Housing and Property Chamber
First-tier Tribunal for Scotland

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: FTS/HPC/PF/21/0795

The Parties:

Mr William Tracey, 11A Murdieston Street, Greenock PA15 4DT ("the homeowner")

and

River Clyde Homes Limited, incorporated in Scotland (SC32903) and having their Registered Office at Roxburgh House, 100-112 Roxburgh Street, Greenock PA15 4JT ("the property factors")

Tribunal Members – George Clark (Legal Member/Chairman) and Elizabeth Dickson (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") decided that the property factors have failed to comply with their duties in terms of Section 2.4 of the Property Factors Code of Conduct ("the Code of Conduct") made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The Tribunal determined that the property factors have not failed to comply with their duties in terms of Section 6.3 of the Code of Conduct and have not failed to carry out the Property Factor's duties. The Tribunal proposes to make a Property Factor Enforcement Order as set out in the accompanying Notice under Section 19(2)(a) of the Act.

Background

1. By application, received by the Tribunal on 30 March 2021, the homeowner sought a Property Factor Enforcement Order ("PFEO") against the property factors. His complaint was that they had failed to comply with their duties under Sections 2.4

and 6.3 of the Code of Conduct and that they had failed to carry out the Property Factor's duties.

2. The homeowner's complaint related to work carried out in early 2017 to replace the roof of the tenement of which the Property forms part. The homeowner contended that the property factors had not consulted with or obtained permission from the owners of the flats in the tenement to carry out the work, that they had not surveyed the roof to ascertain the scope of the work required, and that a contractor had been appointed without a proper scope of of works or a tendering process. As a result, the owners had incurred considerable expense in having to pay for work that was unnecessary.

3. The application was accompanied by a copy of a letter of complaint sent to the property factors on behalf of the homeowner on 10 December 2020. The homeowner complained that there was lack of evidence of any consultation with him to obtain his written approval prior to the property factors instructing the roof repairs. No explanation had been provided to the homeowner as to how and why the property factors instructed Graham Roofing to carry out the work. The property factors did not appear to have carried out a competitive tendering process. They had also failed to act in accordance with their Written Statement of Services, which states that they will generally instruct repairs if they expect the share of the total costs payable by each homeowner to be less than £250, although in some emergency situations they may instruct works, without notice, even where the estimated cost is greater than £250 for each flat. The view of the homeowner was that the need for roof repairs in the present case did not appear to have constituted an emergency and that the property factors had failed to comply with the Written Statement of Services, as they had not made every effort to ensure there was appropriate consultation prior to instructing the repairs or to obtain a price that represents value for money.

4. The homeowner also provided the Tribunal with the property factors' Stage One response to his complaint. The response was dated 22 December 2020. In relation to Section 2.4 of the Code of Conduct, the property factors said that the homeowner had previously raised various challenges to the roof renewal works and that he had had their responses. He had entered into a payment plan to pay off the balance due by him and had maintained payments until the start of the COVID-19 lockdown. There had also been interactions with various personnel within the property factors' organisation and enquiries had been made on his behalf by elected members of Inverclyde Council. Prior to the complete renewal works, the history of the roof had been one of repeated callouts to make safe and to carry out patch repairs. It had been determined by the property factors' technical team that the roof was nail-sick and that further patch repairs would be ineffective. In order to maintain the fabric of the building and prevent further hazards caused by slipping tiles, the property

factors had been left with no option but to perform a complete renewal, and this had been notified to owners prior to the work commencing.

5. In relation to the complaint under Section 6.3 of the Code of Conduct, the property factors referred to their response of 24 July 2019 to a complaint by the homeowner, in which they had confirmed that the contract had been awarded through the Scottish Procurement Alliance ("SPA"), a charitable not-for-profit Government organisation, of which they were founder members. Contractors all had to submit tenders to be on that framework. The selected contractors were the best of the tender applications and were scored on quality, cost and community benefits. By employing this framework, the property factors provided value for money for large scale works.

6. The homeowner also provided the Tribunal with a copy of the property factors' response of 27 August 2019 to a Stage Two complaint, made on 30 July 2019. They stated that the condition of the roof had been flagged up by their Housing Inspector, their workmen having visited to carry out repairs and having noted the poor condition of the roof. The roof was at the end of its natural life cycle and was due for replacement. A qualified clerk of works had instructed the roof replacement through the SPA framework, following further confirmation from him as to the condition of the roof.

7. Finally, the homeowner provided the Tribunal with a copy of the property factors' Written Statement of Services and referred to the paragraph which stated - "We will contact you, advising you of any repairs where the costs are expected to be higher than £250 for each homeowner."

8. On 4 May 2021, the Tribunal advised the Parties of the date and time of a Hearing, and the property factors were invited to make written representations by 25 May 2021.

9. The property factors' written representations were received by the Tribunal on 25 May 2021. They provided a copy of their letter to the homeowner of 14 December 2016, in which they stated that "after a visual inspection, the roof…is beyond repair". There had been ongoing roof repairs over the past few years and "the roof renewal at your property has been deemed as essential to prevent further damage to the building". The share of the cost payable by the homeowner was to be £3,320.25. They also provided a spreadsheet showing six roof repairs having been carried out between 11 January 2012 and 10 September 2015. The property factors argued that their letter of 14 December 2016 complied with their duty under Section 2.4 of the Code of Conduct and with their Written Statement of Services and that there was no necessity to seek further authority from the homeowner. This was based on two grounds.

10. Firstly, their relationship with the homeowner at the time was not that of an agent. They were acting as principals, so had the right to effect repairs so long as they were acting reasonably. They referred to the Deed of Conditions by the then Inverclyde District Council as feudal superiors. It included a clause that for so long as they may be the proprietors of any part of the tenement, they were entitled to act as Common Factors. This Manager Burden reserved to the superiors the power to manage the development personally or to nominate a factor and was first registered on 19 November 1990, at which point a 30-year clock started running, in terms of the Title Conditions (Scotland) Act 2003, as the property was a former council house and had been sold under the Right to Buy Scheme. The work in question in the present case was carried out within the 30-year period, so it was not necessary to consult with the homeowner or to communicate the works prior to their instruction.

11. The second ground was that the replacement works followed on from repair requests, due to water penetration, that could not be carried out as it was indicated that the roof could not be repaired further. Accordingly, the replacement would be reconsidered as a repair rather than planned maintenance, in line with case law such as *Ravenseft Properties Ltd v Davstone (Holdings) Ltd 1980 QB12.* The property factors considered that the work was both a repair and an emergency and in such emergency circumstances it was not common practice to delay repairs by arranging a survey, which would have added to the cost. There was no provision in the Written Statement of Services that the property factors would process contracts by arranging three quotes and they had explained, in their letter of 22 December 2020 to the homeowner, how the contract had been procured using the SPA Framework. Use of this Framework was the quickest way to have the emergency work undertaken. A full-scale tendering process would have been a lengthy process allowing further damage to the block.

Hearing

12. A Hearing was held by means of a telephone conference call on the morning of 1 July 2021. The homeowner was present and was represented by Mr Colin Jackson, a Councillor with Inverclyde Council. The property factors were represented by their Senior Project Manager, Mr Richard Orr.

13. The Tribunal Chair advised the Parties that they could assume that the Tribunal Members had read and were fully conversant with their written representations and that it would not, therefore, be necessary to lead the Tribunal through that evidence in detail again.

14. Mr Orr told the Tribunal that the Property was in a tenement block which originally comprised seven flats and a shop. The shop had, however, since been converted

into an eighth flat. The property factors owned four of the flats, following a stock transfer in 2007 and the remaining four were privately owned.

15. The homeowner told the Tribunal that the roof of the block is 30 feet high. No survey had been carried out and nobody had accessed the loft space to inspect the underside of the roof. The inspection had merely been from ground level. There had been no competitive tendering for the work. The homeowner would have expected a survey to be carried out, given the amount of money that was involved.

16. The property factors stated that, as Registered Social Landlords, they have to carry out stock condition surveys. They were aware of the general condition of the roof of the tenement these assessments and from the reports when repairs were carried out. It was not reasonable to infer that they were unaware of the condition of the roof. As regards competitive tendering, it is a competitive process for contractor to become listed on the SPA Framework.

17. The homeowner's representative told the Tribunal that the homeowner had video evidence showing scaffolding having been erected which was not high enough to gain access to the roof itself. On questioning by the Tribunal, however, it was confirmed that this scaffolding had been erected in connection with snagging matters after the roof works were carried out, so the Tribunal advised the Parties that the evidence was not relevant to the present proceedings. The homeowner's representative fully understood the Framework process but felt that works of such a high cost should have gone out to competitive tender.

18. The property factors responded that their governance arrangements stated that they could use the Framework for works costing between £10,000 and £50,000. The process had been that the decision to replace the roof had been taken following the recommendation of the contractors assessing the roof, combined with the stock condition survey information held by the property factors and the advice given by the contractors who had undertaken the roof maintenance works.

19. Questioned by the Tribunal, the property factors told the Tribunal that the stock condition survey indicated that the roof was perceived to be at the end of the life cycle for a slated roof. It would have been scheduled to be replaced in the next five years, but the water ingress was such that the replacement of the roof of the present tenement was escalated.

20. The homeowner then questioned why the owners had been told they needed a new roof when nobody from the property factors had been up on the roof and nobody had inspected the roof space. He said that none of the owners had

agreed to the works being carried out. Mr Orr advised the Tribunal that the previous roof repairs had been carried out by Inverclyde Council's Direct Labour Organisation ("DLO") and, as part of the assessment after the DLO had been out, Graham Roofing had been asked to look at the roof. They reported back that they were in agreement with the DLO. The nature of the Framework is that contractors are rated both on quality and cost. Graham Roofing were at that time Number One on the list, but any contractor on the list is regarded as competent and qualified to do the work. The homeowner's representative commented that no independent survey had been carried out and questioned why the property factors were not using the most common tender websites. Mr Orr responded that they do use such websites when putting work out to tender, but in the present case the decision had been to put it to the SPA Framework, with its pre-agreed rates, as they had been told in December 2016 that the water ingress to the building could not be abated and they felt it was necessary to avoid the delay that would be incurred by undergoing a full tendering exercise.

21. The Tribunal referred the property factors to the requirement of Section 2.4 of the Code of Conduct that property factors must have a procedure to consult with homeowners and pointed out that, even if, in the present case, the property factors were not required to consult, such a procedure should be in place, as it would certainly be required if they were contemplating improvements to properties that they managed. Mr Orr responded that, for improvements, they would seek majority approval, but there was no set procedure beyond the Written Statement of Services and the provisions in the title deeds. The Tribunal asked whether it would not be sensible to have some sort of consultation in case the owners, who probably knew the property best, wished to add something to the proposed work. Mr Orr said that, in other circumstances, there would have been more time for discussion around planned works, but in the present case, there was a need to have the works done sooner rather than later. The Tribunal pointed out that the letter of 14 December 2016 had been very brief, and it did not say that, as it was an emergency situation, it was not possible to go through a consultation process. Mr Orr accepted that the situation could have been explained better and that, from this case, the property factors had learned lessons on communication. He made an offer to the homeowner of a drone survey of the tenement block to look at the condition of the property now. This, he said, might allay concerns about the quality of finish of the roof works and highlight any other items that might require attention.

22. In his closing remarks, Councillor Jackson alluded to instances of other properties where, he contended, the property factors had carried out works without consultation, including works that were unnecessary. The Tribunal Chair ruled that this was outwith the competency of the Tribunal in determining the present application, as was a question from the homeowner as to whether the

property factors ever instructed a company other than Graham Roofing in the Inverclyde area.

23. The Parties then left the Hearing, and the Tribunal Members then considered all the evidence, written and oral, that had been presented to them.

Findings in Fact

(i) The homeowner is the proprietor of the property 11A Murdieston Street, Greenock, part of a traditional tenement block originally comprising seven flats and a ground floor shop, which has now been converted into an eighth flat.

(ii) The homeowner's title was registered in the Land Register on 15 January 2000 and was subject to the burdens and conditions contained in a Deed of Conditions by Inverclyde District Council registered on 12 November 1990.

(iii) The Deed of Conditions stipulated that so long as they as they were proprietors of any part of the tenement, Inverclyde District Council were entitled to act as common factors, or to nominate and appoint factors.

(iv) Four of the flats in the tenement remain in the ownership of the property factors, by virtue of a transfer by Inverclyde Council of ownership and management of its council house stock in 2007.

(v) The property factors, in the course of their business, manage the common parts of the tenement. The property factors, therefore, fall within the definition of "property factor" set out in Section 2(1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").

(vi) The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.

(vii) The date of Registration of the property factors was 12 December 2012.

(viii) The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.

(ix) The homeowner made an application to the First-tier Tribunal for Scotland Housing and Property Chamber, received on 30 March 2021, under Section 17(1) of the Act.

(x) The concerns set out in the application have not been addressed to the homeowner's satisfaction.

(xi) On 4 May 2021, the Housing and Property Chamber intimated to the Parties a decision by the President of the Chamber to refer the application to a Tribunal for determination.

Reasons for Decision

24. The Tribunal considered first the homeowner's complaint under Section 2.4 of the Code of Conduct, which provides as follows:

"You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services that will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies."

25. The Tribunal noted that the Property had been purchased by the homeowner from the local authority under the Right to Buy legislation. The Deed of Conditions, registered on 12 November 1990, which affected the Property, stated that, so long as they were proprietors of any part of the tenement, Inverclyde District Council were entitled to act as common factors, or to nominate and appoint factors. This constituted a Manager Burden, as defined in Section 63 of the Title Conditions (Scotland) Act 2003.

26. In terms of Sections 63(4) and 63(6) of the 2003 Act, the Manager Burden fell to be extinguished 30 years after the date on which the Deed of Conditions was registered in the Land Register, namely on 12 November 2020. Accordingly, the Manager Burden was in force when the property factors instructed the roof works in December 2016.

27. The property factors acquired the flats remaining in the Council's ownership by virtue of a stock transfer by Inverclyde Council, as successors to Inverclyde District Council following local authority reorganisation which took effect in 1996, and, consequently, are still the proprietors of four of the eight flats in the block. The stock transfer placed the property factors in the same position as Inverclyde Council had been as regards the Manager Burden. Accordingly, the Tribunal accepted that in instructing the repairs to the roof, the property factors were acting both as principals and as common factors. They were not, therefore, obliged to consult with the owners of the other four properties in the tenement before instructing repairs.

28. The Tribunal accepted the argument put forward by the property factors that, whilst the work involved replacing the roof, it was, in essence, a repair and was not part of any programme of cyclical maintenance or investment works as set out in the property factors' Written Statement of Services.

29. The fact, however, that in this particular instance, the property factors did not have a duty to consult the homeowners to seek their approval for the work did not affect the complaint under Section 2.4 of the Code of Conduct, which requires property factors to have a procedure to consult with the group of homeowners and seek their written approval before providing work or services that will incur charges or fees in addition to those relating to the core service. The Tribunal examined carefully the property factors' Written Statement of Services but was unable to find within it any procedure for seeking written approval for such works. They say that they generally instruct works if they expect the share of the total costs of the works payable by each homeowner to be under £250 and there is a statement that the property factors "will make every effort to ensure that we provide homeowners with effective communication, appropriate consultation and a price that represents value for money". They also reserve the right to instruct works, without notice, even where the estimated cost is greater than £250 for each homeowner. There is, however, no provision for seeking written approval and the Tribunal determined that, although it would not have been necessary to have sought such approval in the present case, the property factors had nevertheless failed to comply with the duties imposed on them by Section 2.4 of the Code of Conduct. Accordingly, the Tribunal upheld the homeowner's complaint under that Section.

30. The Tribunal then considered the complaint under Section 6.3 of the Code of Conduct, which states:

"On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff."

31. The Tribunal noted that there had been six repairs to the roof of the tenement in the few years leading up to the decision of the property factors to instruct its replacement. They had told the Tribunal that their DLO, who had been carrying out these repairs, had advised that the water ingress could not be abated. They had then arranged for a contractor to inspect the roof, and that contractor had agreed with the findings of the property factors' DLO. The property factors had, therefore, instructed the contractors to proceed. That had been in December 2016 and the work was carried out in the following month.

32. The Tribunal noted that there had not been a roof survey carried out by an independent party, such as a building surveyor, before the property factors gave the authority to the contractors to proceed with the work, but the Tribunal accepted,

on the balance of probabilities, based on the evidence presented to it, that, whilst the roof was nearing the end of its serviceable life and would probably have been replaced within a five year period, the work that was carried out was necessary and had become urgent, particularly as it was during the winter months. Accordingly, the property factors had acted reasonably in using the PSA Framework to instruct Graham Roofing to inspect the roof and then carry out the work, rather than undertaking a full tendering process, which would inevitably have caused a significant delay in having the works carried out.

33. The property factors' letter of 14 December 2016 advised the homeowner of the process by which the contractors had been appointed. The Tribunal's view was that this could have been explained very much better, but that it met the requirements of Section 6.3 of the Code of Conduct and that subsequent communications with the homeowner had explained the position in greater detail. Accordingly, the Tribunal did not uphold the homeowner's complaint under Section 6.3 of the Code of Conduct. The Tribunal would recommend, however, that, in future, the property factors set out details of the SPA Framework in such a letter, rather than simply referring homeowners to the SPA website. They should not assume that every client has access to, and is comfortable with using, the internet.

34. The homeowner had also complained that the property factors had failed to carry out the property factors duties. No evidence was provided by the homeowner that the property factors failed to act in accordance with their Written Statement of Services. The complaint was a failure to seek and obtain consent to the roof works, but the Tribunal had found that the property factors' Written Statement of Services did not contain a procedure for obtaining such consent, so, whilst the absence of such a procedure resulted in a failure to comply with Section 2.4 of the Code of Conduct, the property factors had not failed to comply with their Written Statement of Services. Accordingly, the Tribunal did not uphold the complaint that the property factors had failed to carry out the property factors duties.

35. Having decided that the property factors had failed to comply with the requirements imposed on them by Section 2.4 of the Code of Conduct, the Tribunal then considered whether to make a Property Factor Enforcement Order. In the present case, the absence of a procedure had no effect, as the property factors were not obliged to seek consent for the works, so the Tribunal decided that it would not be appropriate to make an award of compensation to the homeowner. The Tribunal's view, however, was that that the property factors should amend their Written Statement of Services to include a clear procedure for consulting homeowners and seeking their written approval before providing work or services that will incur charges or fees in addition to those relating to the core service. The Tribunal therefore proposes to make a Property Factor Enforcement Order as detailed in the accompanying Notice made under Section 19(2)(a) of the Act.

36. It is not the function of the Tribunal to comment on or "approve" the terms of the changes that the property factors decide to make to their Written Statement of Services following on the decision to make a Property Factor Enforcement Order. Accordingly, the proposed Order is limited to a requirement that the property factors amend their Written Statement of Services to include the procedure required of them by Section 2.4 of the Code of Conduct.

37. The Tribunal's Decision was unanimous.

Right of Appeal

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

[redacted]

Legal Member/Chairman: 8 July 2021

George Clark