**First-tier tribunal for Scotland (Housing and Property Chamber)
("the tribunal")**

Decision on homeowners' application: Property Factors (Scotland) Act 2011 ("the 2011 Act"), Section 19(1)

Chamber Ref: FTS/HPC/PF/19/2093

**Property at 20/7 Coburg Street, Edinburgh, EH6 6HL
("The Property")**

The Parties:-

**Carol Black, 20/7 Coburg Street, Edinburgh, EH6 6HL
("the Applicant")**

**James Gibb Property Management Limited, 4 Atholl Place, Edinburgh, EH3 8HT
("the Respondent")**

**Tribunal Members:
Ms Susanne L M Tanner QC (Legal Member)
Mr David Godfrey (Ordinary Member)**

DECISION

1. **The Respondent has failed to comply with the Code of Conduct, Sections 2.5, 6.9 and 7.1.**

2. **The Respondent has not failed to comply with the Code of Conduct, Sections 2.1, and 3.3.**

3. **The Respondent has failed to carry out its property factor's duties.**

4. **The decision of the tribunal is unanimous.**

STATEMENT OF REASONS

1. In this decision the tribunal refers to the Property Factors (Scotland) Act 2011 as "the 2011 Act", the Code of Conduct for Property Factors as "the Code of Conduct" and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "the 2017 Rules".

Findings in fact

2. The tribunal makes the following findings-in-fact:

2.1. The Applicant is the registered proprietor of the Property.

2.2. The Applicant has lived in the Development since around 2008.

2.3. The Applicant's Property is a flat in a development known as The Crescent ("the Development").

2.4. The developer of the Development was Gregor Shore plc.

2.5. The Deed of Conditions for the Development was registered on 2 June 2003.

2.6. There are 62 Properties in the Development, in six blocks.

2.7. The Applicant's Property is situated in block 20.

2.8. The common property in the Development includes the lifts, lift shafts, lift motors and lift motor rooms.

2.9. The Respondent registered as a property factor on 23 November 2012 and renewed its registration on 17 May 2019.

2.10. The Respondent was appointed as a Property Factor for the development in or about 2013.

2.11. There is a Homeowners' Committee ("HC") at the Development, of which the Applicant forms part.

2.12. At the time of the Application, the Applicant was the chair of the HC.

2.13. The Respondent issued Issue 8 of the Written Statement of Services ("WSS") for the Development in January 2018.

2.14. The Respondent issued Issue 9 of the WSS in or about May 2019.

2.15. The Respondent issued Issue 10 of the WSS in or about January 2020.

2.16. The WSS has a development schedule specific to the Development, the most recent version of which is dated 1 November 2017.

2.17. The Respondent has a written complaints process for homeowners at the Development.

2.18. The Applicant made a complaint to the Respondent on 18 March 2019 which was dealt with as a complaint under the complaint process.

2.19. The final stage 5 letter issued by Nik Mayall of the Respondent to the Applicant was dated 27 June 2019 and concluded the internal complaints process.

2.20. On 3 July 2019, the Applicant notified the Respondent of the alleged breaches of the Code of Conduct and alleged breaches of property factors' duties which form the basis of the Application.

2.21. The Applicant made an application to the tribunal on 4 July 2019.

2.22. Following the first procedural hearing on 18 November 2019, parties held a private meeting and an action plan was agreed between parties dated 28 January 2020.

2.23. In January and February 2019 the Respondent sent two letters to Homeowners on the Development in relation to various matters, including a proposed float increase from £225 to £315.

2.24. The February 2019 letter referred to the January 2019 letter.

2.25. The Applicant did not receive the first letter in January 2019.

2.26. Other homeowners in the Development received the first letter in January 2019.

2.27. Nik Mayall of the Respondent sent a letter to the Applicant in June 2019 in which he referred to two letters sent to homeowners in January and February 2019.

2.28. It was not false or misleading for Nik Mayall to refer to the two letters sent in January and February 2019.

2.29. The Respondent produced a list of “snagging” issues in relation to work carried out by Keystone at the Development.

2.30. The Applicant produced a list of six “snagging” issues in relation to work carried out by Keystone on the Development.

2.31. The Applicant’s “snagging list” was not the first or only “snagging” list.

2.32. The HC does not have legal authority to incur expenditure on behalf of the other homeowners in the Development.

2.33. In or about January 2019 the Respondent calculated estimated expenditure for the Development and concluded on the basis of its calculation that an increase to the float was required.

2.34. The Respondent’s calculation included regular expenditure and items of one-off expenditure which had occurred in the previous year and were unlikely to occur in the next year.

2.35. On the basis of its calculation the Respondent stated in letters to homeowners in January and February 2019 that it required to increase the float from £225 to £315 per property.

2.36. The float is calculated on a Development-wide basis.

2.37. There is no agreement between the Respondent and homeowners on the Development for the float to be calculated on a block-by-block basis.

2.38. The Applicant reviewed the Respondent’s calculation and carried out her own calculation which excluded items of one-off expenditure which produced a lower figure for the amount by which the float required to be increased.

2.39. The Applicant and a number of other homeowners objected to the Respondent’s proposed float increase.

2.40. The Respondent froze the implementation of the proposed float increase as a result of homeowners’ queries and objections.

2.41. As part of the agreed action plan between the Applicant and the Respondent, a lower float increase has since been agreed.

2.42. On multiple occasions, correspondence from the Applicant was received by the Respondent and was not responded to in accordance with the timescales in the WSS (Issue 8).

2.43. Following receipt of the Respondent's letter in February 2019, which included the proposed float increase, the Applicant by letter of 28 March 2019 requested an analysis of how the figure of £315 had been arrived at.

2.44. The Applicant did not request supporting documentation or invoices from the Respondent in respect of the proposed float increase.

2.45. The Respondent produced an analysis of how the figure of £315 had been calculated and provided it to the Applicant.

2.46. Schindler held the maintenance contract for lifts in the Development.

2.47. The lift contract for the Development has now been awarded to Pickerings.

2.48. Schindler were unable to identify the cause of a number of defects with the lifts at the Development.

2.49. Schindler failed to carry out some items of routine maintenance.

2.50. Allianz, and latterly Zurich, were instructed by the Respondent to carry out regular checks on the lifts and to produce reports which included items which required to be addressed, some of which were items of routine maintenance.

2.51. The Respondent, through the Allianz and Zurich reports, was made aware of maintenance and repair issues which required to be addressed.

2.52. Schindler failed to carry out some items of routine maintenance in relation to the lifts, including matters identified by Allianz and Zurich.

2.53. An inadequate service was provided by Schindler.

2.54. There was a failure of the Respondent to pursue Schindler in respect of the inadequate service provided.

2.55. The Respondent instructed another contractor who had better knowledge of the schematics of the lifts to carry out routine maintenance and repairs.

2.56. There were financial implications for homeowners arising from the Respondent's failure to pursuer Schindler, as homeowners were paying a proportion of the service contract invoices to Schindler and receiving an inadequate service.

2.57. The Respondent commissioned a report entitled "LOLER Report review TUV SUD" in relation to the lifts, during the tribunal proceedings, to establish whether works should have been carried out under the lift contract which has identified action points for future maintenance and improvements.

2.58. Keystone carried out works on the Development.

2.59. Snagging issues were identified by the Respondent and by the Applicant.

2.60. In respect of the six snagging issues identified by the Applicant, Keystone provided inadequate work or service in relation to three of them.

2.61. A bollard was broken by Keystone's operatives during attendance at site.

2.62. There was render damage on the vennel wall finish which was either caused by Keystone during works; or that if it had been in that condition before the works, power-hosing the area led to penetration and made the damage worse.

2.63. There were splashes on the vennel ceiling caused by overspray during the Keystone work.

2.64. The Respondent failed to adequately pursue Keystone in a timeous manner to rectify the said three snagging issues.

2.65. The bollard has been repaired but has not been returned to the condition it was in prior to damage.

2.66. The bollard requires to be further repaired or replaced.

2.67. The vennel wall render damage requires to be repaired.

2.68. The splashes on the vennel ceiling require to be repaired.

2.69. The Respondent's delay in pursuing the contractor to remedy "snagging" matters cannot all be attributed to the Covid-19 pandemic or the

requirement to wait for other matters on the Development which require to be attended to.

2.70. In relation to the other snagging matters identified by the Applicant Keystone did not provide inadequate work or service.

2.71. The length of the Respondent's complaints' resolution process in WSS Issue 8, and in the complaints process in place at the time, was in the region of eight weeks from registration of the complaint to the final stage; with a discretionary element which allows the Respondent to extend this if further time is required for investigation.

2.72. The discretion to extend the time allowed for the Respondent to deal with complaints which involved complexity or a multitude of complaints.

2.73. The timescales for complaints have since been extended in WSS Issue 10.

2.74. In WSS Issue 8 there was no specified procedure as to how the Respondent would handle complaints against contractors.

2.75. In WSS Issue 10 there is an explicit policy as to how the Respondent will handle complaints against contractors.

2.76. There was a failure by the Respondent to comply with agreed response times to the Applicant's correspondence in terms of the timescales specified in the WSS Issue 8.

2.77. The Respondent did not ensure that annual servicing of water pumps was carried out in January 2019.

2.78. The water pumps were serviced in April 2019.

2.79. The delay of three months in carrying out annual servicing of the water pumps did not cause the water pumps to break down.

2.80. The Respondent failed to conduct a number of monthly inspections at the Development in 2019, prior to the date of the Application.

2.81. The proposed increase to the float amount from £225 to £315, in or about January and February 2019, was significant.

2.82. The Respondent did not seek agreement from the HC, or from a majority of homeowners, for the proposed float increase.

2.83. The Respondent removed the requirement to seek agreement for float increases in WSS Issue 9.

Findings in fact and law

3. The tribunal made the following findings in fact and law:

3.1. It was neither false nor misleading for Mr Mayall of the Respondent in his letter of June 2019 to the Applicant to refer to two letters sent to homeowners in January and February 2019; and there was no failure to comply with **Section 2.1** of the Code of Conduct in this regard.

3.2. It was neither false nor misleading for Mr Mayall in his letter of June 2019 to the Applicant to state that the Applicant had provided a list of further snagging items; and there was no failure to comply with **Section 2.1** of the Code of Conduct in this regard.

3.3. It was neither false nor misleading for the Respondent to state to the Applicant to state that the HC does not have legal authority to incur expenditure on behalf of the other homeowners in the development; and there was no failure to comply with **Section 2.1** of the Code of Conduct in this regard.

3.4. It was neither false nor misleading for the Respondent to state in January and February 2019 that the Development float required to be increased from £225 to £315; and there was no failure to comply with **Section 2.1** of the Code of Conduct in this regard.

3.5. In respect of the multiple occasions on which correspondence from the Applicant was received by the Applicant and was not responded to in accordance with the timescales in the WSS Issue 8, the Respondent has failed to comply with the Code of Conduct, **Section 2.5**.

3.6. In respect of the Applicant's request in March 2019 for an analysis of the proposed float increase, to which the Respondent produced an analysis, as there was no request by the Applicant for supporting documentation or invoices, the Respondent has not failed to comply with the Code of Conduct, **Section 3.3**.

3.7. In respect of the Respondent's failure to pursue Schindler in respect of the inadequate service provided for the lift servicing, the Respondent has failed to comply with the Code of Conduct, **Section 6.9**.

3.8. The Respondent's failure to pursue Keystone in a timeous matter to remedy outstanding matters caused by inadequate work or service, amounted to a failure to comply with the Code of Conduct, **Section 6.9**.

3.9. The Respondent's complaint process in WSS Issue 8 did not fail to comply with "reasonable timescales" and there was no failure to comply with **Section 7.1** of the Code of Conduct in this regard.

3.10. The lack of a specified procedure as to how the Respondent would handle complaints against contractors in WSS Issue 8 was a failure to comply with **Section 7.1** of the Code of Conduct.

3.11. The failure to comply with the agreed response times to correspondence as specified in the WSS Issue 8, **para 6.1.1**, was a failure to comply with the WSS Issue 8, **para 6.1.1**.

3.12. There was a duty on the Respondent in terms of the WSS Issue 8, **para 4.1**, that "roof inspections, gutter cleaning, etc, will be provided, where applicable on an as required basis", which extends to the servicing of water pumps on the Development.

3.13. The Respondent's failure to ensure annual servicing of the water pumps on the Development in January 2019 was a failure to comply with the Respondent's duty under WSS Issue 8, **para 4.1**.

3.14. The Respondent had a duty in terms of its appointment under the WSS Issue 8, **para 4.6.1** to conduct monthly inspections at the Development.

3.15. The Respondent's failure to carry out a number of monthly inspections at the Development in 2019, prior to the date of the Application, was a failure of the Respondent to comply with its property factors' duties under the WSS, Issue 8, **para 4.6.1**.

3.16. The Respondent had a duty in terms of the WSS Issue 8, **para 5.3.5**, to seek agreement of the HC or from the majority of owners if costs increase significantly in relation to the float amount.

3.17. The legal basis for the float increase is in the DOC for the Development which allows the Respondent to set the float at the appropriate level.

3.18. The Respondent's failure to comply with the duty to seek agreement from the HC or from a majority of homeowners for the proposed float increase, which was significant, was a failure of the Respondent to comply with its property factors' duties under the WSS, Issue 8, **para 5.3.5**.

The Application

4. The Applicant lodged an application ("the Application") with the tribunal on 4 July 2019.

5. In Section 7 of the Application the Applicant alleged that the Respondent has failed to comply with the Code Sections: 2.1, 2.5, 3.3, 6.9 and 7.1.

6. In Section 7 of the Application the Applicant alleged that the Property Factor has failed to comply with its Property Factor's duties arising from WSS 2.4, 4.1, 4.6.1, 5.3.5 and 6.1.1.

7. The Applicant produced a paper apart with details of her complaints, which were under the following headings:

    7.1. Lifts;
    7.2. Keystone Building Clean;
    7.3. Float increase dispute;
    7.4. Monthly inspections;
    7.5. Water pumps;
    7.6. Challenge of Homeowners' Committee (HC) authority by JG;
    7.7. Communication and Consultation;
    7.8. Complaint Resolution procedure.

8. The Applicant provided documents with her Application.

9. The tribunal made requests for further information and the Applicant responded and produced further information.

10. On 14 August 2019, the Application, comprising all documentation received in the period 4 July and 1 August 2019, was referred to the tribunal in terms of Sections 18 and 18A of the 2011 Act.

11. On 23 August 2019, the tribunal's administration wrote to the parties to advise that the Application had been referred to the tribunal.

12. A hearing was fixed for 7 October 2019 at the tribunal centre at George House, Edinburgh.

13. The hearing date was intimated to parties and parties were invited to lodge any written representations by 29 August 2019 and to lodge any documents in accordance with Practice Direction number 3.

14. The hearing was postponed and a new date was fixed for 18 November 2019.

Written Representations and documents lodged by parties

15. Both parties produced written submissions which were considered by the tribunal and crossed over to the other party.

16. Both parties produced Lists of Documents and consolidated numbered bundles of documents for the purposes of the hearing. These bundles included some documents which were produced by the Respondent in response to Directions issued by the tribunal.

17. Supplementary documents were added by both parties during the hearing process and were numbered to follow on consecutively from those already lodged.

18. Hearing – 18 November 2019 (procedural), 16 March 2020, 1 October 2020, 10 November and 11 November 2020

19. On 18 November 2019, a procedural hearing took place at Riverside House, Edinburgh. The hearing was remotely chaired by the President of the tribunal Chamber (due to the unavailability of the legal member on that date). The hearing was adjourned to a further date. Directions were issued by the President to parties. The parties requested the opportunity to hold a private meeting following the hearing and facilities were made available to them for that purpose. An agreement was entered into between the parties that the Respondent would produce an action plan to the Applicant.

20. A further hearing date was fixed and the parties submitted a joint request for postponement of the hearing to allow settlement discussions to continue.

21. The hearing was adjourned to 16 March 2020 at George House, Edinburgh. The Applicant attended. The following staff from the Respondent attended: Ms Jeni Bole, Technical Manager, Legal; Ms Angela Kirkwood, Operations Director; Mr Steve Paterson, development manager. The Applicant had no objection to all three staff from the Respondent being present throughout the hearing to represent the Respondent and stated that she thought that they should all be present due to their involvement.

22. Ms Bole requested an adjournment of the hearing to a future date. She indicated to the tribunal that following the meeting after the procedural hearing in November 2019, representatives of the Respondent had met with the Applicant to consider the various issues that were the source of her submission and complaint; and that the Respondent had produced an action plan which they had been working through. Ms Bole conceded that the updates had not been as

regular as they would have liked. From her perspective, she felt that they were making good progress through the various matters. Ms Bole submitted that a hearing was premature. Regarding the lifts, Ms Bole stated that the Respondent has now received a report from an independent inspector which they are happy to share with the Applicant and the tribunal. She described it as a fairly extensive spreadsheet. The investigator has considered the reports provided by Zurich and Allianz including the various recommendations which were made, to isolate which items were covered by the contract with Pickerings and which items were excluded. Ms Bole stated that that the Respondent was making progress on most of these issues. In relation to Keystone, Ms Bole stated that Mr Paterson has met with Keystone with respect to the outstanding items from the list and that an email has been sent to the Applicant about that. Ms Bole indicated that some additional works would be going ahead. Ms Bole sought an adjournment of the hearing on the basis that the matters in the agreed action plan had been, or were to be, addressed.

23. The Applicant objected to the adjournment which was sought on behalf of the Respondent. She stated that she was ready to proceed. She stated that the complaint had formally started a year before and had been going on for much longer, since summer 2018 and before. The Applicant stated that she wished to air the issues in front of the tribunal. She stated that the hearing had been postponed on 7 October 2019 on the request of the Respondent. She stated that the meeting in November 2019 (after the hearing) was completely accidental. She stated that she had decided to meet with the Respondent out of frustration and lack of action. She stated that she thought that the tribunal evidential hearing was long overdue. She stated that regardless of the action plan, she was here and always have been here to prove, hopefully with sufficient evidence that the Respondent has to be held accountable for several breaches of the Code and breaches of property factors' duties.

24. Ms Kirkwood responded that the purpose of the hearing is to resolve a dispute between the parties. She stated that the parties had an action plan in place and that that should be the ultimate goal. She stated that there are items in the application in relation to which the Respondent has agreed that there have been breaches. She stated that they would like the opportunity to work with the Applicant. She stated that the Respondent can evidence what they have been doing since the meeting in November 2019. She stated that the information from the independent lift consultant was a long report which had been received a week previously. She stated that they would like the opportunity to try and work through that and to try and have direct dialogue with the lift contractors. She repeated that request for an adjournment of at least a month to allow for that dialogue.

25. In relation to the alleged failures to comply with the Code of Conduct and property factors' duties, Ms Kirkwood indicated the Respondent's position as follows:

25.1. **2.1.** The Respondent has not deliberately issued information which is misleading or false. The Respondent does not make any concession and contests the allegation that there has been a breach.

25.2. **2.5.** The Respondent concedes that there have been occasions where the information which has been received has not been responded to in a timely fashion and concedes a breach of the Code of Conduct, Section 2.5.

25.3. **3.3.** There are two parts to this part of the Code. The Respondent contests the allegation of a breach of either part. A breakdown is provided as a matter of course. Every quarterly invoice contains a statement with a breakdown and how those amounts are allocated to each individual owner. In response to the Applicant confirming that she was happy with the invoicing but was requiring a justification for the float analysis, Ms Kirkwood stated that the alleged breach was disputed.

25.4. **6.9.** Each allegation is disputed.

25.5. **7.1** The allegation that there has been a breach of the Code of Conduct Section 7.1 is conceded. The Respondent concedes that the original version of the WSS did not have information about pursuit of contractors and amounted to a breach of Code of Conduct, Section 7.1. However, the Respondent does not concede the allegation that the timescale for the complaints process was unreasonable. Ms Kirkwood indicated that the Respondent has since updated its complaints process.

25.6. **Property Factor's duties**. Two alleged failures to comply were conceded and three were disputed, as follows:

25.6.1. Section 4.6.1 WSS. It is accepted that there was a failure to comply. It was conceded that routine monthly inspections were not carried out, however it was stated that there were multiple visits.

25.6.2. Section 6.1.1 WSS. It is accepted that there was a failure to comply and the Respondent has already conceded that there was a breach in a similar vein to Section 2.5 of the Code of Conduct.

25.6.3. Section 2.4 WSS. It was disputed that there was a breach, but this allegation was later withdrawn by the Applicant.

25.6.4. Section 4.1 WSS. It is disputed that there was a breach.

25.6.5. Section 5.3.5 WSS. It is disputed that there was a breach.

26. Ms Kirkwood indicated that the updated version of the action plan had been forwarded to the tribunal and now formed number 22 in the Respondent's bundle. She stated that the date of the document should be 28/1/20, not 28/1/19.

27. Ms Kirkwood indicated that the Respondent could produce a copy of the lift document to the tribunal and to the Applicant.

28. Having heard both parties, the tribunal refused the Respondent's request to adjourn the hearing given the time which had already elapsed since the Application to the tribunal was made and the fact that there were matters in dispute despite the "action plan" which had been agreed between the parties in November 2019 and was now contained in a document dated February 2020.

29. The tribunal noted the concessions which had been made by the Respondent in relation to failures to comply with the Code of Conduct Sections 2.5 and 7.1 and the WSS Sections 4.6.1 and 6.1.1; and proceeded to hear parties' evidence and oral submissions to supplement written submissions on each alleged failure to comply which remained in dispute.

30. The oral hearing continued over four days, on 16 March 2020, 1 October 2020, 10 November and 11 November 2020.

Alleged failures (4) to comply with Code of Conduct, Section 2.1

31. Section 2 "Communication and Consultation" provides: ***"Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:***
2.1 You must not provide information which is misleading or false. …"

Applicant's evidence and submissions (Code of Conduct, Section 2.1)

32. The Applicant alleged <u>four</u> separate failures to comply with Section 2.1:

33. **(1)** The Applicant stated that the information provided by Nik Mayall of the Respondent about the float increase in a letter dated 27 June 2019 (App appendix 6) was both misleading and false. The Applicant stated that she personally only received one letter about the float increase (which she stated was

accepted by Angela Kirkwood). She stated that at stage 5, Nik Mayall had stated that two letters were sent, the first being on 19 January 2019 (on Page 2, point 6). The Applicant submitted that that was a false statement in Mr Mayall's letter. The Applicant stated that others in her block received a letter in January 2019 but that she did not. The Applicant stated that she cannot speak for other blocks, only hers.

34. **(2)** The Applicant stated that in the same letter (App appendix 6), page 2. number 4, to do with Keystone, there is false information. *"your previous property manager was of the opinion that all of the snagging items were completed… while I appreciate that you have provided a list of further snagging items".* The Applicant stated that she did not provide a list of further snagging items but rather that she had provided the main list with six issues. She stated that she is aware that other people provided one or two items. She stated that she is the liaison point with the Respondent in her role as chair on the HC.

35. **(3)** The Applicant stated that in the same letter (App appendix 6) page 2, number 5, there is a statement which is both misleading and in her opinion false, in relation to the authority that the HC has (in this case in relation to incurring expenditure on behalf of other homeowners for boundary wall re-render). The letter stated: *"It is our opinion that the Committee do not have the authority to instruct expenditure on behalf of owners".* She thinks that the Respondent's position has altered and that they have since contradicted that position. She submitted that the HC does have the authority to instruct expenditure on behalf of owners. She believes that it is in the constitution, which is not in her Appendices. She referred to the Inventory Page 9. She stated that the HC took a vote and agreed authority limits for expenditure. There are 62 homeowners in 6 blocks. Between the Respondent and the Applicant, they used a spreadsheet to appoint to the HC. She used the left-hand column and the Respondent used the right-hand column. The result of the vote was 37 in favour and 1 against. The vote was not taken at a meeting. The Respondent instructed a lawyer to look at this. The Applicant and Respondent had decided that the best way to get things done and to appoint the Respondent was to do so electronically. A 55% majority is required to carry a vote. 37 votes is in excess of 55%. More votes came in but they were not recorded on the spreadsheet. The expenditure levels were jointly agreed with the Respondent. Page 9 of the inventory is a Notice Board communication which said that the HC has the authority to make decisions in the best interests of homeowners. The HC agreed spending limits which are recorded. The HC did this after the votes were cast in 2012. Details have been recorded in the development schedule. The HC gave the factor the expenditure limits noted in the development schedule. The HC collaborates with the Respondent. The Development limit is £2000 or £300 per block (except one block that is smaller). There were emails from the HC at the time giving authority to the Respondent. The Applicant is the only member of the HC who was on the HC at the time that

limits were agreed. The HC has custom and practice. The HC does not authorise huge expenditure without consulting with homeowners. The noticeboard communication was not dated. It was written in 2013. The Applicant personally typed this but it was circulated to the HC and laminated by the Respondent for the HC and the Respondent put their logo on it to work together. The Applicant stated that she cannot provide evidence that the HC have the authority to incur expenditure on behalf of the homeowners but stated that when the voting was cast 37/1, the column for HC authority resulted in emails which went out from the HC (five of them at the time, including the Applicant) in similar terms to the paragraph on the noticeboard. The emails also discussed expenditure limits. The expenditure limits were set for the Respondent. The Applicant stated that she could not provide written evidence on this issue because it had been deleted. She submitted that the HC does have authority to instruct expenditure on behalf of owners. She stated that Jeni (Bole) or Steve (Paterson) provided quotations to the Applicant and that the HC would agree between themselves which to proceed with, without consulting the other owners. The HC would then update the homeowners in newsletters, especially when Jeni (Bole) was the property manager for five years. The Applicant stated that this was for matters up to the limits in the Development schedule to the WSS. The HC provides their opinions on matters and comes to consensus within the HC. On occasion, if the issue is more serious or the expenditure is higher, the HC will consult with the block reps. The HO has lived in her block for 12 years. The emails were sent to all homeowners at the time, those for whom the HC had emails, which was maybe only around 50. The Applicant stated that there is *"some document recently"* where the Respondent has said that they are not disputing that the HC has authority to incur expenditure on behalf of owners. The Applicant did not refer to a lodged document in her bundle or that of the Respondent.

36. **(4)** In relation to a letter from the Respondent dated 20 February 2019 (App Appendix 2), in relation to the float increase saying that it needed to be increased from £225 to £315, the Applicant stated that she had proved the amount to be wrong. She stated that she is not sure if that is misleading or false, perhaps both. She then alleged that it is definitely misleading and that it is false. She stated that the Respondent gave a statement that the float should increase to £315 (App Appendix 2, page 1). She stated that the averages are nowhere near £315 and therefore she thinks that the statement is false. She stated that the quarterly invoices are sent out and that she has analysed them. She stated that their letter said that it was based on one year's expenditure. She stated that they were doing a projection and including contingency funding which was temporary which she stated that they are not entitled to take that into account for a float. She stated that contingency funding should have been be stripped out of the numbers as the contingency fund was instructed to be increased for four quarters only to fund Keystone building clean. She stated that she thinks that it came down to a change of property manager. She referred to the WSS, 5.3.5. She stated that

there was no need to increase the float to £315 on her analysis of the quarterly statements taking the contingency fund out.

Respondent's evidence and submissions (Code of Conduct, Section 2.1)

37. **(1)** The Respondent disputed that there was a false or misleading statement in relation to whether there were two letters sent to homeowners, including the Applicant. Ms Kirkwood stated that there had been two letters issued on 25 January 2019 and 20 February 2019. She stated that whether Ms Black received the first letter is a different point. She stated that no one else in the block complained that they had not received the first letter.

38. **(2)** The Respondent disputed that it was a false or misleading statement to state: *"Whilst I appreciate that you have provided a list of further snagging items…".* Ms Kirkwood stated that the Applicant did provide further snagging items. She stated that this complaint did not form part of the Applicant's original submission. She stated that the Respondent would be able to evidence that there was an original snagging list. She stated that there was a lot of email communication, including multiple emails from the Applicant finding additional items of snagging. In its letter, the Respondent stated that they appreciated that the Applicant had provided a list of further snagging items.

39. **(3)** The Respondent disputed that it was false to state that the HC did not have the authority to incur expenditure on behalf of other homeowners. Ms Bole stated that there is a copy of the HC constitution in the original Application papers (although not lodged in by either party in their hearing bundles) which has a section on finances and there is nothing specifically delegated to the HC. However, it does say that the HC will work with the Respondent. Any ongoing expenditure incurred by the Respondent has been within the Respondent's authority to act figure. The HC constitution does not give authority to the HC to spend any money on behalf of the owners. That is fact. There is nothing in the constitution or deeds that says that the HC has any delegated authority. The limits for the Respondent are in the development schedule. The covering email (in the additional documents) refers to the point but does not say that the HC has authority to instruct on behalf of the owners. Ms Bole confirmed that verification was requested and that was provided by way of the constitution. It proves that there was no financial authority to the HC. The constitution version in the main pack is dated 21 February 2019, signed by Mr Mackie, a more recent purchaser. It is not clear if this has been re-circulated to the current owners or if it is still in the same terms as the original 2012 version that was voted on. Ms Bole questioned how the Applicant could maintain that the statement it was either false or misleading if the Applicant could not point to the authority.

40. **(4)** The Respondent disputed the allegation that the statement about the float increase amount was false or misleading. Ms Kirkwood stated that as part of the Respondent's analysis they review the total expenditure for the year leading up to the float increase. The expenditure was taken directly from their system. They divided by 4 and divided by 62, which came out at £308.99 quarterly for estimated annual expenditure. At that time, the float was £225 and therefore there was an anticipated shortfall. Ms Kirkwood stated that whether the Applicant is of the opinion that certain figures should be stripped out is irrelevant. The Respondent stated that based on the last year's expenditure, the future year's float needed to be increased. They notified the homeowners in advance. The Respondent would not consider £90 per property a significant increase which would require agreement by the HC or the majority of owners. The Respondent always said that it was based on actual expenditure. They wrote the first letter to give homeowners an opportunity to disagree. That is why two letters went out.

Applicant's Response (Code of Conduct, Section 2.1)

40.1. In relation to point **(1)**, the Applicant referred to the complaints process stage 4. She stated that she thought that Angela Kirkwood in her letter of 5 June 2019 (not lodged but with the original application bundle) had apologised that the Applicant had not received the first letter. However, the Applicant accepted that the letter provides "I am sorry that you and some other owners did not receive communication from us in January regarding the float increase. A mail out was issued … and I apologise if this did not reach owners at the Crescent." The Applicant accepted that the Respondent was saying that they sent it out and were only apologising if it was not received.

40.2. The Applicant did not add anything further in relation to point **(2).**

40.3. On point **(3)**, the Applicant referred what she said was contained in the HC constitution, Section 4, which provides that authority is delegated to the committee to act in the best interests of owners at all times and to engage with the factor on behalf of all owners. She did not produce a copy of the HC constitution in her hearing bundle. The Applicant stated that the HC was in place prior to her purchasing her Property in 2008. The Applicant is not clear whether there was a prior constitution. The Applicant submitted that the votes to which she referred gave an all-encompassing authority to the HC to act in the best interests of homeowners, which she submitted broadly meant that it is open to interpretation. When asked by the tribunal to refer to any evidence upon which she relied to support her assertion that the HC had authority to incur expenditure on behalf of all homeowners, she stated that she could not provide such evidence to the tribunal.

40.4. On point **(4)**, the float increase, the Applicant stated that she will be able to prove that the amounts are approximately £200. She stated that the Respondent has taken four amounts but that they did not provide an analysis. She stated that if they had, the homeowners would have seen what had gone wrong, in that the £100 extra from 62 owners was for four quarters only and it was never going to happen again. She stated that it was not necessary to increase the float to £315.

Alleged failure to comply with Section 3.3 of the Code of Conduct

40.5. **Section 3.3** provides: **"You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. 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."** [The underlined section is the section being relied upon by the Applicant].

Applicant's evidence and submissions (Code of Conduct, Section 3.3)

40.6. The Applicant confirmed that she was not challenging the fact that there was quarterly invoicing.

40.7. The basis of the Applicant's allegation under Section 3.3 is that she requested an analysis of the float increase with a breakdown of how the figure had been arrived at. She stated that more should have been stated than *"your new amount is £315"*. She stated that other owners asked her to request an analysis. She stated that she made request from February 2019 to November 2019 for an analysis. She initially stated that she asked for supporting documentation but later in the hearing accepted with reference to the correspondence relied upon that there had been no such request. She referred to the fact that it was a 40% increase from £225 to £315.

40.8. The Applicant stated that she first asked on the day she received the letter on 20 February 2019. She immediately emailed them. She stated that this runs all the way through her complaint process. From March to 3 July 2019 she was trying to get an analysis. She believes Mike Mackie also went to the Respondent. She referred to her email dated 20 February 2019 to Alexandra Pater, copied to Ms Kirkwood. *"Hello Alexandra, this must be an error. First I received nothing in January about any float review and the*

number cannot be correct as I expect our quarterly fee to reduce once we moved to a lesser lift contract although I am still waiting on information. Apart from possible one-off funding to contingency even that will become zero again. Please look into this and explain. Bear in mind our management fee is also frozen." She stated that there was no response as far as she is aware. Then she went into informal complaints and then formal complaints. This continued during many months of 2019. She wanted a full breakdown of the £315. She looked at the WSS and said that they were not going to agree this until the Respondent could give them a full analysis. The invoices came in around £225. The Applicant stated that she expected an analysis similar to what the HC did themselves i.e. to show the breakdown. The Applicant and the secretary of the HC both work in finance. The Applicant wanted an analytical answer. There were wordings that said that the Respondent does not exclude one-offs and does not exclude contingencies. The Applicant stated that she kept trying to explain that their contingency had already been agreed. She stated that this happened because of change in property managers from Ms Bole to someone who did not understand. She stated that the contingency fund was being used as future funding and that it was not expenditure. She stated that she was chasing for a summary of figures during 2019. She stated that she is trying to prove that she has never had an analysis of £315.

40.9. Later in the hearing, the Applicant returned to the alleged breach of Section 3.3 of the Code of Conduct. She stated that at the end of the first day of the hearing on 16 March 2019, Ms Kirkwood had put forward her analysis of the float and that Production 25.1-3 was added (a communication of 28 March 2019 which was also covered in a letter of 15 May 2019). She stated that it was in also her own appendices as 20.6. The Applicant stated that she wished to make further submissions.

40.10. She referred to page 3 of her written submission and stated that a supporting document was not provided in response to reasonable requests. She stated that she thinks that she has demonstrated her repeated requests for supporting documents. She stated that she asked repeatedly as to where the documentation was. She stated that she still does not have an analysis of £315. She stated that she maintains the position that there is a breach of Section 3.3 and that she stands by the fact that she did not receive an analysis of £315. She submitted that this amounts to a failure to produce supporting documentation in response to reasonable requests.

40.11. She stated that during her whole complaints process and during the hearings she has asked repeatedly. She stated that she has written to the Respondent for reasoning and an analysis of the numbers. She stated that the Respondent then had the audacity to ask her for the numbers. She stated

that she intended to refer to Appendices between February 2019 and the Application date.

40.12. The Applicant stated that £315 is Development level and that what she had said about the block is something distinct. She stated that Code 3.3 is nothing to do with agreeing anything. She stated that the Respondent has messed everything up. She stated that the "general blurb" does not address her clear points in relation to Code 3.3, which is a lack of analysis for £315.

40.13. In response to a question from the tribunal chair as to whether the Applicant had ever requested "supporting documentation", as referred to in Section 3.3 of the Code of Conduct, the Applicant stated that she does not think that she ever used the words exactly. She was asking for an analysis of £315, which she said for her was supporting documentation. She stated that ultimately she did a spreadsheet herself to break down the numbers. She stated that on page 3 of her written submissions, she refers to Appendix 8, pages 6 and 7.

40.14. The tribunal chair asked the Applicant whether she accepted that there was a response to her enquiry about the float request. The Applicant stated that Appendix 20.6 was a response but that it is not supporting documentation. It says that the float is going up. She stated that that is not supporting documentation; that is a statement. She stated that in all of her communications to Angela Kirkwood she had kept saying that they need a breakdown of the £315 or the £308.99. She accepted that maybe she did not say *"may I have supporting documentation".*

40.15. She stated that she has never received a breakdown of the £315 or £308.99. She referred to an email on 29 March 2019 at 1738 to Angela Kirkwood, the third item down, float increase. *"We would require an analysis of the £308.99"*. She stated that this specific email was part of her informal complaint and that it is not in my formal appendices. The document was added to the Applicant's Appendices, without objection, and with the consent of the tribunal, as Appendix 24.

40.16. The Applicant stated that her position is that there has been no analysis provided in response to that request. She stated that she agreed with her committee at the time. A number of them went into dispute over the float increase. She submitted that it was proved that the HC was correct and that the Respondent was wrong, now that they have negotiated a compromise in the float increase.

Respondent's evidence and submissions (Code of Conduct, Section 3.3)

40.17. Ms Kirkwood stated that a full response to the Applicant's request for justification and a breakdown was provided by her to the Applicant on 28 March 2019. She stated that her response gave a detailed explanation along with a summary of the figures. She stated that there was no request by the Applicant for copy documentation.

40.18. A copy of the letter to which Ms Kirkwood referred was lodged as an additional production. Ms Kirkwood stated that the letter dated 15.5.2019 (A20-1) responded to that enquiry from Ms Black advising how they came to the figure. She stated that it is critical that the Respondent is in funds. When they reviewed the funds we held for the Development, there was insufficient money to pay the costs of what was coming out. She stated that after the letter was issued with the proposed float increase, the Applicant came back and asked for more information.

40.19. She stated that within the information the Respondent confirmed that the current float was £225 but when they did the calculations with quarterly estimated expenditure for the company, it was their recommendation that it increased to £315. They said hopefully that is helpful but if you require any further information, please let them know. She stated that they were not withholding information, quite the opposite. She stated that they thought that they were being helpful in their response. They put in place the opportunity for discussions to take place.

40.20. Ms Kirkwood stated that the Applicant's allegation that she had requested a further breakdown and that the Respondent had refused to provide it was a serious one that had not been evidenced by the Applicant.

40.21. Ms Kirkwood stated that in their stage 3 and stage 5 responses they provided an analysis and a total and a straight division by the number of units. They did not look at the individual expenditure per block. She stated that the argument of the Applicant is that the expenditure of each block is different. The position is that the Applicant does not agree the figures. That is different from whether the Applicant requested a breakdown. That is really critical. In their stage 5 response from their Managing Director it clearly shows that the original float has not met the expenditure for the vast majority. She submitted that that supports their position that the float required to be increased to that figure, irrespective of whether people agree. They take the average of the Development and it is critical to make sure that the Development is in funds. It is a Development wide figure. There is no requirement in law or the deeds to have separate floats to the individual blocks.

40.22. Ms Kirkwood stated that at the end of the 29 March 2019 email Appendix 24, that formed part of the complaint that the Applicant submitted, includes the phrase: “this should remain part of the complaints process until we receive a satisfactory response”. She stated that it was the Respondent’s understanding that that was to be part of the complaints process which was fully responded to. She referred to Appendix 8 and stated that the matter was fully responded to in the 5 June 2019 response. She stated that that response included an analysis of how the float increase had been arrived at.

40.23. Ms Kirkwood also referred to Appendix 20-6, Section 5, a table with a breakdown that the Respondent thought was sufficient to respond to the query. Ms Kirkwood stated that it is further referred to in Appendix 8-1, after the Applicant asked for further clarification.

41. She stated that in the email of 29 March 2019, under the paragraph headed float increase, it said “this should remain part of the complaint process until we receive a satisfactory response”. She stated that the Applicant’s complaint came in on 19 March 2019 and that one of the points in the complaint is the float increase. The Respondent’s first response was to the complaint reference number. The complaint response was issued (Appendix 20-1) on 15 May 2019. The Respondent referenced the float increase letter and gave the table with a breakdown of the figure.

42. Ms Kirkwood stated that the Applicant then came back with queries. Ms Kirkwood stated that she had further responded on 5 June 2019 Appendix 8-1.

Applicant’s Response (Code of Conduct, Section 3.3)

43. The Applicant stated that the table relied by Ms Kirkwood on is not an analysis or supporting document or breakdown of the £315 (or £308.99).

44. In relation to the sentence in the email to which Ms Kirkwood had referred, *“I accept that it should remain part of the complaints process”*, the Applicant stated that she does not understand why it is relevant. She stated that it was informal and became formal because she did not receive a satisfactory response to the request for a full analysis.

Alleged failures (Schindler - lifts (1); Keystone - snagging (6)) to comply with Section 6.9 Code of Conduct

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

Applicant's evidence and submissions (Code of Conduct, Section 6.9)

(1) Schindler – lifts

46. The Applicant's first allegation is that the Respondent failed to comply with Section 6.9 in that they did not pursue Schindler to remedy defects in works or service provided in relation to the lifts.

47. The Applicant referred to the summary she had produced in written submissions.

48. The Applicant stated that the problems started in summer 2018 when there were problems with the lifts. She stated that several failed in quick succession. She stated that one of the ones which failed was in her block. She stated that she is a block representative ("rep"). Another block rep came to her so that they could work together. They became aware of increasing frequency of problems with lifts. The Applicant then started to liaise with Development/Property Manager at the time, Ms Jeni Bole. (It is now Steve Paterson). Schindler quoted a repair of £17,000 on top of what the homeowners paid for a maintenance contract. This was negotiated by Jeni Bole down to £12,000 but was still very high. At that point, the Applicant asked Jeni Bole to bring in a second contractor for another opinion as Schindler did not seem sure about diagnosis of faults. The Applicant stated that for her own block, Schindler appeared to have no idea of the source of the fault. She stated that she was standing in her own home when the lift engineer was outside. He said he had no idea and might need to get more help. He could not work out what the fault was. The Applicant stated that she and Jeni Bole discussed that that was the case. Jeni Bole brought in Lift Control. Lift Control managed to bring the lifts back into working order. They also did it for a lower price than Schindler had quoted. As far as the Applicant is aware, her share was never billed to her.

49. The tribunal queried what defects were alleged in the work or service provided by Schindler. The Applicant stated that the Schindler service was lacking. The lifts were out for a long time. Their costs were excessive. They were not able to fix things quickly. They did not seem to have expertise to know what they were doing. Her particular lift was out for at least a month and the other lift for longer. It was only when she got involved and she asked Jeni Bole to bring in another lift company to see if they could do something quicker than Schindler that Lift Control were instructed. The homeowners were paying a maintenance contract throughout the period of time. They had a five year plus one year fully

comprehensive maintenance contract with Schindler costing us a large amount per annum for five lifts. It covers servicing and they come out and have to put the lifts back into order. There was regular servicing. They were also contracted to attend call outs. She stated that this is not to do with maintenance. There have been many times when the lifts have failed in the last 5 or 6 years. In Summer 2018, Block 9 and Block 20 were out for a long time. Normally the engineer would come, fix the lifts and go away. However, at this time Schindler appeared to not know what they were doing which prompted quite an unusual situation to ask the factor to bring in another contractor. The block 9 rep said that his lift was out of order for a long time. He needed that lift as he was on the top floor with a disabled son. After the Applicant became involved, she spoke to the Respondent about it in Summer 2018.

50. The tribunal sought clarification of the allegation that the Respondent did not pursue the defects in the work or service. The Applicant stated that if she had not become involved, she is not persuaded that it would have been fixed when it was. She stated that the Respondent pursued Schindler. She stated that she gave up her time to see what the root cause was. She discussed with the Property Manager. Ms Bole is always very busy. It is hard to get anything done. She said by her getting involved that speeded up the process and that if she had not done that then who knows how long it would have taken to fix it.

51. The tribunal then asked whether or not the Applicant was alleging that the Respondent did not pursue the contractor, Schindler. She stated that they had an independent lift inspection twice a year by Zurich, and formerly by Allianz. She stated that Schindler and then Pickerings produce maintenance reports (Pickerings came in in 2019). She stated that the Respondent did not give her transparency of the reports. She stated that she had requested them during the tribunal process and that they were then produced. Having had sight of the reports, she then considered the reports. She referred to the Schindler Report page 4, para 3, and stated that she believes that these lifts have not been maintained properly by Schindler, nor did they correct the defects in the independent inspection reports. The service e-sheets were not always sent to the Respondent and when they were, compared with other lift companies, there are no details on them. No frequent service reports appear to be available so how can they be sure that they were adequately serviced.

52. The Applicant referred to the Zurich independent lift inspection reports. She stated that the Respondent failed to ensure that the Zurich inspection was done in April 2018, resulting in no independent inspections from April 2017 to October 2018. She stated that Zurich were assessing Schindler to ensure that they are maintaining the lifts as they should per Regulations and the law for lift maintenance. She stated that inspection was not done partly due to the Respondent not keeping oversight on what they have done and Schindler not

having cleared defects which had been identified. She stated that if the reports were being passed to the Respondent by Schindler, the defects should have been fixed. She stated that the Respondent did not ensure defects on the lift inspection reports were cleared. She stated that the Respondent has not pursued Schindler quickly enough and has not ensured that the defects were fixed in their entirety. She stated that homeowners are being charged when they probably should not be as they have to pay Pickerings bills when it should have been covered under the Schindler contract.

53. The tribunal asked the Applicant to specify what she alleges that the Respondent should have done. She stated that she believes that the Respondent has not pursued or kept oversight of Schindler over the comprehensive lift contract, for the fact that they have not attended to the defects timeously and the defect reports kept coming. She stated that her conclusion is that the Zurich inspection report should be clear of defects to show that Schindler has done their job properly. She stated that the Respondent has not proved that they have chased Schindler to do whatever they should have done. Her position is that from her involvement from 2018 at least up until the point of application to tribunal the Respondent did not pursue Schindler.

(2) Keystone – snagging issues (6)

54. The Applicant's second allegation is that the Respondent failed to comply with Section 6.9 by not pursuing Keystone to fix snagging issues to her satisfaction.

55. The Applicant stated that Keystone did an external building clean in November 2018. There were snagging issues. The Applicant sent a list of six issues to the Respondent on 10 January 2019 (Appendix 18, with photographs). She stated that these items have not been addressed either satisfactorily, or at all, as the bollard has allegedly been fixed but has not been fixed to her satisfaction. She does not believe that the Respondent has ensured that Keystone has fixed all of the snagging issues to her satisfaction. She stated that at the point of application the six issues were outstanding.

Respondent's evidence and submissions (Code of Conduct, Section 6.9)

56. Ms Bole stated that the Respondent disputes both allegations in relation to Section 6.9.

(1) Schindler - lifts

57. Ms Bole stated that lift maintenance contracts were carried out by Schindler and Pickerings; and independent inspections were carried out by Zurich. There was a

gap in independent inspections due to Allianz moving to lone working. The Respondent had to replace the insurance policy. It was moved from Allianz to Zurich. Zurich had to catch up on multiple developments. She was not sure of the dates. She stated that the gap in independent inspections did not affect the performance of the Respondent's duties as maintenance was ongoing at that time. The Respondent's position is that October 2017 and April 2018 were the only two independent inspections. She referred to the inspection reports from Zurich dated April 2018 (9.4 and 9.6). They were not able to carry out the report on that occasion and a further visit was arranged.

58. Ms Bole stated that they do not agree that there were service failings by Schindler. There were a series of lift failures in 2017 and 2018. These were caused by various matters. One related to the fire brigade being called out. There were another two instances in block 5 and block 9 where the source of the problem was due to failure of major parts excluded under the contract.

59. Ms Bole stated that contrary to the Applicant's submission, Lift Control were involved as early as 2011. They also instructed them in a consultancy capacity. Lift Control were brought in by the Property Factor in 2017 due to a recurring problem in one block. Schindler were having problems in identifying the issues. Lift Control were brought in as they were well versed with Sodimas. He had access to some schematics which are not widely available. The very high cost quoted by Schindler for works at block 9 was because they were going to have to manufacture a part from scratch. Lift Control did manage to resolve a number of issues at blocks 5, 9 and 20. Schindler were amenable to Lift Control coming in to deal with issues. Lift Control were at the Applicant's block in June 2018.

60. The Respondent disputes any overcharge to the homeowners.

61. She stated that obsolescence was an exclusion from the maintenance contract.

62. At the expense of the Respondent, the Respondent had the lifts independently assessed by TUV-SUD. They have not found evidence of any failings with services which have been carried out. Ms Bole referred to a spreadsheet produced at the hearing in March 2020 (25.1, 25.2. and 25.3).

63. During the period that Schindler were in place there were multiple instances of smaller items being attended to. The other difficulties were due to difficulties in obtaining parts, not due to Schindler or the Respondent. The Respondent's position is that there were no issues with the service or works by Schindler. There were some queries latterly as there were instances in block 20 and Block 9 where Schindler were unclear as to how to resolve the problem. These were resolved directly by going to Sodimas.

64. Ms Bole stated that the Respondent also wished to state that with respect to matters that were recurring there is a difference between essential repairs and recommended “nice to have”, not essential to the ongoing operation. She stated that it is apparent that the Applicant perhaps does not have a clear understanding of the differences between essential works and discretionary “nice to have” works. The “nice to have” works would be better to present at an AGM. That is yet to occur.

65. The Applicant cross-examined Ms Bole in relation to a number of matters. The Applicant referred to HO doc Appendix 21, the inspection report for Zurich in 2018. She asked Ms Bole to explain the detail in comment 6 as to why it was not done. Ms Bole responded that when Mr Jim Pringle from Zurich attended the development, the access to the control panel was not where it was supposed to be. Because Schindler were carrying out repairs at another block and Ms Bole was on A/L, it was reported into the office. Ms Bole spoke to Mr Pringle on her return and gave him the location of the key and said he could re-attend when it was suitable for him. The Applicant stated that it was not clear from the Respondent’s file that the key was kept at Block 5 and asked why James Gibb did not record on central files as to where the key is located? Ms Kirkwood intervened and responded that Schindler had inadvertently moved the keys to another position on site and that it was not a deficiency in the Respondent’s record keeping. Ms Bole stated that the key is in a central location. It is recorded on the file. However, on the date that Mr Pringle turned up it was not at that location. It had been removed by Schindler for maintenance at another block. The Applicant suggested that the location of the key was not clearly documented in the central file in April 2018. Ms Bole did not accept that and stated that it is information embedded on the database.

66. The Applicant referred to Appendix 21 and stated that an inspection was not done in her block 20. She asked if that was the case in April 2018 why was there no inspection until October 2018. Ms Bole stated that it was getting re-scheduled. Mr Pringle and others are busy. Ms Bole does not know when she contacted Mr Pringle. It was fairly soon after her return from holiday. She thinks that the first time he was available was October 2018.

67. The Applicant suggested that there was a recommendation that there would be keys at each lift. Ms Bole stated that she was not aware of any such recommendation.

68. The Applicant suggested that Schindler failed in their duty to maintain the lift with reference to PF doc 10.18. Ms Bole accepted that there was an instance on one occasion when they did miss something obvious, but they maintained that lift for many years.

69. The Applicant made a request to lodge a late document and then referred to it. It was an email from Ms Bole to the Applicant dated 30.8.2018 1541. The Applicant stated that she and Ms Bole formed a relationship as homeowner and Property manager and that they spoke a lot. This email relates to the lift. She stated that it was additional to document 10-18 at 1656. Ms Bole responded that there was a period during which there were several long-term lift failures. One of the issues was Schindler having diagnostic issues. One of reasons Lift Control was brought in was because of its experience of Sodimas lifts. There were issues with repairs being effected in several instances. But as far as routine servicing and attendance was concerned there had been no issues. When there were major failures with lifts in 2017 and 2018, Schindler struggled to diagnose them. They had difficulties and delays in getting things back in service. There was a large cost for Block 19 due to the requirement to manufacture of parts from scratch. The Respondent maintains that there were no service failures or failures on work by Schindler that required to be pursued by the Respondent.

70. The Applicant referred to the PF doc 12.1 and asked what the frequency should be for servicing by Schindler. Ms Bole responded that the contract was on paper only and may have been archived. She stated that usually with comprehensive insurance it would be on a monthly rotation.

71. The Applicant asked that if Ms Bole believed that this maintenance was being done regularly by Schindler why is it that regular e-sheets cannot be evidence by the Respondent. Ms Bole responded that the frequency was “regular” as opposed to monthly. Periodically Schindler issued e-sheets. The Respondent lodged those which we had at 9; there are 36 different documents relating to that. Some e-sheets were there and do not say much more than the fact that they were on site. They did not note any particular issues. Infrequently there was a proposed cost, e.g. 8.59-8.6, in which case they would provide a report.

72. The Applicant suggested to Ms Bole that they had had discussions regarding staffing problems at Schindler and asked whether Ms Bole was now saying that is not the case. Ms Bole stated that the first time the Applicant had mentioned this was today. Ms Bole stated that Schindler have multiple engineers. Often it will be the same engineer who attends. Ms Bole stated that she cannot comment on conversations the Applicant may have had on site.

73. The Applicant asked Ms Bole if she was saying that she is happy with Schindler and their maintenance. Ms Kirkwood intervened and stated that Schindler have a robust programme of inspections. Anything that is missing can be presented. Anything needed was carried out. Anything identified from inspection reports was passed to Schindler. Ms Kirkwood stated that she failed to see the relevance of the Applicant’s question.

74. The Applicant referred to the LOLER TUV-SUD spreadsheet which was prepared after her meeting with the Respondent in November 2019. Ms Bole stated that this was commissioned as a result of the meeting.

75. The Applicant stated that when Pickerings took over, lots of things were needing done and asked what the point of the TUV-SUD report was. Ms Bole responded that they were brought in as independent experts to assess the lifts, the contracts and the charging. It was due to the questions that were being raised as to what should and should not be covered under contract. They were brought in subsequent to the original hearing when the two parties had a meeting. The Respondent made that offer to bring in someone with independent expertise to review the service contract, which offer was accepted by the Applicant. Ms Bole stated that she maintains that there were no deficiencies provided in the overall service by Schindler. The larger works there were issues in diagnostics. These matters had to be investigated by Schindler. They were having difficulties in obtaining parts due to obsolescence. She stated that under section 6.9 the Respondent did pursue the contractors. Ms Kirkwood intervened to state that they do not genuinely see any deficiencies in what Schindler has done. There is a difference between a contractor having a problem in getting to the route of the problem and failings on behalf of the contractor. Ms Bole reiterated that the Respondent does not accept that there are any failings in service or works.

76. The Applicant asked if that was the case, why was Lift Control able to come along, diagnose and fix things without parts. Ms Bole stated that the reason was due to Mr Nichol's long experience with Sodimas and a schematic on an old laptop. He had a greater familiarity with the technical aspects of these lifts.

77. The Applicant asked: When you say essential works versus nice to have which reports are you specifically referring to? Ms Bole responded that she is very specifically referring to Zurich reports where they highlight items in categories A, B and C. With reference to PF doc 9.32 Zurich Block 20 inspection report Ms Bole stated that the Respondents are not engineers. Anything in A is immediate; B and C, the observations are nice to have. B is corrective action as soon as reasonably practicable. These reports are forwarded to the lift maintenance contractor to carry out works covered under the contract terms and report back on any matter that is not covered.

78. The Applicant stated that some of the things categorised as B and C seem quite important and asked whether any of the B's have been addressed. Ms Bole stated that she would have to hand over to Mr Paterson as she was not managing at the time. If it is under A it is an immediate action. They would be instructed whether or not they are within the contract.

(2) Keystone – snagging issues

79. Ms Bole stated that it is not accepted that Keystone failed in their services or works. She referred to HO doc A18. She stated that Keystone returned on multiple occasions. She referred to PF doc 23.1, the email from Steve Patterson shows that a meeting took place. Keystone went back and attempted to do additional works. There was no additional cost to homeowners.

80. In relation to the car park bollard, the Respondent does not accept that Keystone were at fault but they did make payment towards that and that has been repaired. The damaged top was repaired. No further works are planned. The Applicant requested painting but it was not designed to be painted.

81. Because snagging issues were raised by the Applicant, the Respondent liaised with the contractor as a courtesy. There was a meeting early 2020 with Keystone, on the points that have been raised by the Applicant in her application. The meeting was not arranged because there were failings in service or work. The matters had been addressed in various letters. The Respondent was satisfied that matters had been dealt with. They made reference to A6.1-6.3 and A8.1-8.11; and the Respondent's covering submissions 0.2-0.3.

82. The ordinary member referred to the Applicant's submission at page 3, in which it says that items on the snagging list have been attended to in full. That seems to accept that there were issues and that they were fixed. Ms Bole stated that works were completed in November 2018 and the Applicant did not email until 10 January 2019. Ms Kirkwood stated that there was an original snagging list which was produced following a walk through in late November 2018 and that was worked through. Then the Applicant produced her own snagging list which was a bone of contention. Ms Kirkwood stated that there were a couple of points that appeared on both lists. The Respondent did go back to the contractor and the contractor made multiple attempts to remedy and it failed to get better.

83. Ms Bole stated that there were a number of issues of snagging identified by Ms Black and other owners. Ms Bole met with the contractors on site on multiple occasions. There was a snagging list. The clean of the gable that was undertaken was the best result they could achieve.

84. Ms Bole referred to the Applicant's snagging list and the PF doc 23.1 which was dated 9.3.20. Ms Bole stated that it was produced after the meeting at Riverside House (following the first hearing day) to go through the various issues, during which an action plan was put together. A number of these issues were being looked at further.

85. The tribunal sought clarification as to whether there was any concession being made by the Respondent about the works or services provided by Keystone. Ms Bole responded that when the issues were raised, the Respondent contacted Keystone on a few occasions. The Respondent did pursue Keystone with regard to the various items highlighted. With respect to the damaged bollard Keystone did not admit that they were responsible. The repair was carried out, nonetheless.

86. The tribunal asked whether, given what Ms Bole had stated, the Respondent therefore accepted that there was any defect in the service and works in respect of any items. Ms Bole responded that the ultimate finish in some areas was below the expectation of the homeowners but that Keystone has gone over the areas multiple times, in order to improve the finish on the render. They carried out an extensive amount of work for which they did not charge. There were items where they tried to improve finish. Ms Bole does not believe that there was any defect in the work which was carried out. Due to the surface the work was not meeting the expectation of the clients. She stated that the Respondent certainly got them back for areas identified for snagging.

87. The Applicant cross-examined Ms Bole in relation to the six points on the Applicant's snagging list, HO doc, Appendix 18. During the cross-examination, the Applicant attempted to lead a significant amount of evidence. The tribunal assisted the Applicant in the presentation of her case in so far as permitted in terms of the overriding objective.

Issue 1 Keystone – car park bollards

88. The Applicant referred to HO Doc Appendix 18 and PF Doc 23.1. The Applicant stated that she needed an understanding of the situation. The Applicant stated that she was there on the day that the bollard damage happened. Under her bedroom window there are four parking spaces. Keystone had their large piece of machinery, to escalate up the wall and that was parked across the four parking spaces where that bollard was. No cars could be in the spaces on that day. At the end of the day, they moved away out of the carpark and she saw them leaving. Prior to that the bollard was fine. After they took the equipment away, she saw that the bollard was damaged. She did not witness the damage occurring. The Applicant stated that she and Ms Bole have discussed whether Keystone were liable for the bollards. Even though not admitting liability, they are willing to pay for the repairs. Ms Bole responded that during one of the visits, she raised it with Keystone. They did not admit to it. They did ask their staff. There have been instances where they did cause damage to a drain and they contacted the Respondent. In this instance they did not admit liability. However, Keystone said that they would pay for Lothian's work.

89. The Applicant asked whether Ms Bole believes that the bollard damage has been made good. Ms Bole responded that it was of its age and wear at that time. From the photographs submitted, the damage has been rectified.

90. The Applicant stated that she does not believe that it has been rectified. Ms Bole responded that the photographs from the Applicant's original submission show a bollard hit at the mid-point which is more likely a car bumper and stated that that was repaired by Lothian Electric.

91. The Applicant stated that she does not think that it is made good but noted that Ms Bole stated that Keystone are happy to pay the cost of making it good. Ms Bole responded by asking the Applicant what her expectation is with regards to "made good". The Applicant stated that visually it still looks damaged but asked Ms Bole whether she is saying it is not possible to improve on that. The Applicant stated that her expectation is for it to look the same as it did before it was damaged. Ms Bole responded that it was at a 30-degree angle and it is now upright. It has been repaired and it is operational.

92. Ms Bole stated that she had put this into the snagging list because she strongly believes that Keystone damaged it. She is not aware that Keystone has paid. Ms Bole stated that she would need to double check if the Lothian Electric charge was credited to all/some the homeowners. She stated that the Respondent would credit the homeowners and claim back from Keystone. The Applicant responded that it was only her block which had been charged, it was a very small charge and that she had not been reimbursed. She stated that it was more the principle than the money.

93. Later in the hearing, Ms Bole confirmed that she had checked the position regarding payment for the bollards. She stated that the initial sum for the bollards was £20.60 per property and was billed out to owners. It has not yet been credited but is going to be credited in full.

94. The Applicant responded that she thought that there had been two payments for the bollards and the one to which Ms Bole was referring was only to make it safe after the first visit by Lothian Electric. She stated that a later stage there was a repair which would be difficult to quantify as it is part of a bigger cost but that Lothian Electric always provides a full breakdown of what they have done.

95. On the last day of the hearing, the Applicant stated that she wished to return to this issue. She stated that the first action was taken to make the bollards safe. She stated that she had been wrong and that Jeni Bole was correct. It is an apportionment for Keystone of £24.60. She stated that she has checked and it was apportioned at 1/62 (the total number of homeowners). Each proprietor was charged £0.39. She stated that the £0.39 had not been refunded.

96. The Applicant stated that the next entry was Appendix 22 and that the second bottom entry for Lothian Electric showed a total cost which she believed is for the repair of the bollards in question. She stated that the repair of two bollards was £39.04, plus VAT and a little bit of labour. She stated that she is not going to split hairs as this is not about the cost. She stated that whoever is sorting it out this quarter at the end of November should just use their judgment. Ms Bole confirmed that the matter would be attended to.

Issue 2 Keystone – para 2, 23.1. Appendix 18, point 2. Vennel area.

97. The Applicant stated that there are marks on the roof and some render is off. She stated that there are still gaps in the render in the vennel wall and the paint splashes are all over the roof. She asked Ms Bole if she could clarify if this has been resolved. Ms Bole responded stating that there were no paint splashes as no paint was being used so this was not a matter to do with any work Keystone undertook. The loose render in PF doc 23.1 was already loose prior to any low-pressure steam cleaning being done. As far as having any work done at that level it is something that will be done when there is access to that vennel area.

98. The Applicant referred to colour photographs in Appendix 18, which include three photographs of the vennel area. She stated that they were taken by her in June/July 2019; and to 23.1, para 2. The Applicant stated that the machine they used to blast the walls had high pressure water to clean. She stated that the machine has blown up the surface onto the vennel ceiling. She stated there is a white part on three photographs. She does not know if they are being deliberately obtuse. She stated that whether it is paint is irrelevant. The machine has blasted it up the wall. The mark has gone onto the ceiling. It is very clear that that is what has happened. The vennel area was varnished not long before. Ms Bole responded that the walls in the vennel and the building are K-rendered. They have never been painted to the best of anyone's knowledge. The Respondent has been advised not to paint them. The method by which they were cleaned was by low pressure steam. There is no evidence anywhere else of any surface damage caused by cleaning. The Respondent does not accept the Applicant's position. Ms Bole stated that the photographs appear to have been taken in January 2019, after the main steam cleaning works but prior to the snagging. Ms Bole stated that there are no photographs of the area before the steam cleaning was carried out. Ms Bole stated that Mr Paterson had a discussion with Keystone in March and they said it was not caused as a result of a steam clean. At the site inspection Ms Bole conducted, all of these areas were looked at. Mr Paterson had a further site meeting further to the submission by the Applicant. Whether or not paint was discussed there was a discussion about how marks were caused. Keystone denied that the marks were a result of the works because they used steam.

99. The Applicant asked about other damage she believes has been caused by the machine. The gaps on the walls under the ceiling. There are gaps in the render. The varnish is marked. Ms Bole responded that with respect to loose render she covered that earlier. Any loose render was already loose. That is what Keystone said. In relation to proposals for remedy or repair of those issues Ms Bole stated that the next time they have access on site there will be an attempt to clear off the marks and attach the render. Ms Bole stated that that has not been done as it was not directly related to this contract. The Respondent said that they would arrange to do the work when next on site. There have been COVID-19 restrictions. They have not had contractors in that area specific to that type of work. That is something that might be done at the same time. Different contractors will be used. The Respondent had taken this up with Keystone. They have not admitted liability with respect to the marks on the vennel ceiling. It will be undertaken when a contractor is next there.

100. The Applicant stated that Ms Bole was confused and that the conversation about loose render was with regard to the boundary wall. The Applicant stated that she had assurances from Ms Bole in the interim project update which says that the render on the wall will not be damaged as a result of the work. The Applicant stated that she knows 100 per cent that it was to do with the work as she watched it happening with her own eyes. The Applicant stated that there were no marks on the ceiling or the gaps prior to the work, regardless of what Ms Bole has said or what Keystone has said. The Applicant questioned why Ms Bole was raising the loose render which was to do with the boundary wall and asked whether she was definitely talking about the vennel. Ms Bole responded that as far the vennel is concerned, there is render and a fine skim coat. In relation to the two separate issues: (i) as far as the render is concerned, due to this being low pressure cleaning it is not a type of cleaning that could have caused damage and (ii) anything dislodged would already have been loose in some way. She stated that this was covered in Mr Paterson's response, PF doc 23.1. She stated that the matter was taken up with Keystone. They were very careful. They stopped cleaning in another area after it was taken up with them. They said anything loose was not a result of the cleaning process. Ms Bole confirmed that when she was discussing render, she was talking about the vennel.

101. The Applicant stated that the Respondent had said as a gesture of goodwill, that the Respondent will fix the gaps on the wall and the ceiling and blamed COVID-19 for the delay. The Applicant stated that the issue was pointed out in January 2019 and that COVID-19 did not happen in 2019, so why was there a delay. Ms Bole responded that this was part of the ongoing discussions in the action plan in relation to which they were trying to seek resolution. She stated that it was more cost effective to have it dealt with as part of larger works rather than piecemeal.

102. Ms Bole deferred to Mr Paterson on whether and when there are any larger scale works planned. Mr Paterson responded that they need to get access with a small mobile scaffold for the lights in the vennel. They want to get it done when other things need done. They have not had enough work to make it worthwhile for something not urgent. Mr Paterson does not think anything was planned and delayed as a result of COVID-19. The Respondent was trying to avoid spending the owners' money unnecessarily. They did not have work specifically planned but they had quotes for the dwarf wall render. Ms Bole then stated that she did not say that there was anything specific being undertaken this year but any work to be considered after COVID-19 restrictions were brought in would be emergency or essential work, with other work being done after easing of restrictions.

Issues 3 and 4 Keystone – wall staining

103. The Applicant referred to Appendix 18, the remaining four photographs in bundle. She stated that they show a number of stains after the cleaning. She stated that Euan from Keystone is the contractor and during the works, the Applicant had a meeting with Jeni Bole and Euan in November 2018. The Applicant stated that she knew that there would be some stains that would be difficult to remove. Keystone agreed to remove a difficult stain. There are other stains that remain. The Applicant asked Ms Bole why it was not possible for Keystone to remove the stains. Ms Bole replied that they did attempt multiple additional cleans, particularly for staining on the gable. The result was as good as they could get. Similarly, with the low-level stains, these were gone over on multiple occasions. The tribunal chair asked whether it is accepted that there was any defect in the work or services. Ms Bole stated that the Respondent certainly pursued them and they carried out the work. Initially they hoped that some of these areas would come up better than they did. That was the reason that the Respondent asked them to return as part of the snagging. They returned and did go over these surfaces on a number of occasions. In relation to the two large stains under balcony B5, Ms Bole stated that she looked with James from Keystone and she is aware that they did go over these areas on a number of occasions, as well as the entrance area. That was the best result that could be achieved.

Issue 5 Keystone – block 22, coping stones on the top of a bin room.

104. The Applicant stated that a few still have black marks and addressed a question to Steve Paterson, stating that he had stated that it is not possible to see any bits that have been missed with the cleaning and querying how he accessed them as they are above normal height level. Mr Paterson responded that he stood on the dwarf wall and looked from there. The Applicant stated that

she had looked that morning directly under balcony 22 and she can still see the marks and asked whether he is maintaining that there are no marks. Mr Paterson stated that he cannot see any marks and that it is not like looking for a mark on a pristine surface.

105. The Applicant then stated that it is so petty that she is going to give up on that point (Point 5 in Keystone alleged breach of 6.9). In relation to a question from the tribunal she then stated that she was not going to withdraw the allegation and asked further questions.

106. The Applicant referred to Appendix 5, the action plan prepared following the meeting in November 2019, which was updated January 2020. She asked Ms Bole who wrote the action plan. Ms Bole responded that the original action plan was written by Ms Kirkwood following the meeting in Riverside House. Ms Bole stated that they think it was Ms Kirkwood who revised but they cannot say for certain. The Applicant stated that surely of the three people present someone must know who revised that action plan. She referred to page 5.4 which stated that Keystone was to be recalled. There are bullet points under the update. This is included in the written communication sent to Keystone. Keystone has confirmed that they are happy to carry out this work. She asked Ms Bole whether that negates what she had said earlier. Ms Bole responded that that relates to a visit between Mr Paterson and Keystone, the update for which was sent to the Applicant in March 2020 and a follow up visit was arranged. In response to a question from the chair Ms Bole confirmed that the work was attended to by Keystone. The Applicant stated that the Respondent wrote in January 2020 that Keystone were happy to do it and that then in March 2020 Steve Paterson said that he could not see the mark, so nothing makes sense. Mr Paterson responded that he could not see the problem. It was stated that Keystone would deal with it on the assumption that there is a problem even though Mr Paterson could not see it. He stated that photographs would probably be the best way to demonstrate it but he offered to meet the Applicant on site. Ms Bole added that the first point in the paragraph was that Keystone would meet Mr Paterson to address the points and the purpose of the meeting was to highlight the points raised by the Applicant.

Issue 6 Keystone – footpath near block 20

107. The Applicant stated that she recalls that there were delays in the work for Keystone and the order should have been that they would clean the wall and then footpath. They reversed the order of work and they did the footpath first. The Applicant stated that she said to Euan at the meeting that it did not seem very sensible but that is what happened. She referred to photograph PF doc 17 – an ariel photograph of the development. A drone survey was carried out to look at the roof. It shows a footpath in point 6. It goes round in a semi-circle. The right-

hand side is the block she is talking about. With regard to the statement made in email PF doc 23.1, Keystone said that they are happy to return and do this area. She asked whether that position has changed. Mr Paterson responded that as far as the Respondent is concerned, the footpath was quite clean. When he met with Keystone they did not suggest that they would clean the footpath again. Ms Bole added that she would refer to the point that was raised. Keystone were happy to do this in principle subject to meeting on site and a follow up report. The Applicant asked whether the Respondent had added as a gesture of goodwill that they will power wash the street side again. Ms Bole confirmed that that is the case. Mr Paterson had a quote to have this done by the cleaners. In response to a question from the chair, Mr Paterson confirmed that he instructed that 2 or 3 weeks before the day of the hearing. He does not have a proposed date but stated that he can speak to the contractor. He would not anticipate any significant delay. Ms Bole stated that in PF Doc 23.1 they stated that the Respondent as a gesture of goodwill will pay for this.

108. The chair asked the Respondent's representatives which items offered in January 2020 have been done and which are outstanding. Ms Bole responded that the only one offered as a gesture of goodwill was the path. The Applicant then stated that earlier in this conversation today, in relation to point 2, Ms Bole had said that as a gesture of goodwill they were arranging for works to be carried out to the vennel area. Ms Bole responded and apologised, stating that the Respondent did say that it would arrange to credit the amount for the repairs to the bollard light and that when works are being carried out on site they will arrange cleaning of the timber vennel. Ms Bole confirmed that in relation to the bollard, the Respondent is going to credit the amount and then pursue Keystone.

109. The Applicant sought further confirmation from Ms Bole that the Respondent is going to do something about the bollard, the vennel render, the marks on vennel roof and deal with the footpath. Ms Bole's response is that the Respondent will be doing what they undertook to do in PF doc 23.1, the email of 9 March 2020.

110. The Applicant confirmed that she had no further questions for the Respondent's representatives in relation to the allegations about Code of Conduct 6.9.

Applicant's submissions in response (Code of Conduct, Section 6.9)

111. The Applicant made submissions relative to her allegations that the Respondent has breached the Code of Conduct, Section 6.9, in respect of a failure to pursue Schindler and Keystone for inadequate work or service.

112. The tribunal chair sought clarification regarding the allegations about Schindler, in relation to whether it is alleged that there was inadequate work or inadequate service.

113. The Applicant stated that she believes that there was inadequate work as discussed on the last hearing day. She stated that in this case it is probably work. She does not know if this service is relevant in this situation. She is offering to prove that the work was inadequate. Whether that encompasses service she does not know. She is sure that their works were inadequate. She is struggling to say that there was inadequate service. She does not know what it means in relation to Schindler. She is not sure of the English interpretation of this sentence.

114. In relation to Schindler, the tribunal chair asked the Applicant whether it is her complaint that the Respondent has never pursued Schindler or that they have delayed to pursue them. The Applicant stated that it was only after conversations where she said to go ahead and get Lift Control in and gave that instruction. She stated that Lift Control were instructed in 2018. They were not brought in fast enough. It is relevant to another point. She stated that since she has become involved, they have pursued Schindler harder. There are different parts to this story. There are monthly works. Then there are ad hoc works. They are two separate issues. She is complaining about everything. She believes that it was because of her that Lift Control was engaged in the summer of 2018. She stated that she has tried to establish that the Respondent has been remiss and has not been pursuing adequately or in a timely manner.

115. The tribunal chair asked the Applicant to clarify the length of the delay she is alleging in the Respondent pursuing Schindler. The Applicant responded that she cannot say what the delay was as she does not have full information on the monthly inspection sheet. Only one month was supplied. She thinks Ms Kirkwood mentioned that there are more. The Applicant stated that she cannot remember. The Applicant stated that she cannot answer the question as she would need full transparency on all of the Schindler monthly maintenance reports back to 2013. She does not have the evidence on whether the monthly maintenance has been done or not for 7 years. With regard to the summer 2018 failure, which is a long time ago to remember, she got involved in summer 2018, to try to push forward the Respondent to bring in Lift Control who were suddenly able to fix the lift. The lifts were out for months. The Respondent's staff always say they have lots of developments to manage. The Applicant repeated that she cannot answer the question.

116. In relation to Keystone, the Applicant stated that the only statement that she wished to make is that with regards to Keystone she has not seen any evidence of all of these alleged meetings that either Jeni or Steve has had with Keystone to discuss everything, all the points, all the snagging. Normally, she would have

sight of some evidence or maybe be at the meeting. She does not know if meetings took place between the Respondent and Keystone.

117. The tribunal chair sought clarification regarding the allegations about Keystone, in relation to whether the Applicant is alleging that in each of the 6 points there was inadequate work or service provided by the contractor.

118. The Applicant responded that it was hard for her to say. She stated that the Respondent has not submitted evidence of snagging meetings. She stated that the only thing she knows for sure is that in November 2018 during the work she met with Euan from Keystone and Euan denied that the cleaning had caused the render to fall off a bin room store at my front door.

119. The Applicant then stated that it is her position that there was inadequate work or service provided by Keystone on any of six points.

120. The tribunal chair sought clarification on what points the Applicant alleges that the Respondent has failed to pursue.

121. The Applicant stated that work finished in November 2018 and snagging went in on 10 January 2019. She stated that the Respondent did not pursue them. She then said that the Respondent only pursued them because she complained as the meetings with Keystone came after her complaint. The Applicant stated that she is not accepting that the Respondent pursued them. She stated that there is no evidence that the Respondent pursued them or evidence of meetings in 2020. She stated that she is not happy. She referred to page 5 of her written submission. She asked why the issues have not been done.

Respondent's further submissions regarding Code of Conduct, Section 6.9

122. Ms Bole stated that with regard to Keystone, there were numerous visits when the works were ongoing. There were a number of delays due to weather. Items were notified by various proprietors during the contract and after which Keystone went back to address. There was a visit at the start of 2019 after the contract was complete where the issues were looked at along with one or two others. They returned for further issued. After PF doc 23.1, there was a further visit with Keystone and Mr Paterson. The Respondent's contention was that they were pursued to look at various issues that the homeowners were dissatisfied with. We do not agree that the work was in any way substandard. Keystone was dealing with years of grime.

123. Ms Bole stated that she would check the position as regards the Lothian Electric charge.

124. In relation to the lifts, Ms Bole stated that she had indicated the Respondent's primary and secondary positions regarding the lift. She stated that she wished to qualify the Respondent's position as we had been interpreting things in a slightly different manner. In relation to service visits, the Respondent maintains that Schindler did do that but nothing has been presented otherwise. She stated that the point at issue in the Application was three lifts failing in 2017 and 2018. Schindler failed to identify correctly and or repair a number of failures in lifts 5 and 9 in particular and latterly at 20. That was the reason they engaged Mr Nicol of Lift Control. He had significantly more experience with the lifts than Schindler did.

125. She stated that so far as repairs are concerned, the Respondent does not dispute that Schindler were unable to diagnose the problem. Then the Respondent engaged Lift Control. The works would have fallen outwith the contract terms in any event. She stated that the Applicant's block 20 did not incur any expense nor did Block 9 in relation to Lift Control. It was only Block 5 that incurred expense.

126. The Applicant intervened and stated that Lift Control were brought in when Schindler was not able to fix the lifts in question during that summer only when she became involved at the request of another homeowner and the Applicant agreed with Jeni to get an alternative opinion. She stated that they only do things because the Applicant was the catalyst for that to happen. Ms Bole responded that that is not true and that she brought in Lift Control in November 2017 prior to any comment the Applicant made. Prior to the Block 9 repair costed at £16,000, the Respondent had already brought Lift Control into the equation at block 5. The Applicant stated that she was aware that the Respondent did bring them in at the end of the previous year for block 5. What she is saying is that on the specific conversations, when she contacted the Respondent to discuss Block 9 and Block 20, Lift Control were then brought in. She stated that she was not party to what happened with Block 5 the year before. Ms Bole repeated that she had already consulted Lift Control with respect to the report prepared by Schindler, in 2018.

Alleged failures (2) to comply with Code of Conduct, Section 7.1

127. **Section 7.1** provides: ***"You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."***

Applicant's evidence and submissions (Code of Conduct, Section 7.1)

128. The Applicant alleges two breaches of Section 7.1, the second of which was conceded by the Respondent.

129. ***Allegation (1)*** The Applicant alleges that the timescales in the Respondent's written complaints procedure in the WSS (version 8, January 2018) (Appendix 4.10) are not "reasonable". She stated that the terms of the WSS have changed since she made her Application. Issue 9 came out in May 2019, during her formal complaints process which started on 18 March 2019 and ended on 3 July 2019.

130. In terms of the WSS 8, the total time from start to end could be up to 8 weeks to move through all the stages.

131. The Applicant stated that she had not included the Complaints Procedure in her revised document bundle because it was exactly the same as Issue 8 (Appendix 4.10).

132. She stated that in reality her own complaint process took 3.5 months because the Respondent can extend each stage at their discretion.

133. She stated that it is the procedure she is criticising. By May 2019, in Issue 9, the Respondent had extended the time to 12 weeks, which can be further extended at the discretion of the Respondent.

134. ***Allegation (2)*** The Applicant alleges that there was no procedure for how the Respondent handles complaints against contractors in the January 2018 version of the WSS (Appendix 4.10). She referred to page 6 in her written submissions and adopted what was said there. She initially stated that she had nothing to add to what is said in written submissions. She then stated that there was no procedure on how to handle contractors in Issue 8, Issue 9 or the complaints guide at the time. She thinks that this has now been resolved as she has checked the latest version of the complaints guide and a paragraph had been added.

Respondent's evidence and submissions (Code of Conduct, Section 7.1)

Response to allegation (1)

135. The allegation is disputed by the Respondent. Ms Bole stated that the Applicant's inventory of documents was consolidated after the March 2020 hearing and that the Applicant was now referring to the WSS rather than the Respondent's Complaints Procedure, which was in the original bundle submitted with the Application documentation. Ms Bole stated that there is no copy of the Respondent's Complaints Procedure in the Applicant's revised bundle. She

further stated that there was no elaboration of the written complaint in the Applicant's written submissions but she accepted that the alleged Code breaches do include Section 7.1.

136. Ms Bole stated that the Respondent is obliged under the Code to have a Complaints Procedure and that they do have one. The timescales were deemed to be reasonable when they issued WSS issue 8, in order that there can be a full investigation with the development managers. The Respondent does not feel that the timescale is excessive.

137. In response to a question from the tribunal chair as to why the timescale was extended in the WSS issue 9, Ms Bole stated that previously when a complaint got to Stage 5, the Directors needed more time to review things fully. She stated that the timescales set out are the "outside edge" as some complaints are more readily investigated and resolved.

138. In response to a question from the tribunal chair about the reason for having 5 stages, Ms Bole stated that Stage 1 is notification of complaint itself. The Respondent may require additional information in order to establish the nature of the complaint. Stage 2 is registration. Then the homeowner is contacted to advise on procedure and given a formal complaint number. Stage 3 is the initial investigation stage, carried out by appropriate staff member(s). Stage 4 is a letter issued to the homeowner with conclusions. If the conclusions are not accepted by the homeowner, the customer has the option to escalate complaint to Director level, which is stage 5. Ms Bole stated that she wished to stress that the timescale and the process are entirely reasonable to ensure any complaint is fully investigated and to provide the homeowner with as full a response as possible. The Respondent does not feel that the timescales are excessive. Only two stages are directly impacting on the client, namely initial registration and their response to stage 4.

Response to Allegation (2)

139. Ms Bole stated that the original breach is accepted by the Respondent, in so far as the allegation relates to the WSS, Issues 8 and 9, which were in force at the time at which the Applicant made her Application, but that it has now been rectified by revision of the WSS and complaints procedure. Ms Bole stated that it had been accepted at the first hearing day that there was nothing in those earlier versions about handling contractor complaints. It has now been added to the WSS Version 10, issued in January 2020. The Complaints' Procedure has also been updated.

140. Ms Bole stated that, by and large, if any issue was raised by a homeowner about a contractor it was largely dealt with in the response to the homeowner and the contractor would be contacted.

141. The tribunal chair queried whether the rectification of the WSS and Complaints Procedure was a direct result of the Applicant's complaint. Ms Bole responded that she believed that it had already been raised.

142. Ms Kirkwood stated that it was not the situation at the time of Issue 8 that the Respondent did not deal with contractor complaints. They were dealt with as part of their complaints process. The complaints process did not specifically refer to contractor complaints as part of the process. However, the process and WSS are more transparent now and the process for dealing with complaints about contractors is set out.

Response by Applicant (Code of Conduct, Section 7.1)

143. The Applicant queried why, if there was an admitted breach of the Code of Conduct, Section 7.1, nobody had noticed that for seven years.

144. The Applicant clarified that she was only querying the lack of a specified procedure in the original documents.

Alleged failures to comply with Property Factor's duties

145. A noted above, the Property Factor conceded the following failure to comply with property factors' duties:

145.1. **WSS, para 6.1.1**. Ms Bole stated that the Respondent had already conceded the complaint in that regard. She stated that the complaint was upheld prior to the tribunal and that it was not part of the complaint raised with the tribunal.

146. As noted above, the Applicant confirmed that she was withdrawing the alleged failure to comply with WSS, para 2.4 (number 6 in her notification letter).

147. The tribunal heard parties' evidence and submissions on the three disputed allegations of a failure to comply with the property factor's duties, arising from the **WSS Issue 8, January 2018**:

147.1. (1) WSS, para 4.1 “routine maintenance”
147.2. (2) WSS, para 4.6.1, “routine property inspections”
147.3. (3) WSS, para 5.3.5, “change in float amount”

148. Both parties led evidence, referred to their written submissions and supplemented them with oral submissions at the hearing.

(1) WSS para 4.1 “Routine maintenance”

Applicant’s evidence and submissions

149. The Applicant stated that this complaint relates to servicing of the water pumps. She stated that para 4.1 provides that “routine maintenance will be provided where applicable on an as required basis”. She stated that the water pumps were in the past serviced annually, every January. She stated that her allegation is that the Respondent failed to ensure annual servicing in January 2019. There was a gap in property managers. After her formal complaint had started, the service was completed on 11 April 2019 by Ritmac. She referred to the Block 20 service report by ‘Ritmac’, which was produced when the two pumps were serviced. Appendix 15 shows that remedial action was urgently required to both pumps, at a cost of over £2,000 to her block. She stated that due to the fact that the inspection was carried out in April instead of January, the homeowners were at risk as the pumps could have failed.

150. The Applicant stated that even if it was only a three-month delay, the manufacturer says that the inspections should be carried out at six monthly intervals. She referred to Appendix 16 - British Standard BS8558 2015. She stated that the hard copy that she had provided is an extract from the manufacturer’s manual and is missing an image. She stated that it corroborates what Ritmac have said about servicing. She stated that it is suggested that there is an inspection at least every six months, which is not necessarily the law but it is in line with the British Standard.

Property Factor’s evidence and submissions (WSS, para 4.1)

151. Ms Bole stated that It is the Respondent’s position that they complied with WSS, para 4.1.

152. She stated that the servicing was previously carried out by ‘Pumpmaster’ Pumpmaster had indicated to the Respondent that an annual service was sufficient. There had been an issue at another block and they did not attend when the water went off. In 2019, the Respondent contacted RitMac to change the servicing contract.

153. With reference to Applicant's Appendix 16, Ms Bole accepted that Ritmac recommended two inspections per year. She stated that the Respondent would be happy to go along with that. It was not the Respondent's understanding that it was recommended to inspect twice a year, prior to that.

154. Ms Bole accepted that the annual service was carried out in April rather than January 2019 but stated that the Respondent does not accept that the delay from January to April was material in relation to any deterioration of the motor which was defective in one of the pumps. She stated that although it was slightly late but it was still carried out during 2019 and that there had been a delay as the report had been sent to her by email, which she had not received. She did not know why the email had been sent to her rather than to the property manager at the time, who was Alexandra Pater (from January 2019). Ms Pater gave the instruction for the first contract with RitMac. After Mr Paterson took over as property manager he called Ritmac and the report was sent.

155. The ordinary member noted that the pumps were previously replaced in 2014 and asked Ms Bole whether it is a regular feature of this development that the pumps have to be replaced every five years, which seems to be a short life span. Ms Bole stated that she would have to check the specifics of what happened in 2014, as she was not with the company at that point (the property manager at that time was Mr Murdoch). She does not know what the issue was in 2014 and if it was a similar problem or something separate. She stated that the pumps are not being replaced on that level of frequency across the development and that they have been replaced in one or two of the blocks since the Respondent began managing the development in 2013. She was not sure how many have been replaced since 2013.

Applicant's Response (WSS, para 4.1)

156. The Applicant stated that she believes she provoked action to make sure that the service was carried out in April 2019 as she is not convinced that it would have been done as there was no property manager on the case. She stated that she was first made aware in May 2019 that Mr Paterson had taken over after a period of time following Alexandra Pater leaving. The Applicant thinks that the problems were caused by the gap.

157. In response to Ms Bole's point about not receiving a report from Ritmac, the Applicant stated that surely it was the property factor's responsibility in Jan 2019 to ensure that the water pumps had had their annual service.

158. The Applicant stated that Ms Bole's explanation for the delay from January to April made no sense, as even when a property manager changes, a report may

still be sent to the previous property manager. She referred to her Appendix 15 – April 2019 and noted that the service report is still addressed to Ms Bole rather than Steve Paterson.

159. The Applicant stated that when a service was missed in 2014, one pump failed. She stated that she has lived in her property for 12 years. She stated that she hung out the window on 1 and 3 July 2019 when Writ Mac installed the two new pumps. She asked RitMac about the pump failing in 2014 and why it was failing in 2019, five years later. He was a new contractor so he could not give her a reason. He did not want to say whether it was due to a missing service. She stated that if something is not maintained it tends to break down.

160. Later in the hearing, the Applicant returned to this issue. She requested to substitute a document as Appendix 16, which attaches another part of the manual. There was no objection by the Property Factor and the tribunal allowed the document to be substituted as Appendix 16.

(2) WSS para 4.6.1, routine property inspections

Applicant's evidence and submissions

161. The Applicant alleges that there has been a breach of WSS, para 4.6.1 in that routine property inspections will be made by the property manager in terms of the section 6 of the development schedule (Applicant Appendix 4A, page 2), which states "monthly basis"; and they can be more frequent with major projects etc.

162. The Applicant stated that Appendix 17 provides a snapshot. She stated that when Jeni Bole looked after the Development for 4 or 5 years there was evidence pinned to the notice board of inspections. She stated that they were not monthly but were fairly regular. She was quite content over those years. However, at the end of 2018, the Applicant noticed that things deteriorated following a change of property manager, Alexandra Pater briefly, then Steve Paterson from 2019. After Jeni Bole stopped being the Development manager there were no more notices or other evidence of inspections provided. The Applicant stated that Appendix 17 provides the status as at the time of application. From June 2018 to February 2019 there was an apparent gap.

Respondent's evidence and submissions (WSS, para 4.6.1)

163. Ms Bole stated that for the period for which she was the manager she put up copies of handwritten reports on the noticeboard when she was on site. The Respondent did not routinely upload those to the development portal. She ticked

boxes and made “scribbly notes” for herself. She conceded that they did not happen every month.

164. Ms Bole stated that at other times when she attended the Development to meet a contractor, no inspection sheet was completed.

165. Ms Bole stated that the system has now changed. She accepted that the WSS did state that there would be monthly inspections. She accepted that the Respondent did not do monthly inspections during her term as development manager but stated that they were consistent.

166. Ms Bole did not accept the Applicant’s submission that there was a gap from summer 2018 to January 2019. She stated that Appendix 17 is a snapshot from the portal and was incomplete because the Respondent’s staff did not automatically upload the reports to the portal as a matter of course.

167. Ms Black stated that she wished to know who inspected after Jeni Bole and prior to Steve Paterson starting in summer 2019. Ms Bole stated that Steve Paterson was actually already with the Respondent by that time and that in the early part of 2019, Ms Bole carried out inspections. She stated that Alexandra carried out at least one inspection. Ms Bole stated that she had also been to the site on another couple of occasions, one of which was meeting Keystone.

168. Ms Black stated that meeting a contractor does not constitute a monthly inspection of a huge development; and secondly that she had asked for evidence of monthly inspections and she has not received any. She stated that homeowners can tell when the development managers are on site and that they never saw anybody for a long time at the start of 2019, until Steve Paterson came along.

169. The tribunal chair asked Ms Bole if there is a paper or electronic record for all routine inspections carried out at the Development. Ms Bole responded that some would be recorded and some would not. She stated that some inspection sheets were handwritten and some were typed up. She stated that the Respondent’s staff have specific days that are booked out for inspections but that the diary does not specify that on a particular date they will inspect this Development. She stated that inspections were normally done on a rota based on geographical location e.g. all the ones in Leith on a single day. Ms Bole stated that there probably were some inspections in addition to those on Appendix 17. She repeated that the Respondent conceded that these were not done every single month and that there were gaps but not to the extent alleged by the Applicant. She stated that she would consider whether to produce any further document to “plug the gap”.

170. Later in the hearing, Ms Bole confirmed that she had gone through automatic diaries. She listed dates of inspections which she carried out as follows: 5/1/18, 24/5/18, 28/6/18, 23/8/18, 17/10/18, a date in December 2018 and 5/1/19. She added that she was on site on 1 November 2018, when she and the Applicant met with Keystone, which was not actually an inspection date but she looked at certain things and stated that it was still an attendance on site and that there were also multiple visits when Keystone were on site. She stated that on 5 and 19 February 2019, Alexandra Pater was on site.

171. The Applicant queried whether there were reports from those dates which were classified as a proper inspection.

172. Ms Bole replied that she made her own version at the property and wrote out a paper copy to put on the noticeboard. She stated that she removed the previous one when she put one up. She stated that most of the reports which are on the portal are paper reports that were then typed up.

173. Ms Bole stated that she could not find any reports arising from visits from Alexandra Pater. She stated that they were probably paper reports and she would have to see if they had been archived. She stated that some are already on the production of the screen shot of the portal (Appendix 17).

174. The Applicant stated that the issue of a lack of reports continued from February 2019 onwards and had continued to date.

175. Ms Bole stated that in March 2020, after the lockdown was announced the Respondent ceased all on-site inspections and that they have only recommenced in the last number of months. She stated that notifications were issued through the client blogs at the height of the lockdown from March 2020.

176. The Applicant stated that it had said on the portal that the Respondent was reinstating them from July 2020. She stated that the only inspections showing as having been carried out by Steve Paterson were December 2019 and March 2020.

177. Ms Kirkwood repeated what Ms Bole had said about all inspections ceasing in early March 2020 and that the Respondent had issued a global communication to all clients on the portal and also by newsletter. She stated that staff are now able to go ahead and carry out inspections but that there is a significant backlog. She stated that the Respondent's staff endeavoured to get round after restrictions were lifted in July 2020. She stated that they had asked owners for patience and understanding and that they are now getting back to regular more routine inspections. Ms Kirkwood stated that when they had checked their records for evidence of inspections they had only looked at the period up to February 2019.

178. Ms Bole stated that they had looked out inspections and visits up to the time of the Application and that there are subsequent inspections up to the time that Mr Paterson took over. She stated that Alexandra Pater left employment at the end of March 2019 and that ongoing business was being overseen. She stated that it was only a matter of weeks between her leaving and Mr Paterson taking over.

179. Mr Paterson stated that he became property manager in late April 2019. He stated that he has carried out inspections. He stated that he has not produced a formal report each time. He stated that in May 2019 he inspected three times and that inspections were carried out by him in July 2019, August 2019 and November 2019.

(3) WSS, para 5.3.5 – change in float amount

Applicant's evidence and submissions (WSS, para 5.3.5)

180. The Applicant referred to her written submissions, page 6, the last point.

181. The Applicant stated that in relation to the WSS 5.3.5 Issue 8 (January 2018), it stated that the float amount quoted in the Development schedule is correct at the date of the publication of this statement of service and may be subject to change by agreement with the homeowners' association or with the majority of owners if costs increase significantly. She stated that she is focussing on the words *"by agreement with the homeowner's association or with the majority of owners…"*. She stated that during the formal complaints process the Respondent produced WSS version 9 and removed the words *"by agreement…".*

182. The Applicant submitted that the cost increase from £225 to £315, which is a forty per cent increase, is significant. She stated that it was £225 from the start on 1 March 2013. The Respondent said that there were insufficient funds to meet ongoing costs at the development according to their calculation. Under WSS version 8 the float could only be increased significantly by agreement and it was not agreed.

183. The Applicant then stated that there is another very important point that in relation to her as a homeowner of Flat 20/7. She stated that it would suit her if they could have block by block increases. She stated that she needed to know if this is something that she can discuss as part of the agreement as a homeowner. She stated that her block is cheaper to run for a number of reasons.

184. She stated that what had been agreed is a development level float for 62 homeowners. She stated that she is an individual homeowner. She stated that the float dispute has many arms and legs. It has been tackled across two codes and one WSS alleged breach. She stated that it would solve a lot of problems now and in the future for the matter to be approached on a block basis.

185. The tribunal chair asked the Applicant whether she could point to the provision in the Deed of Conditions and/or other document which would permit the Respondent to approach it in that way. The Applicant stated that she would have to go through Deed of Conditions and that that would take a little while.

186. The Applicant stated that she wished to refer to Appendix 2. She stated that one of the points Ms Bole had talked about was that only block 22 will be lower because they have no lift. The Applicant stated that that is not always strictly true. There are only four people in that block, regardless of whether there is no lift. She stated that in her block they are apportioned over 11 homeowners and that sometimes the Block 22 invoices can be higher.

187. The Applicant stated that the Respondent had only referred to one sentence in the Deed of Conditions and that some bits of the Deed of Conditions are not applicable now. She stated that the solicitors who wrote the Deed of Conditions have been liquidated and that she is ignoring the Deed of Conditions. She then stated that she is not attempting to ignore the Deed of Conditions but they have to be read with caution.

188. The Applicant referred to page 6 in her written submissions and Appendices 1 and 2. She stated that she wished to highlight her float analysis. She pointed out that there were 6 blocks. She stated that she would like that to be given some attention regardless of whether she has come to a compromise with the Respondent about the float level. She stated that the average for the development is £252; the average for three blocks on Coburg Street is £225; Dock street do not have reps, they do not challenge the costs and have low knowledge and their average is £279. She referred to Appendix 1, the summary. She stated that this is Schindler out-of-contract costs, in addition to £7,500 every year. All have block numbers down the right-hand side. In the middle there is a block split of £24,500. She stated that on the blocks she is concerned about, there are costs she disagrees with. She stated that they have suffered a lot more costs than Block 20 and that she is at the mercy of a development wide float.

Respondent's evidence and submissions (WSS 5.3.5)

189. Ms Bole stated that the float amount was at a consistent level from day one. She stated that the practicalities of consulting every single owner by way of any kind of meeting, for 46,000 clients, is impractical.

190. Ms Bole stated that the Respondent issued two letters, the first in January 2019 (which the Applicant said that she had not received); and a second follow up letter in February 2019, which the Applicant accepted that she had received. It was issued to all developments including the Crescent Development as part of the Respondent's overall review process. Even if there are meetings these are quite frequently not attended by all owners at a development. The process was to issue the mailshot on developments where matters were reviewed. With reference to the complaint responses, it was indicated that the calculations were done on an average basis. PF Doc 3.1-3.3 is a statement of account for the Applicant which shows all of the bills charged and the payments made. 52 per cent of these exceeded the original amount of £225. It was similar to all of the six blocks, with two lower and one higher. The Respondent is obliged to ensure that developments are in funds to pay for ongoing routine charges, insurance and any ad hoc repairs that come up. There have to have sufficient funds to meet the ongoing obligations. As a result of the review of the previous year's quarterly billings the float amount was adjusted accordingly.

191. The tribunal chair asked Ms Bole whether the Respondent considered the increase to be *"a significant increase"* with reference to the wording of the WSS, para 5.3.5 Ms Bole responded that they thought that it was a reasonable sum based on the previous year's outgoings. The purpose of letters in January and February 2019 was for consultation with all owners and there was an opportunity to respond accordingly. She stated that, ultimately, the Respondent has to be in funds to maintain service. The letters were putting forward to all owners that the Respondent was conducting a review of the float to ensure that levels were sufficient to cover expenditure.

192. Ms Kirkwood stated that the follow up letter dated 20 February 2019 (in the original application documents and now Appendix 11) was confirmation of the amount following the analysis. It stated that the Respondent had completed the review and required to increase the float to £315. There was a note saying that if homeowners required any further information they could contact the Respondent. She stated that it was not physically possible to get consent and that the critical thing is to ensure that the development is in funds and not in breach. She stated that the Respondent did not receive any complaint about the increase other than from the Applicant. She stated that it was reasonable to increase it based on factual actual costs. The Respondent thinks it is a reasonable increase. One or two homeowners asked for more detail but other than the Respondent there was

no objection in principle to the need for increasing the float. Ms Bole stated that the Respondent did not think that it was a significant increase. She stated that had it been two or three times the amount they would have required to get agreement in advance. For the proposed increase which was made, the Respondent thought it was a reasonable approach was to write out to owners.

193. Ms Kirkwood stated that the February 2019 letter was the second of the two letters sent to homeowners. She stated she thought that she had asked homeowners to come back with queries but accepts that this letter did not ask them to do so. She stated that it does provide details of where additional information can be found on our website and includes details of a video. They also provided information around altering the direct debit and how homeowners could contact them. She stated that the letter said that there was a float guide on their website and videos, explaining why they have to be in funds and how they calculate that.

194. Ms Bole stated that they did not think that they had to get agreement because it was not a significant cost increase and because it was based on what was actually being spent it was reasonable. She stated that in some developments the floats double.

195. With reference to the Respondent's secondary position, the tribunal chair asked whether the Respondent conceded that there had been no consultation. Ms Kirkwood stated that it was not conceded on the basis that they had written out twice to give owners a chance to come back if they disagreed and that nobody else other than the Applicant came back to her to disagree. She submitted that they consulted, by virtue of the fact that nobody came back. She stated that they cannot manage a development without the money. When the Applicant disputed the increase, the Respondent did put it on hold. Then the Applicant proposed a figure at the meeting after the first hearing day at Riverside House in November 2019 and they had agreed to compromise.

196. Ms Bole stated that in advance of the hearing in March 2020, the Respondent put in a further submission with productions. In that submission under 'Float increase dispute', it confirmed that at the meeting that they had had in November 2019 there was an agreement to adjust the figure down to £250.

197. Ms Kirkwood stated that they had said that they would monitor it because the Applicant indicated large expenditure from the previous year that would not happen again. The Respondent therefore agreed to reduce to £250 on the basis that they would closely monitor it. No period of time was agreed for monitoring. She stated that they would need to check what communication was issued off the back of that to homeowners or the HC.

198. Ms Bole stated that it was applied in the 2019 billing run and is ongoing until reviewed.

199. Ms Bole stated that there was only one formal complaint and it was the Applicant and that the Respondent agreed with the Applicant that they would put it on hold to allow discussion. She stated that because the Applicant felt so strongly about it and there were a few queries, the dispute was put on hold for the whole Development.

200. Ms Kirkwood stated that the Applicant had first engaged with her about the issue of the float increase by email on 15 February 2019 and that the Applicant continued over days and weeks about float. Ms Kirkwood stated that the Respondent had continually engaged up until the point where the Applicant had exhausted their complaints process and taken the matter to the tribunal. She stated that all of that time up to Riverside House meeting in November 2019, they left the float unchanged because it was in dispute.

201. Ms Bole stated that a covering update following the first hearing and the meeting in November 2019 was sent with the updated inventory in advance of the hearing day in March 2020. She stated that it should have been numbered but had not been.

202. Ms Bole stated that in relation to the question of approaching the float on a block-by-block basis, the only block that would qualify legitimately for a lower float would be number 22 as this does not have a lift. She stated that the Applicant's statement shows the number of times that charges exceeded the previous float level and that varying quarterly charges often exceed the float level. She stated that there was only one block where the charges were higher than block 20. All blocks were routinely exceeding the previous float level of 225. Some blocks had several events. She stated that it cannot be assumed that they will exist only on those blocks as there can be all manner of things on a development. She stated that the Respondent looks at it as an overall picture. She stated, with reference to the Deed of Conditions, that it does not provide float details but provides on Page 12 of the Deed of Conditions, 2.6, Clause 13. *"the factor's decision in regard to the apportionment of common charges shall be final and binding upon the proprietors."*

203. Ms Kirkwood stated that there is no reference in the deeds for the requirement of a float on a block-by-block basis. There is nothing in the Act that says they have to do it. She stated that there is nothing in the WSS. She stated that it may be subject to change with the homeowners. She stated that the Respondent does not accept the Applicant's position that there is any requirement whatsoever to consider it on a block-by-block basis. The Respondent looks at this on a development-wide basis to make sure that each development is in funds. For the

common property there is 1/62nd share of annual maintenance. The garden and carpark are apportioned to all 62 proprietors. Charges to an individual block are charged to that individual block or stair. The single lift contract is split across the five blocks that have lifts. They are each charged on a block-by-block basis.

204. Ms Bole stated that she thinks that the Respondent has presented its position with reference to the written submissions and also production 3.1 to 3.3, which highlight that at Block 20 the expenditure exceeded the float on roughly 50 per cent of the bills issued. Only 1 block exceeded it by more than that during that time and the costs can fluctuate. Some costs were proposed works advance funding. She stated that the Respondent has made its points with respect to those matters, looking at covering all financial aspects relative to the development.

Applicant's response (WSS 5.3.5)

205. The Applicant stated that she has said repeatedly that Appendix 11, the February 2019 letter (Appendix 11) is the only letter she received because she did not receive the January 2019 letter. She referred to the letter and stated that it did not make it clear that the Respondent was seeking agreement or consultation from homeowners. She repeated that a forty per cent increase in quarterly proposed costs is significant, not only in her opinion but in the opinion of other homeowners. She stated that it is untrue that she was the only person to complain about the float increase. She stated that many of the homeowners went into formal dispute and a global hold was put on the accounting system for the proposed £90 increase but that some people automatically paid by direct debit. She stated that she and others thought it was substantial, unsubstantiated and unjustified.

206. The Applicant stated that at the time she had communicated with many other homeowners, starting with the ten other neighbours in her block and several other block reps, who then communicated with her block. She started to receive emails to confirm and they said that they had written to the Respondent but that she has not seen the wording of all the homeowners who allegedly wrote to the Respondent.

207. The Applicant referred to page 6 of her written submissions, 3rd line from the bottom and Appendix 1.

208. The Applicant stated that in November 2019 the Respondent had discussed resolving the issue to try to gain agreement with the committee and come to a compromise agreement.

209. The Applicant asked Ms Kirkwood to specify the point at time when Ms Kirkwood had thought that she was speaking to the Applicant about the subject now under discussion. Ms Kirkwood replied that from February 2019 she had fully engaged with the Applicant in relation to this issue and responded to all of her communications; and that this had been done on the basis that the Applicant had stated that she was on the committee and represented its interests.

210. The Applicant stated that Ms Kirkwood had not obtained agreement from homeowners up until 4 July 2019. The Applicant stated that the last day that there was contact about the float increase was 26 August 2019 when a counter-offer was made of £275. The Applicant stated that she had discussed it with committee and that they had countered with £250 and that after that date, communications had gone dead until November 2019, until after the meeting at Riverside House, when she had come to a compromise with the Respondent.

211. The Applicant submitted that in relation to WSS 5.3.5, if the tribunal finds that the increase is significant, the only other point is whether agreement was obtained. She referred to Appendix 11, dated 20 February 2019. She stated that it is the only letter she has received and stated that there was no request for feedback or agreement or consultation.

212. The Applicant submitted that there was no relevance to the video which was signposted in the February 2019 letter. She stated that she has looked at the video. She stated that she is an accountant by trade in the first part of her career. The video was generic and related to all homeowners in all developments. It explains how a float works. She submitted that everything that the Respondent had pointed to does not show that agreement was obtained from homeowners. She submitted that the February 2019 letter does not amount to obtaining agreement from a majority of the homeowners.

213. The Applicant submitted with reference to her written and oral submissions that she had established a breach of WSS 5.3.5.

214. In response to a question from the tribunal, as to whether she accepted that she had not requested supporting documentation in her letter of 3 July 2019, the Applicant stated that she was “probably vague” in the letter.

Parties’ submissions in relation to proposed PFEO

215. Both parties were invited to make submissions in relation to the terms of any PFEO in relation to the admitted failures to comply; and the disputed failures, in the event that the tribunal found in favour of the Applicant in relation to those matters.

216. Ms Bole and Ms Kirkwood stated that in relation to the admitted failure to comply with response times, that the Respondent now responds to communications in the specified periods, therefore it was submitted that there would be no need for an order in this regard.

217. Ms Bole and Ms Kirkwood stated that in relation to the admitted failure to inspect the Development on a monthly basis in accordance with the WSS, that they would be content with an order to carry out such monthly inspections, if the tribunal considered that to be necessary.

218. Ms Bole and Ms Kirkwood stated that in relation to any financial payments considered by the tribunal, that as a gesture of goodwill the Respondent had already made a substantial financial outlay following agreement of the action plan with the Applicant in November 2019. Ms Kirkwood stated that it had been agreed with the Applicant that the Respondent would, at its own expense, appoint an independent lift consultant to review the documentation and provide a report. The cost was over £1,000.00 and it was borne by the Respondent and not charged to the homeowners. She stated that the independent report is complete.

219. Ms Kirkwood stated that no financial compensation or refund of management charges has been made to the Applicant. She stated that the management fee at the current time is £123.83 plus VAT per property per quarter and that that was frozen last year in recognition of some of the issues raised, while majority of developments increased by 3%. Ms Kirkwood confirmed that the Applicant has paid the management fee throughout the period since the application was made.

220. The Applicant did not give any response and did not make any submissions about proposed remedies.

221. The tribunal chair advised parties about further procedure. The oral hearing concluded and the tribunal retired to deliberate.

Discussion

222. The tribunal's reasons for its decision are summarised as follows, with reference to each alleged failure to comply with the Code and alleged breach of - property factor's duties and its findings-in-fact and findings-in-fact and law:

Code of Conduct, Section 2.1

223. Section 2.1 provides:

> ***"Section 2 "Communication and Consultation" provides: "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:***
> ***2.1 You must not provide information which is misleading or false. …"***

224. The tribunal considered each of the four allegations made by the Applicant:

225. **(1)** The tribunal was not satisfied on the basis of the evidence that it was either misleading or false for the Respondent to state that a letter was sent to homeowners in January 2019, whether or not the Applicant received a copy of the letter at the time. The tribunal took account of the fact that the February 2019 letter from Nik Mayall to homeowners referred back to the January 2019 letter.

226. The tribunal was not satisfied on the balance of probabilities that there was a failure to comply with Section 2.1 in this regard.

227. **(2)** The tribunal was not satisfied on the basis of the Applicant's evidence that any list of snagging issues produced by her was the first or only snagging list.

228. Neither party produced the Respondent's original "snagging" list in evidence but the tribunal accepted that Respondent's evidence that there was an earlier snagging list and that the Applicant had provided an additional list with the six items which now form part of her Application.

229. Therefore, the tribunal was not satisfied that it was either false or misleading for Mr Mayall to state that *"your previous property manager was of the opinion that all of the snagging items were completed… while I appreciate that you have provided a list of further snagging items".*

230. The tribunal was not satisfied on the balance of probabilities that there was a failure to comply with Section 2.1 in this regard.

231. **(3)** The tribunal was not satisfied on the basis of the evidence that it was false or misleading for the Respondent to state that the HC did not have the authority to incur expenditure on behalf of the other homeowners in the development.

232. The Applicant did not prove that the HC, as an entity, had any legal authority to incur expenditure on behalf of the other homeowners in the Development.

233. The Deed of Conditions ("DOC") makes provision for the number of homeowners required for a quorum at a meeting and for the percentage of homeowners required to vote in favour of a resolution. It does not state that the HC has the power to incur expenditure on behalf of other homeowners.

234. Page 11 of the DOC provides that the developer will appoint the first factor. It goes on to state that if the homeowners want the property factor to act, they have to convene a meeting and obtain the consent of the majority of owners. The factor has sole discretion on what they do and do not do. For 62 properties, 55 per cent would require 35 votes in favour of a resolution. The words "Homeowners' Committee" are not contained of the Deed of Conditions. The reference in the DOC is to "homeowners".

235. The Applicant did not produce the constitution of the HC in her hearing bundle or produce any other document which she submitted provided a basis for such legal authority on the part of the HC.

236. The Applicant failed to prove that the HC has any legal authority to incur expenditure on behalf of other homeowners.

237. The Respondent's statement that the HC has no such authority was neither false nor misleading.

238. The tribunal was not satisfied on the balance of probabilities that there was a failure to comply with Section 2.1 in this regard.

239. **(4)** The tribunal was not satisfied that the Respondent's statement in the February 2019 letter to homeowners about the requirement to increase the float was either false or misleading.

240. Just because the Applicant disagrees with the way in which the Respondent performed its calculation as a basis for the proposed float increase does not mean that the Respondent's statement was either false or misleading.

241. The tribunal was satisfied that in its calculation, the Respondent had included one-off items of Development expenditure. The tribunal observed that the

Respondent had carried out a fairly superficial exercise in that it had added up all the bills without analysing them and it had not gone through the expenditure in forensic detail (such as the exercise conducted by the Applicant when she reviewed matters). However, at the time that the statement was made, the Respondent proceeded on the basis of their calculation and thought that they had produced a reasonable estimate of what the float increase should be to cover predicted expenditure on the Development. The question of whether the Respondent was justified in taking a 'broad-brush' approach is not the focus of the duty in Section 2.1. The question is whether they made a statement which was misleading or false.

242. Similarly, just because the Respondent has since suspended the proposed increase and negotiated a smaller increase, does not mean that the statement relative to the proposed increase was false or misleading at the time.

243. The tribunal was not satisfied on the balance of probabilities that there was a failure to comply with Section 2.1 in this regard.

244. The tribunal therefore determined that the Respondent had not failed to comply with Section 2.1 of the Code of Conduct in respect of any of the four allegations made by the Applicant.

Code of Conduct, Section 3.3

245. Section 3.3 provides: **"You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. 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."** [the underlined section is the section being relied upon by the Applicant].

246. The tribunal considered each of the Applicant's allegations of failure to comply with Section 3.3.

247. The tribunal was not satisfied that the Applicant's letter of 28 March 2019 (which was lodged on 1 October 2019) amounted to a request for "supporting documentation and invoices". What the Applicant requested from the Respondent was an analysis (of the type she later carried out herself).

248. The response from the Respondent to her request for an analysis may not have been in the format or content which the Applicant was expecting but the Respondent did provide a response in their letter, even if it did not meet with the Applicant's expectations or approval. However, the content and approach are not the issue. The Applicant did not ask for specific supporting documentation and invoices.

249. The Applicant's opinion is that the Respondent's calculation has been carried out in an inappropriate way, as she is of the opinion that certain one-off items of expenditure should not have been included. The Applicant therefore disagreed with the proposed float increase to £315, because it was calculated in that way.

250. However, during the hearing, the Applicant accepted that she had never asked for supporting documentation but stated that she wished an analysis of the amount of £315.

251. The tribunal was not satisfied on the balance of probabilities that there was a failure to comply with Section 3.3 of the Code of Conduct in this regard.

Code of Conduct, Section 6.9

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

253. The tribunal considered whether the Applicant's complaints relative to (1) Schindler and (2) Keystone amounted to failures to comply with Section 6.9 of the Code of Conduct.

254. The tribunal was satisfied on the basis of the evidence that there was a failure in Schindler's service in respect of the service contract for the lifts at the Development. Schindler was instructed by the Respondent and they were being paid to do certain things as part of the maintenance contract.

255. The tribunal was satisfied on the evidence that Schindler failed to carry out some items of routine maintenance. Allianz / Zurich were carrying out regular checks and producing reports. Neither party produced evidence as to what was included in the regular maintenance contract. The tribunal accepted that some items were essential to normal functioning and some were not. Schindler should have picked up on the points raised that fell within the terms of the maintenance contract and attended to them as part of their service. The evidence was that they did not do so, in part because they were unable to identify the cause of some of the issues, leading to the Respondent instructing an additional

contractor. As such, the tribunal was satisfied that an inadequate service was provided by Schindler.

256. The tribunal was satisfied that there was a failure in the Respondent's approach to pursuit of Schindler in respect of the inadequate service provided.

257. The Respondent did not offer any evidence that they had pursued Schindler in respect of inadequate service.

258. The Respondent's only defence was that they instructed another contractor who had better knowledge of the schematics of the lifts to carry out repairs. The Respondent is relying on the LOLER TUV SUD Report which was commissioned during the tribunal proceedings to show that the service contract was properly implemented and overseen. No evidence was produced of pursuit of Schindler at the time complained of.

259. There were financial implications for homeowners arising from the Respondent's failure to pursue Schindler, as homeowners were paying a proportion of the service contract invoices to Schindler and receiving an inadequate service.

260. (2) Keystone

261. The Applicant referred to six separate "snagging" issues in respect of works carried out by Keystone at the development.

262. In respect of a number of these items, the tribunal was satisfied that Keystone provided inadequate work or services, namely:

262.1. Bollard. The tribunal was satisfied on the basis of the evidence that Keystone had broken the bollard during attendance at site. The tribunal accepted the Applicant's evidence in this regard about the events on the day.

262.2. Render damage on vennel wall. The tribunal was satisfied that parts of the render had fallen off and that it was either caused by Keystone during works; or that if it had been in that condition before the works, a competent contractor would not have power-hosed the area as it would have led to penetration and made the damage worse. The tribunal accepted the Applicant's evidence in this regard.

262.3. Splashes on vennel ceiling. The tribunal was satisfied that these had been caused by overspray during the Keystone work and that the work was inadequate. The tribunal accepted the Applicant's evidence in this regard.

263. In relation to the other matters in the complaint, the tribunal was not satisfied that there was inadequate work or service by Keystone.

264. In respect of whether or not the Respondent pursued the contractor:

264.1. Bollard. The Respondent should have pursued this matter with the contractor rather than relying on the contractor's position that it was not caused by them. Later, after the Respondent agreed with the contractor that repairs were to be carried to the bollard, the Respondent should have pursued this matter with the contractor to ensure that there was a satisfactory repair or replacement. The Applicant had a reasonable expectation that the bollard would be returned to the same condition that it was in before their attendance. It was not repaired to a reasonable standard. On the basis of the evidence produced, including photographs, it appears that the bollard probably requires to be replaced as repairs have been unsuccessful.

264.2. Render damage on vennel wall. The Respondent should have pursued this matter with the contractor in a timely manner. The issue has persisted for years. The tribunal did not accept the Respondent's evidence that the Covid-19 pandemic was to blame for the delay in pursuing the contractor. The tribunal did not accept that it was reasonable to wait for other matters on the Development which require to be attended to. The delay in pursuing this matter is unreasonable.

264.3. Splashes on vennel ceiling. The Respondent should have pursued this matter with the contractor in a timely manner. As with the render damage, the issue has persisted for years and the tribunal did not accept the Respondent's evidence that the Covid-19 pandemic was to blame for the delay in pursuing the contractor. The tribunal did not accept that it was reasonable to wait for other matters on the Development which require to be attended to. The delay in pursuing these matters is unreasonable.

265. Because the tribunal considered that the Respondent should have done more to pursue the contractor (Keystone) in a timely manner to remedy the issues which were caused by inadequate work or service, the tribunal was satisfied that there was a failure to comply with the Code of Conduct, Section 6.9.

Code of Conduct, Section 7.1

266. Section 7.1 of the Code of Conduct provides**: "You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."**

267. The first alleged failure to comply with Section 7.1 was disputed by the Respondent and the second was conceded by the Respondent.

268. **(1)** In relation to the first complaint, the tribunal considered the complaints resolution procedure in relation to the WSS, Issue 8 (Appendix 4.10), and the accompanying complaints resolution process, which was in force at the time of the Applicant's notification and Application to the tribunal.

269. The timescale in the WSS Issue 8 for the complaints process was in the region of eight weeks from registration of the complaint to the final stage; with a discretionary element which allows the Respondent to extend this if further time is required for investigation. The tribunal was satisfied that such a discretion was appropriate to deal with complaints which involved complexity or a multitude of complaints.

270. The tribunal was not satisfied that an eight-week process, even with the possibility of extension, amounted to a failure to comply with the term "reasonable timescales" in Section 7.1 of the Code of Conduct.

271. It was observed that the timescales have since been extended in issue 10 of the WSS but the tribunal did not require to determine whether this contravened Section 7.1 as it did not form part of the complaint which was notified / in the Application.

272. **(2)** The Respondent conceded that in Issue 8 of the WSS there was no specified procedure as to how the Respondent would handle complaints against contractors. That has since been remedied in Issue 10 of the WSS by inclusion of an explicit policy for how such complaints are handled. The tribunal was therefore satisfied that there was a failure to comply with Section 7.1 of the Code of Conduct in this regard.

Property Factor's Duties

WSS para 2.4

273. The complaint was withdrawn by the Applicant during the oral hearing.

WSS, para 4.1 "routine maintenance"

274. The tribunal determined that the Respondent had a duty in terms of its appointment under the WSS, version 8, to carry out "roof inspections, gutter cleaning, etc, will be provided, where applicable on an as required basis."

275. The tribunal determined that the duty in paragraph 4.1 extended to the servicing of the water pumps on the Development.

276. However, the tribunal was not satisfied that the Applicant had proved that the servicing should be 6 monthly. A photocopy of one small section of the British Standard is not sufficient as proof. The manufacturer's recommendation was not referred to by either party in their evidence and submissions. The Respondent generally accepted in its evidence that it should be serviced once per year (although Mr Paterson sent an email which suggested that it should be twice per year.)

277. The Respondent admitted that the contractor did not attend in January 2019 and that the next service was not carried out until April 2019. No reason was provided by the Respondent in evidence for this failure, although it may have occurred as a result of the change in property manager at the start of 2019.

278. The tribunal determined that there had been a gap in servicing of the water pumps on the Development between January and April 2019.

279. The tribunal was satisfied that the Applicant had established that the Respondent failed to ensure annual servicing of the Applicant's block's two water pumps in January 2019.

280. The tribunal was satisfied that if Writ-Mac has a standing instruction to do something in connection with the water pumps then the Respondent should be ensuring their attendance and that the work is carried out. The tribunal was satisfied that there was a failure in diarising and follow up by the Respondent which resulted in the failure to ensure annual servicing at the appropriate time in 2019.

281. The tribunal was satisfied on the balance of probabilities that there was a failure to comply with WSS, version 8, para 4.1.

282. However, despite the fact that the tribunal found that there was a failure to so comply, the tribunal was not satisfied on the evidence that any particular consequences of the failure had been proved on the balance of probabilities. No expert evidence was led upon which the tribunal could make a finding that the delay of three months had led to the pumps breaking down and requiring to be replaced, as alleged by the Applicant. The tribunal is therefore not satisfied that there were any financial consequences for the homeowner, other than the fact that she had been charged a share of servicing fees for a service which was due to happen in January 2019 and did not happen until April 2019.

WSS, para 4.6.1, "routine property inspections"

283. The tribunal determined that the Respondent had a duty in terms of its appointment under the WSS, version 8, to conduct monthly property inspections at the development.

284. The Respondent admitted during the oral hearing that there had been a failure to conduct monthly inspections at the Development, although there was still some dispute between the parties as to the inspections which had been carried out.

285. The Respondent's additional evidence about the dates of inspections which was produced during the hearing (without objection and with the consent of the tribunal) showed that a number of inspections had been missed in 2019, prior to the date of the Application (in addition to those missed after the date of the Application.)

286. The tribunal therefore determined that there had been a failure on the part of the Respondent to conduct monthly property inspections at the Development in 2019, prior to the date of the Application.

WSS, para 5.3.5, "change in float amount"

287. The tribunal determined that the Respondent had a duty in terms of the Written Statement of Services version 8, para 5.3.5 to seek agreement of the homeowners' association or from the majority of owners if costs increase significantly in relation to the float amount.

288. The tribunal is satisfied that the legal basis for the float increase may be found in the title deeds, which allows the Respondent to set the float at the appropriate level.

289. The tribunal first considered whether the proposed increase from £225 to £315 was “significant” and determined that it was significant. In particular, the tribunal had regard to the fact that the Respondent did not submit that the increase was not significant, even when asked directly by the tribunal members a number of times. Instead the Respondent’s representatives argued that it was “reasonable”, which is not the term used in WSS para 5.3.5. The tribunal did not require to consider whether the proposed increase was “reasonable” to consider an alleged failure to comply with WSS, para 5.3.5, but whether it was “significant”. The tribunal had regard to the fact that the proposed increase of £90 per property was a 40% increase.

290. Because the tribunal determined that the proposed increase was significant, it proceeded to determine whether the Respondent had complied with the duty to seek agreement from the HC or from a majority of homeowners for the proposed float increase.

291. The only evidence relied upon by the Respondent in relation to the proposed increase were the two letters sent January and February 2019 to homeowners. The tribunal was unable to determine whether the January 2019 letter had been sent to the Applicant and had not been received; or whether it had not been sent. The tribunal accepted evidence that other homeowners received the January 2019 letter. The tribunal was satisfied that the Applicant did not receive it, in particular as the receipt of the ‘second’ letter In February immediately caused her to contact the Respondent to challenge and query the proposed increase.

292. The tribunal had regard to the terms of the letters. The tribunal was not satisfied that either letter specifically sought the agreement of homeowners to the proposed float increase. The Respondent simply outlined the proposed increase and the reason for it and signposted the homeowners to various resources such as a video and section of the website which explained how floats were calculated. The Respondent offered homeowners the chance to raise any queries or concerns.

293. The Respondent did not offer to prove that a majority of owners had agreed to the proposed increase. In fact, they stated that it would be too difficult in practical terms to seek agreement from 62 homeowners. There was no evidence of any attempt to seek agreement from the majority of owners.

294. No evidence was led by the Respondent of any attempt to gain agreement of the HC as an alternative.

295. The Applicant clearly demonstrated that she was not in agreement with the proposed increase by her actings after receipt of the February 2019 letter.

296. The tribunal did not accept the evidence of Ms Kirkwood that the Applicant was the only homeowner on the Development to object or to question the Respondent in relation to the proposed increase. She maintained that others queried but did not complain. However, it was conceded by the Respondent that a number of other individuals had not paid the increased amount and that as a result a freeze was put in place of the implementation of the increase on a Development-wide basis, which is inconsistent with the only objection coming from the Applicant.

297. The tribunal therefore determined that there had been a failure on the part of the Respondent to comply with WSS Issue 8, para 5.3.5.
The tribunal noted that following the commencement of the current tribunal proceedings, a lower figure for the proposed increase had been agreed, although the Respondent removed the requirement to seek agreement for increases in WSS Issue 9.

WSS, para 6.1.1

298. The Respondent conceded that there had been a failure to comply with para 6.1.1 in relation to failures in response times for communications. The Applicant included the complaint in her Application so the tribunal was satisfied that it was a matter before the tribunal and that there had been a failure to comply with its property factors' duties in this regard.

Property Factor Enforcement Order

299. The tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Notice in terms of Section 19(2) of the 2011 Act.

300. The Applicant has made payment of her management fees throughout the period of the service issues, the internal complaints process and the tribunal proceedings, which commenced in July 2019 (other than the proposed increase to the float, which was put on hold across the Development pending agreement / a determination by the tribunal). The management fees were £30.96 plus VAT per quarter. In recognition of the multiple service failures by the Respondent, both those which are admitted and those which the tribunal has determined, the tribunal is of the view that it is appropriate to order the Respondent to reimburse the Applicant the sum of £297.20, which represents two years' management fees (with the said sum to be paid in cleared funds and not a payment on account). Whilst this does not reflect the entire period over which issues have been experienced by the Applicant the tribunal is of the view that it is an appropriate

period as it captures the period which includes the majority of the Respondent's failures to comply.

301. The tribunal considered that the Applicant has been put to significant time and inconvenience in pursuing the Respondent for multiple alleged failures to comply with the Code of Conduct and alleged failures to comply with property factors' duties, some of which were conceded by the Respondent (during the internal complaints process or the tribunal proceedings) and others which were disputed I relation to which the tribunal has found in favour of the Applicant. The Respondent has not been entirely straightforward in its defence of the Application and changed its position or produced late evidence in relation to a number of matters during the hearing process, for example in relation to the failure to carry out monthly Development inspections. The Respondent also failed to respond to direct questioning on a number of matters, for example whether the Respondent considered that the proposed float increase was "significant" in terms of the relevant paragraph of its WSS Issue 8. In taking into account the length of the proceedings, the tribunal acknowledged that they have been prolonged as a result of the Covid-19 pandemic in the period from March to October 2020, so no account was taken of that period in considering the Applicant's time and inconvenience. In all of the circumstances the tribunal proposes to order the Respondent to make a financial payment to the Applicant (in cleared funds and not a payment on account) in the sum of £1,000.00.

302. In addition, in relation to the Keystone snagging issues, the tribunal proposes to order that the bollard is replaced with a like bollard; the vennel render is repaired and vennel ceiling damage is repaired, with all work at the Respondent's expense and to be completed within 8 weeks. The Respondent may elect to pursue the contractor to recover the costs but if those costs are not recovered they must not to be passed on to homeowners, including the Applicant.

303. The tribunal does not propose to make any order in respect of communication timescales as these are provided for in the WSS. Any further failures by the Respondent to comply with its agreed timescales could, in any event, give rise to further applications to the tribunal by homeowners at the Development.

304. The tribunal does not propose to make any order in respect of monthly inspections as these are provided for in the WSS. Any further failures by the Respondent to comply with the agree monthly inspection programme could, in any event give rise to further applications to the tribunal by homeowners at the Development.

305. The parties will be allowed to make representations on the proposed PFEO.

Appeals

306. 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.

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Ms. Susanne L M Tanner QC
Legal Member
3 February 2020