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

Property Factors (Scotland) Act 2011 ("the Act"), Section 19

The First-tier Tribunal for Scotland, Housing and Property Chamber (Procedure) Regulations 2016 ("the 2016 Regulations")

Chamber Ref: HOHP/PF/16/0023

Property at Flat 4, 16 Hopetoun Street, Edinburgh, EH7 4GH ("The Property")

The Parties: -

Mr Jason, Anthony Watt, residing at the Property ("the Homeowner")

Life Property Management, Regent Court, 70 West Regent Street, Glasgow, G2 2QZ ("the Factor")

Tribunal Members

Maurice O'Carroll (Legal Member)
Andrew McFarlane (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) ("the Tribunal") unanimously determined that the Factor has not failed to comply with the Code of Conduct for Property Factors ("the Code") or with its factor duties in terms of section 17(5) of the Act. Therefore, no further action on the part of the Factor is required.

Background

1. By application erroneously dated 24 February 2015, received on 25 February 2016, the Homeowner applied to the Homeowner Housing Panel for a determination on whether the Factor had failed to comply with sections 2, 3, 5, 6 and 7 of the Code as imposed by section 14(5) of the Act. The application also raised issues in relation to the Factor's duties generally and in particular stated the Factor had no authority to act.

2. By subsequent revised applications, including one submitted on 10 October 2016, the Homeowner appeared to limit the Code references within the application to sections 2.1 and 2.2. only.

3. By operation of regulation 3 of the First-tier Tribunal for Scotland (Transfer of Functions of the Homeowner Housing Panel) Regulations 2016, the application

was then considered by the Housing and Property Chamber of the First-tier Tribunal for Scotland.

4. By decision dated 30 March 2017, a Convenor on behalf of the President of the Housing and Property Chamber decided to refer the application to the Tribunal for a hearing. A hearing date was set down for 2 June 2017 within George House, Edinburgh.

5. Despite the revised applications, the Legal Member of the Tribunal considered that the grounds of the application were unclear and required clarification from the Homeowner. By Direction dated 3 May 2017, the Tribunal required the Homeowner to submit a clear summary of the points of the Code upon which he wished to rely, together with a summary of the non-Code factor duties which he considered had not been complied with. He was also required to submit a ring binder with all relevant documentation contained within it. The Homeowner was given until 31 May 2017 to comply.

6. Shortly before the deadline for compliance with the Direction, the Homeowner wrote the Chamber to indicate that he required more time. At the same time, the Factor sought an adjournment of the hearing set down for 2 June 2017 in order to allow the attendance of an essential witness for the Factor.

7. The Tribunal therefore decided to hold a Case Management Discussion ("CMD") on the date set down for the substantive hearing. The CMD was attended by the Homeowner and his representative from the Citizens' Advice Bureau, Mr Simon Shearer. At the CMD, the Legal Member explained in detail what was required of the Homeowner in order to comply with the terms of the Direction of 3 May. The Tribunal was satisfied that following the CMD, the Homeowner understood fully the requirements of the Direction of 3 May 2017.

8. A further Direction was issued on 2 June 2017 confirming the outcome of the CMD and setting a new deadline for the provision of information by the Homeowner on 10 July 2017. A third Direction was issued on 22 June 2017 confirming a new substantive hearing to be held on 21 July 2017, and providing the Factor with one week to respond to the Homeowner's submissions, that is, by 17 July 2017. The deadlines set by the second and third Directions were complied with by the parties.

9. The Code breaches listed by the Homeowner in answer to the Directions were as follows: section 1, preamble (obligation to provide a Written Statement of Services); sections 2.1, 2.2, 2.4, 2.5, 3.3, 6.1, 6.3, 6.6, 6.9 and 7.1.

10. A hearing of the Tribunal was held on 21 July 2017 at George House, George Street, Edinburgh. The Homeowner appeared, again accompanied by Mr Shearer. The Factor appeared represented by Mr David Young of Messrs BTO, solicitors. Mr Young was accompanied by Mr David Reid, Managing Director of the Factor, who was also a witness.

11. The alleged breaches of sections 6.1 and 7.1 of the Code were withdrawn during the course of the hearing by the Homeowner. Further, Mr Shearer

explained that despite the extensive discussions during the CMD, he did not realise that general factor duties could be raised separately from the Code and that he thought he was restricted to raising Code issues only.

12. Notwithstanding that, wider issues in relation to specific issues not covered by the Code were considered during the course of the hearing, in particular in relation to the appointment of the Factor and the failure to obtain a Completion Certificate for the development. These matters had previously been the subject of discussion between the parties as demonstrated by the letter of 15 March 2017 from Mr Young to Karen Sutherland of Citizens' Advice, found at tab 6 of the Factor's productions for the hearing. Adequate prior notice of those issues had accordingly been provided to the Factor.

13. The submissions produced by each of the parties were taken into account by the Tribunal, in addition to the oral evidence led at the hearing. In light of the considerable and detailed historic involvement of Mr Young on behalf of the Factors in relation to the issues connected to the development, he was in a position to provide direct evidence relating to the points under discussion at the hearing. Mr Reid and the Homeowner also provided oral evidence to the Tribunal. A witness for the Factor, Mr Eric Holmes, Chairman of the Residents' Association and past Chairman, gave brief evidence regarding the appointment of the Factor. A witness for the Homeowner, Mr Steven Moffat, attended the hearing ready to give evidence, but after discussion with the Tribunal, he was not called upon to testify and was excused.

Tribunal findings

The Tribunal made the following general findings in fact pursuant to Regulation 31(2)(b)(i) of Schedule 1 to the 2016 Regulations:

14. The Property is situated within a 5-storey building which was built in or around 2007. The entire block is numbered from 12 to 18 Hopetoun Street, Edinburgh and is known as Bellevue Apartments. There are 50 units in total, of which 49 are residential and one commercial, currently occupied by an organisation known as Project Scotland. There are generally 3 residential flats per floor. The developers of the block were Bluebell Estates (Hopetoun) Limited. The Homeowner did not buy the Property directly from the developers, but rather from a Mr and Mrs Quigley in or around April 2008.

15. A Deed of Conditions was registered in respect of the block in which the Property is situated by Bluebell Estates on 21 December 2007. It sets out various provisions for the definition and maintenance of the common parts of the building and stipulates that each proprietor with the block shall have a single vote in matters affecting the development. There is a manager burden allowing the developer to appoint any factor of its choosing until the sale of the last unit. The Factor is not specifically named, although there was evidence, which the Tribunal accepted, that it was in fact the property manager chosen by the developer from the outset in terms of that burden.

16. The development had a number of significant defects which became evident soon after construction. The normal course of redress via the developer was unavailable to the homeowners within the block as Bluebell Estates refused to carry out the necessary works. Investigation of their lodged accounts at Companies House revealed that Bluebell Estates had considerable debts and therefore lacked the funds to put matters right, even although they were still technically trading.

17. When each purchaser bought their respective properties, it was a condition of the missives that each flat would come with an insurance policy in the name of each purchaser. Each purchaser was provided with a certificate of Insurance from Premier Guarantee which would indemnify them for the cost of implementing repairs for defects in their property and their share of the cost of implementing works for the remedy of defects in the common parts of the development building.

18. Claims were intimated under the indemnity policy by individual proprietors to MD Insurance Services (MDIS") who were the administrators for the Premier Guarantee policy. A claim in respect of necessary repairs to the common parts was also intimated by the Factor. MDIS requested a report confirming the presence of the defects, in respect of which a report was produced by Buildings Investigation Centre ("BIC"). Following that report, MDIS instructed two contractors, AWM and Prodrive to undertake certain works to the development building. AWM and Prodrive were instructed by the underwriters and not the Factor, so that the latter had no contract with them or control over them.

19. The Factor subsequently instructed BIC to produce a report commenting on the works carried out in or about 2011 by AWM and Prodrive. A further report produced by Mr John Gargaro of BIC in December 2012 raised concerns regarding the works carried out on the instruction of the underwriters and expressed the opinion that the works undertaken had not in fact remedied the defects in the building. In particular, the building was not wind and watertight, the fire door and window system was defective and the main roof had considerable volumes of ponding water on it. As a result of these defects and others, the City of Edinburgh Council ("CEC") would not grant a formal Completion Certificate until such time as the necessary remedial works were carried out to its satisfaction.

20. The issue of the Completion Certificate is central to the Homeowner's grievance. It had still not been issued by CEC as at the date of the hearing, some seven years after his purchase of the Property. All proprietors within the development, including the Homeowner, were thereby placed in a precarious and irregular position after the expiry of the temporary habitation certificate. They occupy their properties without the benefit of a Completion Certificate which should have, in the ordinary course of events, followed on swiftly from the temporary habitation certificate. Moreover, the Homeowner is effectively unable to sell his property should he choose to do so.

21. The inadequacy of the works carried out by AWM and Prodrive was disputed by MDIS who considered that all works undertaken on their instruction had

addressed all necessary matters. As a result of that stance, it eventually became necessary to litigate in order to compel the underwriters to fulfil the terms of its indemnity policy.

22. Messrs BTO were instructed by the Factor in or about 2013 to review the case against the underwriters. In the course of that instruction they recommended that an expert report be obtained in order to identify the ongoing defects in the building and to comment on the nature of the remedial works still required and to provide an estimate of the cost of those works. Given the already extensive involvement of BIC and the acknowledgement of MDIS of Mr Gargaro's expertise, a quote was sought from him and he was subsequently instructed by the Factor.

23. Due to the nature of the contractual relationship between the underwriters and the proprietors within the development, it was not possible for the Factor to sue the underwriters based on a majority decision of the homeowners. Each proprietor required to sue individually to the extent of their own share of the costs. A litigation scheme was created by Messrs BTO to enable one cumulative claim to be made against the underwriters on behalf of the proprietors entering into the scheme. The contractual rights of the proprietors were assigned to the Factor who pursued the claim against the underwriters on their behalf and at their own risk. The Factor thereby undertook a two-fold role: Firstly, they were factors of the entire development property in the normal way; secondly, they undertook an additional role as agents for the litigation scheme on behalf of the proprietors who had decided to pursue that course of action.

24. Proprietors of 40 out of the 50 units opted to enter the litigation scheme. The Homeowner was one of 20% of proprietors who did not opt to enter the scheme and chose instead to pursue an individual claim against the underwriters himself.

25. Although it has not run smoothly (as is often the case with litigation) and the court action has been sisted on three occasions, the litigation scheme has been largely successful. As a result of the threat of court action, the underwriters have funded further works which were instead instructed by the Factor and not by themselves. The total cost of the works carried out to date are in excess of £1m, far more than the underwriters were initially willing to pay.

26. The expense of obtaining Mr Gargaro's report (approximately £14,000), which had originally been the subject of dispute, was paid by the underwriters. The cost of providing scaffolding alone in order to do the job properly has been £120,000. At the time, the underwriters via MDIS had initially sought to maintain that the works carried out by AWM and Prodrive were adequate, the total costs had been in the order of £600,000, in contrast to the £1m+ now expended with more planned. Following those initial works, CEC had refused to issue the Certificate of Completion as it too considered the works to be insufficient to remedy the defects in the building.

27. Works are now approximately 90% complete. A final stage of addressing the defects has involved remedying water ingress to the podium deck. There will

be an EGM of all proprietors in the near future in order to seek agreement for additional invasive investigations to be carried out. That will involve undertaking a minor tendering process to find the best contractor. The overall cost of this final stage was stated by Mr Young to be in the region of £600,000. It has been necessary for the Factors through Messrs BTO to persuade the underwriters to pay that cost. It is hoped by the Factor that once this final stage of work is completed, CEC will be prepared to issue a Certificate of Completion.

28. The Tribunal finds that had it not been for the institution of the litigation scheme, and the work on the building paid for by the underwriters had instead ceased after the involvement of AWM and Prodrive, the further expense of carrying out the works necessary to bring the building up to a sufficient standard in order to qualify for a Certificate of Completion would have fallen to the body of proprietors. As at the date of the hearing that would have amounted to approximately £½ m, or £10,000 per proprietor. Once the works to the podium deck and elsewhere have been completed, that liability would have increased by the same amount or more if the current estimate is correct. The litigation scheme was therefore entirely necessary and, moreover was progressed as quickly and as efficiently as was possible in the difficult circumstances which pertained, as narrated above.

Further findings

The Tribunal made the following specific findings in relation to the alleged breaches of the Code and factor's duties:

Section 1 of the Code – Written Statement of Services

29. The introductory paragraph to section 1 of the Code requires factors to provide a Written Statement of Services ("WSoS") to all existing homeowners within one year of initial registration. The Property Factors (Scotland) Act 2011 entered into force on 1 October 2012. The Factor was initially registered on 9 October 2012, so it required to provide the Homeowner with a WSoS by October 2013 at the latest.

30. The Homeowner told the Tribunal that whilst he did now finally have a WSoS, one was not issued as required by the Code. The Factor gave evidence that a WSoS was issued to all proprietors within the development in November 2012. A revised statement was issued on 12 September 2013 and another further revised version on 23 July 2015.

31. The Homeowner was unable to refute that evidence. Interestingly, the example WSoS provided by the Homeowner as part of his documents for the Tribunal contained the following paragraph at the end of the document: "How LPM were appointed to manage your development: We are contracted for 2 years from 15 November 2012 as agreed by the Residents Association on 14 November 2012. Thereafter if no contract period is confirmed the contract will be on a rolling basis."

32. It therefore appeared that the Homeowner did in fact come into possession of a WSoS from the Factor at some point after November 2012. On the

preponderance of evidence, the Tribunal found that the WSoS was supplied by the Factor to the Homeowner soon afterwards and in any event prior to October 2013. It therefore found that there had been no breach of section 1 of the Code.

Section 2.1 of the Code – Misleading or false statements

33. Section 2.1 of the Code states the following: "You must not provide information which is misleading or false."

34. In support of this complaint, the Homeowner referred to two items of correspondence. The first of these was a lengthy email of complaint sent by the Homeowner to the Factor on 26 June 2016. The first paragraph of the second page of that email contains the following sentence: "you knowingly allowed residents to buy units despite knowing the building was in a critical state, furthermore you must have known the completion certificate position when taking over the development without a valid completion certificate."

35. It was accepted in evidence by the Homeowner that it was not a duty on the part of the Factor to inform residents of defects within the building, or indeed to advise on the absence of a valid Certificate of Completion from the local authority. That would have been a matter for the legal advisors to the residents upon purchase of their respective properties. This misconception appears to have been at the very least a main driver in the Homeowner's grievance against the Factor. It was, however, stated by Mr Shearer that the Factor's actions had in fact inhibited or obstructed the obtaining of a Completion Certificate from the Council. This submission was not accepted by the Tribunal. Reference is made to the findings above in relation to the necessity, conduct and relative success of the litigation scheme in progressing the necessary repairs.

36. The Homeowner then stated the following in the third paragraph of that page: "You then proceeded to mislead owners by advising that the developer was bust." That was the information allegedly conveyed to the Homeowner and relied upon in relation to section 2.1 of the Code. The original correspondence in which such a statement was allegedly made was not provided by the Homeowner. In response, Mr Young explained that whether the term "bust" was used or not (and that is not an expression he would have chosen), the fact was that the developer, Bluebell Estates, was still active but had no money and was in debt for millions of pounds. This was what was relayed to all residents, including the Homeowner: BTO after being instructed in 2013, sent a detailed 6-page letter to all residents advising that due to its financial situation, there was no claim against the builder. That statement, it was submitted, was accurate.

37. The Tribunal accepted that evidence. Whether Bluebell Estates was "bust" in the sense of having become absolutely insolvent was perhaps irrelevant, given that the reality of the situation was that due to its lack of funds it was unable to carry out the repairs necessary to the building. It also accepted by the Tribunal that Mr Young on behalf of the Factor did not make such a bald or colloquial

statement, but instead indicated the situation regarding the financial position of the developer which meant that it could not be held to account to repair the defects (see also paragraph 5 of the email dated 29 July 2013 by Mr Young to Mr Webb, another proprietor within the development). In that regard, therefore, there had been no inaccurate or misleading information provided to the Homeowner by or on behalf of the Factor. The Tribunal therefore accepted that no misleading or inaccurate statement had thereby been conveyed to the Homeowner by or on behalf of the Factor and no breach of section 2.1 of the Code had occurred.

38. The second piece of correspondence referred to by the Homeowner was a letter dated 23 December 2016 from Caroline Carr, Client Relations Partner at Messrs BTO to the Homeowner in relation to a complaint about Mr Young by the Homeowner. At page 2 of that letter, in numbered paragraph 2, the following is stated: "At no time was there any vote in favour of bringing in "experts" from the City of Edinburgh Council and instead a private scheme was progressed." It was submitted by the Homeowner that there was indeed a vote in favour of bringing in experts from the Council, so that it was incorrect to deny that. The Homeowner pointed to the fact that £56 had been taken from each homeowner by the Factor for that purpose.

39. Mr Young firstly pointed out that the letter to the Homeowner from Caroline Carr was in respect of a complaint against him personally as a precursor to a potential complaint to the Scottish Legal Complaints Commission and was not in relation to a factoring issue. Whilst the content of the letter had required his input, it was not a statement made to the Homeowner by the Factor or on its behalf when viewed in that context. The Tribunal agreed with that submission which is enough to reject the second of the Homeowner's complaints under this heading. However, Mr Young went further to explain fully the factual circumstances which underlay this particular allegation.

40. The £56 mentioned by the Homeowner was a contribution towards the cost of re-opening the building warrant procedure with the Council, the temporary habitation certificates having expired. As there were still a number of major items requiring attention (such as ponding on the roof), it was decided that undergoing that procedure was premature and that process was suspended. As a result, the £56 was eventually refunded to all proprietors in the development, including the Homeowner.

41. The Homeowner had the mistaken belief that the Council would carry out its own survey and resolve all matters. However, consideration of re-opening the building warrant procedure was the only involvement of the Council. It was never going to take any more active steps towards resolving the substantive issues which the development faced. The survey costs alone amounted to £14,000, so to think that all matters could instead have been resolved by the Council for the sum of £56 per unit was entirely mistaken. Accordingly, quite apart from viewing Ms Carr's statement in its true context, the content of the statement complained of was in fact accurate. The Tribunal accepted this evidence and submission and finds that there was no breach of section 2.1 of the Code.

Section 2.2 of the Code – Abusive or intimidating communication

42. Section 2.2 of the Code states the following: "You must not communicate with homeowners in any way which is abusive or intimidating or which threatens them (apart from a reasonable indication that you might take legal action)."

43. All three allegations under this heading arise from a letter dated 30 June 2014 from Mr Young to the Homeowner in response to an email from him dated 21 June 2014. The last paragraph of that letter states: "To date the costs of incurred in replying to the matters raised by you have thus far been borne by all of the buildings proprietors. However, should you continue to raise matters *already addressed by LPM and their representatives*…LPM will invoice you separately for any costs incurred to them in responding, so as not to unduly prejudice other proprietors." (italics added)

44. The Homeowner queried why it was that a solicitor was required to answer his questions, when the Factor could do so directly and less expensively. He further stated that whilst some of his questions might have been repeated ones, the quality of the answers he received meant the persistence was necessary in order to have them answered to his satisfaction. The statement in the last paragraph was intimidating because it was an attempt to curtail his questioning, lest he be liable for substantial expenses.

45. In response, Mr Young emphasised the part of the sentence italicised above. That statement was included in the letter of 30 June in response to repeated complaints met with repeated responses in answer which the Homeowner had simply refused to accept. The Homeowner had not adduced any correspondence to demonstrate where any inadequate answers to questions posed by him had been given such as to justify repeated requests for information. It was therefore a reasonable statement to have made in those circumstances and was not threatening or intimidating.

46. The Tribunal agreed with the submission made by the Factor. In some instances, factors use the services of solicitors in correspondence with homeowners which can have the effect of creating a barrier to communication. In this particular instance, the involvement of the services of BTO were entirely necessary as discussed above. As a result of his involvement in the litigation scheme, it was Mr Young who had the necessary intimate knowledge of the progression of repairs with which the Homeowner was concerned. It was correct to state that the Homeowner had produced nothing which demonstrated that repeated complaints and requests for information were necessary as a result of inadequate responses. That allegation had not been made out on the balance of probabilities. In any event, the important qualification italicised above appeared to the Tribunal to have been a reasonable response to what it perceived to be repeated requests for the same information. It could not therefore be described as threatening or intimidating.

47. The second statement in that letter was in response to an earlier statement of the Homeowner in a letter sent by him to Malcolm Chisholm MSP on 27 April 2014. It was quoted by Mr Young and was as follows: "it would appear that both LPM [the Factor] and bto are extremely keen to make as much money as possible and at a cost of honesty and integrity." It was accepted that this was a use of intemperate language but that it was borne of frustration. The situation with the development had been ongoing for eight years, the Homeowner was unable to sell his property and felt that matters were going nowhere.

48. In response to that reported statement, Mr Young stated the following in the penultimate paragraph of the letter of 30 June 2014: "False and defamatory statements which disparage the professional competence or conduct of LPM and this firm give rise to a right of action against you in damages, regarding financial losses that we or LPM suffer as a result. Accordingly, we therefore require to formally put you on notice that you must cease such conduct immediately and make no further misleading and defamatory statements about LPM or this firm."

49. Mr Young submitted that the statement was a rational reaction to that type of statement which of itself would have warranted a solicitor's letter in response. It was fair notice that such statements must cease, failing which legal proceedings might follow. The Tribunal agreed with that submission. In any event, the statement falls within the clear exception contained within parenthesis within section 2.2 of the Code: it was a reasonable indication that the Factor might take legal action and therefore could not be a breach of that section.

50. The final matter within that letter considered by the Homeowner to be intimidating is contained within the first paragraph of page 2 of the letter of 30 June. In that paragraph, Mr Young pointed out that it is an offence under section 21(5) of the Building (Scotland) Act 2003 for someone to be in occupation of a building for which no completion certificate has been granted unless there is in place a temporary habitation certificate. The habitation certificates having expired, Mr Young explained that he had obtained an assurance from Mr McKenzie, the Senior Building Standards Surveyor, that he had no intention of taking any enforcement action in the absence of a Completion Certificate for the development. Mr Young then went on to state that Mr McKenzie was no doubt comforted by the steps being taken by the Factor resolve the issues with the building, but that should that no longer be the case, Mr McKenzie may revise his position.

51. The Homeowner queried why such a statement required to be made in the first place. It was, he said, unnecessarily alarmist. The implication of the statement was in his view that the Council might take steps any day to put him out of his property. The reference to a criminal offence had the effect of inculcating a worry about potential prosecution and that he and the other residents in the development would be made homeless. In response, Mr Young stated that the references to being put out of his property were an unfair spin on the terms of his letter. It was quite proper in his view to raise the possibility of the Council changing its mind about enforcement action and it would have been remiss of

him not to mention that as a possibility. Certain fire safety measures were being taken at that time further to obtaining the Certificate of Completion. If those steps were not being undertaken, then the possibility of the enforcement action on the part of the Council might have been a very real one.

52. The Tribunal was of the view that it was quite reasonable of Mr Young to point out the potential consequences of not proceeding to carry out the works to the development. It agreed that it was important to point out the irregular situations which all of the proprietors found themselves in and that the ultimate goal of obtaining a Certificate of Completion could not be achieved other than by continuing with the works which were underway at the time without delay. It did not consider the statement complained of to be intimidating or to amount to a threat that that the Homeowner could be made homeless at any time. Therefore, in respect of each of the aspects of the letter of 30 June 2014 complained of, the Tribunal did not find there to have been a breach of section 2.2 of the Code.

Section 2.4 – Consultation procedure

53. Section 2.4 of the Code provides that factors must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service.

54. The Homeowner stated that he would have expected the Factor to have in place a written consultation procedure contained in a separate document from the WSoS containing information as to how the Factor proposed to consult and hold general meetings regarding work to be carried out on the development. Such a procedure should for example involve the input of the Residents' Association. He accepted that there was no specific requirement for such a procedure within section 1 of the Code, but argued that since there were remedial works required for all owners within the development and not simply a litigation scheme, this ought to have been done.

55. In response, Mr Young pointed to his own productions. One at Tab 3 was a letter dated 23 December 2013 referring to a previous letter dated 8 November 2013 and to a meeting of proprietors held on 18 November 2013. Full details of the proposed litigation scheme were given and a voting response form in relation to three questions was included in accordance with the Deed of Conditions. At Tab 4 was a letter from the Factor to the Homeowner informing him of an invitation to a homeowners meeting issued by the Factor on 25 November 2015. The meeting was held on 7 December 2015. The invitation had an agenda attached. Appendix 1 to the invitation set out the necessary remedial works in detail. Appendix 2 showed the competitive quotes that had been obtained for those works in order to inform the body of homeowner who would be required to vote on further action at that meeting. These were examples a high level of substantive consultation which was carried out.

56. It was notable, in Mr Young's submission, that the Homeowner had refused to any such meetings of the proprietors in order to discuss future progress. On

this point, the Homeowner stated that the reason for this was that after the AGM held in 2003, he considered that Mr Young had done all of the talking and there was no opportunity for him to ask questions regarding the Council's involvement. He had felt thereafter that it was pointless to attend any future meetings so did not do so.

57. On a separate matter, urgent works to the zinc panelling on the block at numbers 16-18 required to be carried out as a matter of emergency following an urgent AGM of the Residents' Association in 2015. They were replaced at a cost of approximately £10,000 per panel in order to safeguard the building. It is stated within the section of the Code itself that emergency works do not require prior consultation.

58. The Tribunal was satisfied that there was no requirement on the Factor to engage in the specific form of consultation specified by the Homeowner in the course of submission to the Tribunal. It was further satisfied on the evidence that detailed consultation had been undertaken with the body of homeowners at Residents' Association meetings, with ample advance notice being given of the works to the development which were in contemplation. The Homeowner was fully entitled not to attend such meetings, however this did not affect the quality and extent of prior consultation which was in fact provided by the Factor. It therefore found that there had been no breach of section 2.4 of the Code.

Section 2.5 – Response to enquiries and complaints

59. Enquiries and complaints must be responded to within prompt timescales. The only instance the Homeowner provided was an email dated 30 November 2013 to Mr Young in which three questions had been posed by him. He sent a reminder letter on 8 December 2013, but could not state when a response had in fact been received.

60. In the first place, the enquiry was of Messrs BTO and not the Factor. Even if they are to be seen as inseparable in practice, in the view of the Tribunal, a delay of 8 days does not constitute undue delay in responding to an enquiry or complaint. It therefore found no breach of section 2.5 of the Code.

Section 3.3 – Supporting information in response to requests

61. The relevant part of section 3.3 referred to is the second half which states: "In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying subject to notifying the homeowner of this charge in advance."

62. On 26 February 2014, the Homeowner sent an email to the Factor listing 7 specific points that he required further information about. At point 5 he indicated that he was making a claim via Premier Guarantee (the underwriters) directly. To that end he stated: "Can you possibly add up all bills that have been paid example, survey fees, project fees, excess and building work

payments, email is fine for this. This will help with my claim." In evidence, the Homeowner stated that all he sought was a short note of fees and expenses.

63. The response to that request was interlineated within the email of 26 February 2014. It had apparently been sent by the Factor to him having consulted with Mr Young. The response was as follows: "We can provide you with details regarding the claim and copies of the relevant paperwork for a fee of £1,700 plus VAT." It was the indicated that BTO and the Factor would need to spend between 4 and 7 days preparing the suitable paperwork. It was also indicated that some information could not be supplied directly for data protection reasons.

64. Mr Young accepted that there was an apparently large disparity between the information requested and the proposed response to that request. He had understood that the request was in fact for all background evidence in relation to the claim as communicated to BTO via the Factor because, as the Homeowner had stated, he wished to pursue a claim himself against the underwriters. As stated in the response, there were data protection issues which meant that all communications would require to be sifted so that nothing was provided which would personally identify any of the litigation scheme claimants. It was accordingly, a far more extensive request than the Homeowner had suggested in evidence.

65. The Tribunal considered that communication on both sides could have been better. On the one hand, the Homeowner might have responded to question why a simple note of fees and expenses should cost as much as £1,700. This could have clarified the extent of his request. On the other hand, the Factor might have attempted to clarify whether what was being sought was the entire claim file, or something less than that. However, the point it noted is that the insurance claim and the litigation which accompanied it was all outwith the normal core services provided by the Factor all as narrated above. In the Tribunal's view, it had no obligation to provide any such information at all.

66. The Code at section 3.3 refers to charges made and a description of the activities and works which are charged for by the Factor. The works being carried out to the development were not split among the block owners but were instead being pursued via the underwriter, as a project entirely separate from the Factor's core services. In effect, the Homeowner was seeking information from the Factor which had been accumulated as a result of the operation of the litigation scheme, which he was not party to, in order that he could progress his own claim separately. It therefore seemed reasonable to the Tribunal that a normal commercial rate should be applied to the provision of such information, whatever its extent. It further found that it was reasonable for the Factor to have data protection concerns which would have required sifting in order to ensure that no breaches of data protection legislation occurred. It therefore found that there had been no breach of section 3.3 of the Code by the Factor.

Section 6.3 – Appointment of contractors

67. Section 6.3 of the Code provides that on request, factors must be able to show how and why they have appointed contractors, including in cases where they

have decided not to carry out a competitive tendering exercise or use in-house staff.

68. The Homeowner gave evidence that Mr Gargaro continues to be appointed in relation to the development to the present day. There had been no procedure for his appointment or consultation or any proper tendering process.

69. The Tribunal has already made a relevant finding in this regard as set out above. Mr Gargaro was appointed in relation to the survey works as he was trusted by the underwriter and was already known to one of the block proprietors. He had a detailed knowledge of the works required to the development so appeared to be the natural appointee to take over once the additional works had commenced in 2013. In addition, Mr Reid gave evidence that two alternative contractors had been identified and the option of appointing them was put to the body of residents at a General Meeting. The residents had decided to continue to appoint Mr Gargaro. In any event, the issue might be seen as academic since Mr Gargaro's fees were paid for by the underwriters and not the homeowners as found above. In addition, his appointment was further to the litigation scheme and not part of the core factor duties. For all of these reasons, the Tribunal found that there was no breach of section 6.3 of the Code.

Section 6.6 – documentation in relation to any tendering process

70. Section 6.6 states: "If applicable, documentation relating to any tendering process…should be available for inspection by homeowners on request, free of charge.

71. On questioning by the Tribunal, the Homeowner stated that he had made no such request. This section has accordingly not been breached.

Section 6.9 – Pursuing contractors to remedy defects

72. Section 6.9 provides: "You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided."

73. The Tribunal has already made relevant findings in this regard as set out above: The original inadequate works to the block were instructed by the insurer. The Factor was not in a contractual position to require AWM or Prodrive to remedy their inadequate work or to enforce any collateral warranty. In fact, it was the challenge to those works by the Factor which led to the warranty claim being pursued further by the alternative method of the litigation scheme and to further remedial works being undertaken subsequently. The Tribunal finds that there has been no breach of section 6.9 of the Code.

Other factor duties

74. It had originally been asserted by the Homeowner that the Factor did not have authority to act as such (see letter of 15 March 2017 from Mr Young to Karen Sutherland of Citizens' Advice, found at Tab 6 of the Factor's productions for

the hearing). Despite not being included as part of the summary of issues for the hearing, the Factor came prepared to answer that allegation As narrated above, Mr Eric Holmes gave evidence on behalf of the Factor in relation to its appointment.

75. Prior to his giving evidence, it has already been conceded by the Homeowner that as at the date of the hearing, the Factor was validly appointed and had been since 2010 with that position having been formalised in 2012. Reference is also made to the narrative at the end of the WSoS referred to above. Mr Holmes thereafter confirmed that the Factor had been appointed as such by the developer in terms of the title deeds and had simply continued in that capacity after the last unit had been sold. That further evidence was also accepted by the Tribunal.

76. It followed that the allegation that the Factor had not been validly appointed was rejected by the Tribunal. It also finds that any charges relating to its factoring services had also validly been made, although no specifically disputed charges were brought to the attention of the Tribunal.

77. The final issue in relation to a failure in duty to obtain a Completion Certificate for the development has been fully discussed above. The Factor had no such duty as part of its core services. However, it has undertaken all reasonable steps further to obtaining such a certificate and it is to be hoped that the long struggle further to that aim will soon be at an end.

Decision in relation to the Factor's duties

78. Therefore, the Tribunal finds that the Factor has not breached its duty in respect of any parts of the Code. It also finds that the Factor has not failed to comply with any factor duty arising separately. No further action on the part of the Factor is therefore required. The decision was unanimous.

Expenses

79. At the end of the hearing, Mr Young made a claim for the expenses of the entire hearing in terms of Rule 10 of the 2016 Regulations. He submitted that much of the evidence had been found wanting upon questioning by the Tribunal. Some parts of the claim had been withdrawn during the course of the hearing itself and much had not been the subject of prior notice. There was a lack of specification despite there having been two Directions issued and a CMD where the Tribunal had explained what was required of the Homeowner in terms of evidence to support his application. In all, the whole application had been misconceived from the start and Mr Young expressed surprise that it had passed through the sifting procedure in terms of section 18(2) of the 2011 Act.

80. In response, Mr Shearer for the Homeowner stated the critical word in Rule 10 was "unreasonable". The Homeowner has had longstanding issues with the Factor extending over a period of many years and he genuinely felt that he was getting nowhere despite extensive correspondence. It had seemed to him that the Homeowner Housing Panel (now the Tribunal) was his only means left

whereby he could obtain some form of satisfaction in respect of the issues he had to deal with in respect of his property. The Tribunal had been an appropriate avenue to pursue his claim, even if he might not have ultimately been successful in having any part of his application upheld.

Discussion of applications for expenses

81. Rule 10(1) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2016 provides:
"The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party or parties to unnecessary or unreasonable expense."

82. The Tribunal is mindful of Rule 3, the overriding objective which is to deal with proceedings justly. That would include consideration of the position of parties who are unrepresented, inexperienced in formal dispute resolution and potentially dealing with fraught and emotional issues in that context for the very first time.

83. It is also mindful of recent guidance on the awards of expenses by tribunals provided by the Upper Tier Property Tribunal in England in the case of *Willow Court Management Company v Alexander* [2016] L&TR 34. That case sets out a three-stage process: (1) a tribunal must decide whether the conduct in question was unreasonable, that is, whether there is a reasonable explanation for the conduct complained of, which is an objective test and not a matter of discretion; (2) if conduct is found to have been unreasonable, the tribunal must decide whether to exercise its discretion to award expenses and (3) in those circumstances it then requires to consider what the terms of the order should be.

84. Taking the first of these steps, Mr Shearer quite correctly placed emphasis on the word "unreasonable" contained within Rule 10. He could have gone further to emphasise that the wording is "unreasonable behaviour in the conduct of a case." This is to be contrasted with the wording of Rule 13(1)(b) of the English Property Chamber Rules 2013 which states that where the tribunal finds a person has acted unreasonably in bringing, defending or conducting proceedings, the tribunal may order payment of unreasonable conduct costs. There is no explicit sanction in the form of expenses for the unreasonable *bringing* of an application. The scope of the Scottish rules therefore appears to rule out awards of expenses for claims that are misconceived in the first place and are limited to conduct during the substantive hearing.

85. Mr Young submitted that the Homeowner's entire application was misconceived. As is clear from the foregoing decision, the Tribunal agrees that, large parts at least, of the claim were indeed misconceived. However, the Tribunal must consider objectively the conduct of the Homeowner in the course of the proceedings. The Homeowner clearly had difficulty in dealing with his application. This was initially demonstrated by the three attempts at submitting the application form which he made. The Tribunal sought to address the

difficulties he evidently experienced thereafter by the issuing of Directions in an effort to focus his application and related documentation which had become unmanageable.

86. The Homeowner did not in fact comply with the Direction of 3 May 2017. However, rather than simply ignore it and attend the hearing unprepared, he sought further time and enlisted the assistance of Mr Shearer from CAB. Both Mr Shearer and the Homeowner then attended the CMD in order to obtain guidance from the Tribunal in relation to compliance with the Direction. As the Direction of 2 June 2017 narrates, the Tribunal was satisfied that the Homeowner had genuinely attempted to comply with the terms of the first Direction but was unable to do so without assistance. The fact that the Homeowner, as an unrepresented party, unaccustomed to formal proceedings, sought the help of Mr Shearer is an indication that the conduct of the proceedings was carried out in a reasonable manner.

87. At the hearing itself, Mr Shearer on the Homeowner's behalf conducted proceedings courteously and without any undue prolixity. In dropping the complaints under sections 6.1 and 7.1 of the Code he helped to ensure that proceedings were brought to a conclusion within a single day.

88. Rule 10 is permissive ("may award expenses") and conditional ("but only where…"). This is in contrast to the rule in the ordinary courts where expenses normally follow success. This demonstrates the exceptional nature of the remedy. It was not unreasonable for the Homeowner to seek to have his perceived grievances against the Factor heard in open forum at a hearing by the only body which appeared to have the jurisdiction to resolve the difficulties he found himself in through no fault of his own. The fact that he has been entirely unsuccessful does not diminish in any way his entitlement to be heard by the Tribunal and to have his application followed through to a conclusion. The Tribunal therefore decided to refuse the application for expenses.

Appeals

89. 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 within 30 days of the date the decision was sent to

D Preston

M O'Carroll

O'Carroll
Legal Member

Date: 14 August 2017