limited company and it is the company who is the homeowner. A clear choice has been made in the background for Dr Khanna to operate as a commercial residential landlord at distance from her residence in England. A commercial decision has been made to employ managing agents, KPM. Despite trading as a limited company, Dr Khanna appears to have treated the issue as a personal one rather than a commercial and business one. The Tribunal appreciates the time and effort which Dr Khanna has invested in the matter personally, but the requirement to do so goes hand in hand with being a Director of the company which owns the property. She has done this whilst employed and having demanding responsibilities in the course of her employment as a doctor. The Tribunal formed a positive view of Dr Khanna generally in that there were no issues which arose in respect of her credibility. She is a professional medical doctor and it is clear that she has always been respectful in her communications with the respondent and, indeed, was respectful throughout the Tribunal hearing. She remains committed regarding a future business relationship with the respondent. The Tribunal concluded however that Dr Khanna is simply entirely unrealistic in respect of her understanding as to how the relationships between homeowners and property factors work and her expectations are similarly unrealistic as regards what is reasonably expected to be incurred in terms of time and costs in managing residential properties which are comprised within a traditional sandstone tenement which is around 140 years old.

The Tribunal did invite submissions from parties at the end of the hearing as to what may be a reasonable disposal by way of a monetary penalty being imposed upon the respondent in respect of any relevant breaches of the Code of Conduct. Dr Khanna estimated that she should be entitled to somewhere in the region of £10,000-£20,000. This is a grossly inflated estimate of what may be reasonable in this jurisdiction. The actual losses sustained by the applicant company are minimal for all of the reasons which the Tribunal has set out.

The Tribunal noted that in accordance with the complaints procedure undertaken in respect of the applicant's grievances that an *ex gratia* offer in the total sum of £750 had been offered to the applicant in respect of admissions regarding partial breaches of the Code of Conduct. This was in the context at the time of the respondent admitting breaching two sections of the Code of Conduct. The Tribunal has found that the respondent breached three sections and indeed the third breach was candidly accepted on behalf of the respondent at the hearing as aforementioned.

In all of the circumstances, given the breaches identified by the Tribunal, and having regard to reasonableness, the Tribunal concluded that the appropriate sum to impose by way of penalty to be paid by the respondent to the applicant in respect of their breaches of the Code of Conduct, should total £1,000. This is a proportionate sum to be paid to the applicant.

The Tribunal has noted that in advance of the Tribunal proceedings, a sum of £3,500 had been offered to the applicant to seek to avoid these Tribunal proceedings. There was no formal evidence led regarding that offer and it seems to the Tribunal much more likely that this inflated sum was offered on an economic basis so that the respondent could seek to avoid the, no doubt, the significant time and costs of being engaged in these proceedings. It seemed to the Tribunal that the offer of £3,500 could not at all be attributable to the actual failings of the respondent, accepted by them in advance of the Tribunal proceedings and found by the Tribunal after consideration of all relevant evidence.

Property Factor Enforcement Order (PFEO)

The Tribunal proposes to make a PFEO given the Tribunal's findings and that the respondent has breached sections 2.5, 6.1 and 6.4 of the Code.

The Tribunal therefore intends to make the following PFEO:

"1. Within 14 days of the date of service of this PFEO the respondent must pay the applicant £1,000 for breaching the Code which forms part of the contractual arrangements between the parties.

2. Within 14 days of the date of service of this PFEO the respondent must prepare a schedule of proposed staff training to ensure that all staff are fully aware of the respondent's obligations:

   (i) To have detailed knowledge of the terms of the Code of Practice and to ensure that they comply with it.

   (ii) To accurately record all homeowners complaints in writing whether such complaints are received in writing or by telephone, and to record the dates when corresponding contractors are instructed including their identity and a summary of the work undertaken and when it is completed."

The parties should note the Tribunal's proposal to make a PFEO and intimation of this decision complies with the requirement to give notice to the parties for the purposes of Section 19(2) of the Act. Any representations which the parties wish to make under Section 19(2)(b) of the Act (restricted to the terms of the PFEO) must reach the First-tier Tribunal for Scotland (Housing and Property Chamber) office no later than 14 days after the date of intimation of this decision to them.

Appeals

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

Legal Member [redacted]

Date: 3 May 2021