Housing and Property Chamber
First-tier Tribunal for Scotland

Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

Chamber Ref: FTS/HPC/PF/21/0183
FTS/HPC/LM/21/0786

Re: Property at House G Eastwood Court, 2B Crosslees Drive, Thornliebank, G46 7RS ("the First Property") and

Property at House 4 D Crosslees Court, Crosslees Drive, Thornliebank, Glasgow G46 7RT ("the Second Property")

The Parties:

Mr Adam Moad, 48 Glenmill Avenue, Darnley, Glasgow, G53 7XF ("the First Applicant" and "Mr Moad")

Ms Maureen McAlpine, 32 Orchard Drive, Glasgow G46 7NU ("the Second Applicant" and "Ms McAlpine")

East Renfrewshire Council, Housing Services, 211 Main Street, Barrhead, East Renfrewshire, G78 1SY ("the Respondent")

Tribunal Members:

Martin McAllister (Legal Member)
Helen Barclay (Ordinary Member)

Decision

The Tribunal determined that a proposed property factor enforcement order be made requiring the Respondent to pay the sum of £2,500 to each of the applicants. Payment is to be effected by the Respondent reducing the sum due by each applicant in respect of the current contract for the repair and partial reconstruction of the common wall at Crosslees Drive, Thornliebank, Glasgow.

Background

1. **These are applications made by the First and Second Applicants in relation to the actings of the Respondent in its capacity as property factor of the development in which both properties are situated. The First**

Property is owned by the First Applicant which he purchased in December 2017. The Second Property is owned by the Second Applicant which she purchased in March 2018.

2. **Both applications relate to alleged breaches of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors ("the Code") and failure to comply with the property factor's duties in terms of the Act.**

3. **In this Decision, the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules" and the First- tier Tribunal for Scotland (Housing and Property Chamber) is referred to as "the Tribunal." Mr Moad and Ms McAlpine are sometimes together referred to as "the Applicants" and East Renfrewshire Council is referred to variously as "the Property Factor" or "the Council."**

4. **Ms McAlpine and Mr Moad had made separate applications each relating to their respective ownership of properties in the development for which the Council provides property factoring services. It had been decided to hear both applications together in terms of Rule 12 of the Rules.**

5. **There had been case management discussions and the Tribunal had issued Directions in terms of Rule 16 of the Rules.**

6. **The Applicants and the Respondents had submitted written representations.**

The Hearing

7. **A Hearing was held on 20th September 2021. It was held by audio Conference because of the pandemic.**

8. **Mr Moad and Ms McAlpine were in attendance. Mrs Moad was present as a supporter. Mr Gerard McBride, husband of Ms McAlpine, gave evidence on behalf of the Applicants.**

9. **Mrs Laura Jack, factoring officer and Ms Gbemisola Taiwo, housing services manager, represented the Council.**

Preliminary Matters

10. It was noted that the Applicants had made separate applications and that each stated that separate breaches of the Code had been breached. The Respondents had collective notice of both applications and Mrs Jack conceded this. She said that she had no issue with matters being considered on the basis that both applications had the same alleged breaches of the Code. It was pointed out to Ms McAlpine that the most recent written submissions, which she had submitted on behalf of both parties, made reference to the property factor failing to comply with paragraph 3.1 of the Code but that this was not included in either application. Mrs Jack said that she would have no objection to this paragraph of the Code being included. Both Mr Moad and Ms McAlpine made application to amend their applications and Mrs Jack said that the Council had no objection. The Tribunal allowed each application to be amended under Rule 14 of the Rules.

11. As a consequence of the amendments to the applications, the matters for determination by the Tribunal in respect of breach of paragraphs of the Code are Paragraphs 2.1,2.4,3.1,3.3,6.1,6.3,6.4,6.6,6.9 and Sections 1.1a-Bc and 1.1a-Ci.

Matters not in Dispute

12. Mr Moad purchased the First Property with a date of entry of 17th December 2017 and Ms McAlpine purchased the Second Property with a date of entry of 8th March 2018.

13. The properties are situated in a development of twenty two properties. Twelve are owned by the Council and are tenanted and ten are privately owned. The development consists of two blocks of flats which are situated in landscaped grounds surrounded by a wall.

14. The Council are property factors for the development. They issue annual factoring statements. Proprietors in the development are charged for such things as common lighting. They are not charged for grass cutting or maintenance of trees.

15. Prior to the respective purchases by Mr Moad and Ms McAlpine, their solicitors made enquiry of the factoring position with the solicitors acting in the respective sales. The solicitors acting for Mr Moad and Ms McAlpine were provided with documentation provided by the sellers' solicitors which they in turn had obtained from the Council. The

information did not disclose any outstanding or contemplated works to the common parts of the development.

16. **Both Mr Moad and Ms McAlpine had sight of Home Reports for each of the properties which they purchased. They had these prior to purchase and both indicated that, in respect of the common wall, it was a category 2 as far as its condition was concerned.**

17. **The Council had, in 2016, taken steps to ascertain the condition of the common wall surrounding the development. It produced a document entitled "Housing Services- Project Brief" and dated 6th May 2016.**

18. **The Council instructed Balfour Engineering Consultancy to carry out a structural inspection of what was described in the subsequent report as "the retaining wall on Crosslees Road and Main Street Thornliebank."**

19. **Balfour Engineering Consultancy produced a report to the Council which is dated 28th April 2017.**

20. **Prior to the purchases by Mr Moad and Ms McAlpine, the Council had not registered Notices of Potential Liability against either property.**

21. **Neither Mr Moad or Ms McAlpine had received a copy of the Balfour Engineering Consultancy report ("the Balfour Report') or had knowledge of its existence or its contents, prior to their respective purchases.**

22. **Neither Mr Moad or Ms McAlpine had received a copy of the Housing Services- Project Brief from 2016 or had knowledge of its existence or its contents, prior to their respective purchases.**

23. **Work to replace sections of the wall and to repair other sections is currently ongoing.**

Applicants' Position

24. **Ms McAlpine had made detailed written submissions on behalf of the Applicants. Mr Moad had made written submissions earlier in the process. The Applicants had lodged various documents. Both Ms McAlpine and Mr Moad were clear that they considered that the Council should have given them more information prior to their purchases and, in particular, that they should have been advised of the intended work to the common wall. Their position was stated to be that the property factor owed them a duty of care and should have disclosed the knowledge it**

had. They said that the Balfour Report was clear that work required to be done to the wall. Both said that they would have changed their view about acquisition. Mr Moad said that, had the Home Report contained a category 3, he would not have bought the property. He said that he had contacted the surveyor who had carried out the Home Report and that he had responded by letter dated 10th May 2021. The letter states that, if the surveyor had been made aware that the wall was not structurally sound, he would have reported it as a category 3 in the Home Report. Mr Moad said that he had never purchased a property where its Home Report showed any items as a category 3. Mr Moad and Ms McAlpine both said that they had paid over the Home Report valuations and they said that, had the knowledge of an impending repair to the wall been known they would either not have purchased or alternatively would not have paid as much for the property.

25. Ms McAlpine said that the Respondent's written statement of services obliged it to deal properly with new purchasers. She referred to the Respondent having duties towards her as a customer and a consumer.

26. Ms McAlpine said that there is an issue about the costs of the works. In 2016, they were estimated to be £20,000. There was then a tender obtained in 2019 which meant that the cost for each homeowner would have been around £4,100. She said that the latest tender obtained, and on which the works are proceeding, meant that each homeowner would have a liability for around £6,800.

27. The Applicants' position was that, the Property Factor had breached numerous sections of the Code, had a service "not fit for purpose" and had not complied with the property factor's duties in terms of the Act. They said that they had sustained loss as a result of not being told, prior to purchase, of the need to repair the wall and that they have also suffered other losses as a result of the property factor's poor management of the matter subsequent to their respective acquisitions.

28. Ms McAlpine said that, in relation to the Upper Tribunal cases which she had been referred to at the case management discussion, the applications before the Tribunal were different and she asked the Tribunal to accept this.

29. Ms McAlpine referred to the Consumer (Scotland) Act 2020 and said that as a consumer, as defined in the Act, she was owed a duty of care by the Council.

30. The Applicants consider that the Council erred in not registering Notices of Potential Liability against the First and Second Property when they were still owned by the previous proprietors.

The Property Factor's Position

31. Mrs Jack was unequivocal in stating what had been set out in the Property Factor's representations and that was that it was accepted that the provision of information prior to the Applicants' respective purchases was deficient. She said that significant changes to the processes had now been made. She said that the Property Factor, in recognition of the poor service, had made offers to each of the applicants to reduce the sum which they would be required to pay.

32. Mrs Jack said that the Respondent accepted that it had duties to prospective buyers of properties when queries were made of it in respect of properties which it was factoring.

33. Mrs Jack said that, in 2016, it was not certain that work was going to be done to the wall.

34. The Respondent, as part of its submission, had raised an issue with regard to whether or not it owed a duty to comply with the Code of Conduct and the property factor's duties in respect of its dealings with the Applicants. It stated that, since they were not "customers" at the time certain information was provided to solicitors acting for the sellers of each property which was then subsequently passed on to solicitors acting for them, they had not failed to comply with the Code.

35. Mrs Jack said that the price of £20,000 contained in the 2016 document was not a real price but just indicative. She said that the document was for the internal purposes of the Council.

Submissions following evidence

36. Ms McAlpine stated that the Applicants' position is that the Council owed duties to them prior to their respective purchases of the properties. She said that the Council did not follow the written statement of services because they did not ensure that the costs of the wall were borne by the previous owners and did not provide correct information to the Applicants

37. Ms McAlpine said that the Council accepted that it had failed because it had now changed its procedures relating to disclosure of information on sales.

38. Ms McAlpine said that, after she and Mr Moad became homeowners, they had not been informed about the issue of the wall and they had also been misled with regard to the potential increase in tender costs if works were delayed for a year. She said that the vote taken at the meeting of owners should be considered void because those attending

had not been told that they could abstain from the vote which was taken.

39. **Ms McAlpine said that the Council was culpable in not having started work on the wall for almost five years after issues with it had been identified and that, in that period of time the costs had risen from £20,000 to £150,000. She said that, in this regard, the Council had failed to meet the repairs target set out in the written statement of services.**

40. **Ms McApine said that contractors were appointed in January 2021 without discussing matters with homeowners and without advising them of the significant increases in cost.**

41. **Ms McAlpine said that the Council did not comply with health and safety legislation and delayed in fencing the wall to protect the public.**

42. **Ms McAlpine said that she should have been provided with information on the contract when she requested it and that she should not have had to resort to a freedom of information request.**

43. **Both Ms McAlpine and Mr Moad said that the Council did not have a factoring service which was fit for purpose and that this was evidenced by the fact that there was a high turnover of staff and at times no person responsible for the project.**

44. **Ms McAlpine said that the Applicants were not satisfied with the guarantee for works which was being provided.**

45. **Mr Moad said that the Council had not followed its basic procedures when solicitors acting for sellers asked for information. He said that the Council did not have acceptable staffing levels and did not have and adequate training regime. Mr Moad said that he had effectively bought a property with a category 3 in its Home Report but that had not been intimated to him prior to purchase because of the Council's failures in its systems.**

46. **Ms McAlpine said that the Applicants should be relieved of any obligation to pay for the works to the wall and that, in addition, they should each receive a payment of £1,000 in compensation. She said that the issue of the wall had been extremely stressful for both Applicants.**

47. **Mrs Jack said that the response times referred to in the written statement of services was not for major programmed works.**

48. Mrs Jack said that it is accepted that the Council's system for provision of information when properties are being sold was flawed but has now been changed.

49. Findings in Fact

49.1. The First Applicant is the owner of Flat G, Eastwood Court, Crosslees Drive, Thornliebank, Glasgow, G46 7RS.

49.2. The Second Applicant is the owner of 4D Crosslees Court, Crosslees Drive, Thornliebank, Glasgow, G46 7RT.

49.3. The Respondent provides factoring services for the development at Crosslees Drive, Thornliebank, Glasgow on which the properties owned by the Applicants are situated.

49.4. On 6th May 2016, the Respondents produced a document entitled Housing Services – Project Brief which recommended that a wall in the development, which is the common property of its owner, be repaired/replaced.

49.5. On 28th April 2017, Balfour Engineering Consultancy produced a report for the Respondents on the wall and the report identified structural and safety issues. The report recommended replacement of the wall or alternatively, if the budget did not allow, that certain remedial steps be taken.

49.6. Prior to the First Applicant assuming ownership of his property on 17th December 2017, he was advised that there were no outstanding common repairs and he was not made aware of the project brief of 2016 or the Balfour Engineering Consultancy report of 2017.

49.7. Prior to the Second Applicant assuming ownership of her property on 8th March 2018, she was advised that there were no outstanding common repairs and she was not made aware of the project brief of 2016 or the Balfour Engineering Consultancy report of 2017.

49.8. In 2019, the estimated cost for each homeowner in the development for works to the wall was in the region of £4,100.

49.9. Works to the wall are currently being carried out and the costs for each homeowner in the development will be in the region of £6,800.

50. Findings in Fact and Law.

50.1. The First Applicant has been a homeowner in terms of the Property Factors (Scotland) Act 2011 since 17th December 2017.

50.2. The Second Applicant has been a homeowner in terms of the Property Factors (Scotland) Act 2011 since 18th March 2018.

50.3. The Respondent has failed to comply with the Code in relation to the Applicants.

50.4. The Respondent has failed to carry out the property factors duties in relation to the Applicants.

Reasons

51. The Tribunal required to consider a preliminary matter on what it could determine with regard to the applications.

52. It was noted that the Respondent, as part of its submission, had raised an issue with regard to whether or not it owed a duty to comply with the Code of Conduct and the property factor's duties in respect of its dealings with the Applicants prior to their ownership of the respective properties.

The Law

53. The Property Factors (Scotland) Act 2011("the 2011 Act")

Section 10 Section 9: interpretation etc.
……(5) In this Act, "homeowner" means—

(a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or

(b) an owner of residential property adjoining or neighbouring land which is—

(i) managed or maintained by a property factor, and

(ii) available for use by the owner.

Section 17 Application to the First-tier Tribunal
(1) A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed—

(a) to carry out the property factor's duties,

(b) to ensure compliance with the property factor code of conduct as required by section 14(5) (the "section 14 duty").

(2) An application under subsection (1) must set out the homeowner's reasons for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty.

(3) No such application may be made unless—

(a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, and

(b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowner's concern.

(4) References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.

(5) In this Act, "property factor's duties" means, in relation to a homeowner—

(a) duties in relation to the management of the common parts of land owned by the homeowner, or

(b) duties in relation to the management or maintenance of land—

(i) adjoining or neighbouring residential property owned by the homeowner, and

(ii) available for use by the homeowner.

54. It can be seen from the provisions of Section 17 (1) of the 2011 Act, that a "homeowner" can make an application to the Tribunal for determination of whether a property factor has failed to carry out the property factor's duties or has failed to comply with the Code.

55. Section 10 of the 2011 Act provides a definition of "homeowner" and that is "an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor." The Tribunal considered that, in determining any applications under the Act, whether or not an applicant considers her/himself a customer or a consumer was irrelevant. What is relevant is whether or not an applicant was a homeowner in terms of the 2011 Act.

56. The Tribunal had no difficulty in establishing that the First and Second Parties are currently homeowners of the properties which they respectively own. The matter for determination was whether, as current homeowners, they could bring an application under Section 17 (1) of the 2011 Act in respect of alleged departure from the Code or failure to comply with the property factor's duties prior to their respective ownership of the First and Second Properties.

57. The Upper Tribunal has considered the issue and parties were referred to two relevant decisions at the case management discussion: Shields and Blackley [2019] UT2 and Lynas and Ferri [2019] UT22.

58. In the Shields and Blackley case, the appellants sought to overturn two decisions of the First-tier Tribunal which had determined that homeowners (as defined in the 2011 Act) could not bring applications before the Tribunal with regard to matters arising from during their ownership if they had sold their properties prior to submitting applications. The appeals were successful and the Upper Tribunal stated at paragraph 4 *"When section 17(1) is considered as a whole it becomes clear that the right to apply to the tribunal is for determination of past*

failures on the part of the property factor. Once that is recognised it does not greatly strain the language of the subsection to interpret it as requiring only that the person making the application was a homeowner at the time of the failure which is the subject of the complaint." **The Tribunal went on to state at paragraph 7** ***"I consider that properly construed section 17(1) of the 2011 Act requires only that the applicant should have been a homeowner at the time of the alleged failure on the part of the property factor."***

59. The Lynas and Ferri case was an appeal brought by homeowners who had appealed against a finding of the First-tier Tribunal that they did not acquire title to bring a complaint against the factor until the date of entry and settlement in relation to their purchase. The appeal was unsuccessful. The Upper Tribunal referred to the finding in the Shields and Blackley case. The decision of the Upper Tribunal explored the meaning of the terms "owner" and "homeowner" together with the provisions of Sections 10 and 17 of the 2011 Act. It stated at paragraph 10 ***"…..a person who has yet to pay the price for or take possession of a piece of property would not ordinarily be understood to be its owner……Until the appellants paid the price and in return received a disposition someone else was necessarily the owner of the property."*** **In paragraph 15 of its Decision the Upper Tribunal stated** ***"I turn now to the appellant's esto case that a person who was not a homeowner at the time that the events complained of occurred can acquire a right to complain retrospectively by dint of their later becoming a homeowner. In Shields and Blackley which concerned complaints brought by former homeowners against the factors of properties, which each had owned at the time of the events giving rise to their complaint, the upper tribunal held that properly construed section 17(1) of the 2011 Act required only that the applicant should have been a homeowner at the time of the alleged failure on the part of the property factor……..The required nexus between factor and homeowner did not exist at the time of the failure now complained of."***

60. The Tribunal, in following the reasoning set out in the two appeal cases, had no difficulty in determining that the Applicants were not homeowners at the time their respective solicitors received information on factoring issues prior to their acquisition of the properties. If they were not homeowners at the time the information was provided by the Council, then the fact that they subsequently suffered loss as a result of such representation was not relevant to an Application in terms of the Act. They may well be able to take action in another forum if they consider that there has been misrepresentation by the Council which has led to delictual loss but the application before the Tribunal is in terms of the Act which states that applications can be made by Homeowners. The two Upper Tribunal cases referred to provide clarification of the definition of "homeowner."

61. It was noted that the Council had made offers of compensation to the Applicants in respect of the deficiencies in provision of information.

These offers seemed to be different. In a letter to Mr Moad dated 16th September 2019, the Council stated "….therefore I am offering to reduce your share of costs to repair the wall by 25%." In a letter to Ms McAlpine dated 2nd April 2020, the Council stated "….offer of 25% reduction of costs for your share of the works, which will be about £1,000." Ms Taiwo confirmed that the offer to Ms McAlpine is £1,000.

62. **The issue of whether or not the Property Factor should have registered Notices of Potential Liability did not have to be considered by the Tribunal since such Notices could only have been registered prior to ownership of Mr Moad and Ms McAlpine and therefore, when they were not homeowners.**

63. **Having decided that the issues for determination are restricted to the period from ownership by the Applicants of their respective properties, the Tribunal went on to consider if the Property Factor had complied with the Code and property factor's duties from the respective dates of entry.**

64. **Mr Moad purchased his property in December 2017 and Ms McAlpine in March 2018. The Tribunal considered that, in considering matters, it would not distinguish between the periods of ownership since there was only a period of a few months between each date of entry.**

Knowledge of Property Factor

65. **In 2016, the Council had identified that there was an issue with the "Crosslees Retaining Wall" and a document was prepared entitled "Crosslees Court Retaining Wall Housing Services Brief- Project Brief. Mrs Jack said that the document was for internal use in the Council. The document stated that the "objectives of the project" were to "assess and address issues with bulging retaining wall…….adjacent parts should also be assessed for any issues of concern." The document acknowledges that a majority of owners in the development require to agree any works but states "however as ERC is majority owner we can confirm that this work will happen but that we will require to carry out relevant procedures." In a section entitled "Progress to Date with Owners (if any)", it is stated "None to date- we will write to owners advising that we are carrying out investigations." The document states that there is an indicative cost for the works of £20,000 but that this should be followed by "reasonably accurate indicative costs to allow us to engage formally with owners." The document, at its conclusion, gives a "preferred timetable" for progressing the matter which indicates that practical completion of the project would ideally be achieved by the end of September 2016.**

66. **It was not disputed that, notwithstanding the terms of the 2016 document, the Council did not write to homeowners on the matter of the wall until October 2018.**

67. In 2017, Balfour Engineering Consultancy was engaged by the Council to carry out a structural inspection of the retaining wall on Crosslees Road and Main Street, Thornliebank to establish the condition of the "retaining wall." It produced a report dated 28th April 2017. It is useful to set out part of the report's conclusions: "The immediate areas of concern are to the Main Street Elevation, particularly around the steps and where the horizontal cracking has caused the top courses of the wall to move outwards. These areas should be repaired immediately before it becomes unstable. From a public safety point of view, the wall is in poor condition with risks associated with loose masonry and coping stones. While we do not see an immediate problem with collapse, some sort of public notice should be placed on the wall to discourage access……It is our opinion that given the extent of the works required to repair the wall, the most cost effective solution would be to demolish and replace the wall." The report states that "should the current budget" not allow for replacement of the wall then certain works should be carried out as a minimum. The report then details eight actions which were recommended.

68. The evidence of the Property Factor was that no work was done to the wall in response to the Balfour report prior to Mr Moad and Ms McAlpine becoming owners of their respective properties.

69. At the time the Applicants became owners of properties in the development, the Council had a considerable amount of information on the condition of the wall and the need for work to be carried out. It had its internal report which rather optimistically stated the preferred timetable for work allowed for completion before the end of 2016. It had the Balfour Report which made certain recommendations as to resolution of the issues and significantly raised safety concerns. Ms Taiwo said that the report did not state that the wall was in danger of imminent collapse. Whilst that is correct, it did raise issues of safety and suggested erection of signage to protect the public.

70. The Tribunal understood the Applicants' concerns because, had the Council followed its own timetable for work or responded quicker to the Balfour Report, the works to the wall would have been completed, or at the very least been in progress, prior to their ownership. For the reasons previously stated, the Tribunal could not take into account any failures of the Property Factor prior to the Applicants becoming Homeowners in determining whether or not, at that time, it had failed to follow the Code or complied with the property factor's duties.

71. The Tribunal considered that Homeowners were entitled to have information from their property factor as soon as it is available if it related to significant works requiring to be done to common areas and/or where there are significant issues of safety. Mr Moad was a Homeowner from December 2017 and Ms McAlpine from March 2018 but it was not until October 2018 that they were written to and advised of the issue. The Tribunal noted the terms of the letter sent on 11th October 2018:

"Following a report of concern regarding the retaining walls, which form part of the Estate of Crosslees Court and Eastwood Court, we instructed internally for a member of our Property and Technical team to attend and investigate. Their inspection noted the condition and structure as poor and that a structural engineer should be engaged to compose a full report." The letter stated that Balfour Engineering Consultancy visited the property and sent a copy of the Report with the letter which went on to summarise the findings of the report and advice as to progressing matters.

72. **The Tribunal accepted that the terms of the letter which have been quoted were accurate but considered that the Council were somewhat disingenuous in not stating that there existed an internal council document from 2016 which proposed works to be completed by the end of that year and also that it had the Balfour Report in April 2017.**

73. **Mr Moad and Ms McAlpine, whilst stating their primary argument to be that the Council should have told them about the issue of the wall prior to purchase, said that, on acquisition, they should have been told so that they could have tried to make a claim against the sellers. The Tribunal did not consider that they would necessarily have had much success in such claims since the sellers would have been unaware of the existence of the Council's consideration of issues with the wall and the Balfour report and that would therefore have given the Applicants some difficulty in pursuing claims against the sellers on the basis of breach of contractual obligations. Nevertheless, the Tribunal considered that the Applicants, upon assuming ownership, should have been advised of issues concerning the wall and that this would have alerted them to the possibility of their responsibility for paying for it.**

74. **There is no common insurance policy for the development and the Applicants have their own policies. It seemed to the Tribunal that another reason that they should have been advised of the issues with the wall was that the Balfour report had noted safety issues which they should have been aware of so that they could have taken the decision whether or not to intimate these to their insurers because of potential public liability issues.**

The tendering process

75. **The Applicants' position was that best value was not obtained for the proprietors in the development because the Council used the "Quick Quote" procedure under Public Contracts Scotland. Ms Taio said that the Council was obliged to follow its procurement process in respect of any work for properties which are factored.**

76. **The written statement of services states that, in relation to appointing contractors, the Council required to operate under Scottish Government**

regulations and its own policies to deliver best value. It states that the Council requires to obtain competitive quotes.

77. **Ms McAlpine stated that she did not think that the Council's use of the Quick Quotes process under the Public Contracts Scotland scheme offered best value for homeowners.**

78. **Ms Taiwo said that the Council were obliged to use the Public Contracts Scotland scheme for placing contracts for works. She said that there had been three tenders for the works in question and that, on each occasion, three contractors had tendered. She was unclear in her evidence as to whether or not it was preferred contractors selected by the Council who had been asked to tender or whether or not the contractors invited were common to the portal and available for all public contract works. She said that they always invited at least one local contractor to bid. She said that, in the first tender of August 2019, six contractors were invited and three tendered and in the second tender exercise of March 2020, five contractors were invited and three responded. She said that the final tender exercise had five invitees and three respondents.**

79. **The Applicants had concerns that the tendered costs may rise and Ms Taiwo said that they would not and that increased costs have managed to have been accommodated within the contract price by altering some of the specification without affecting the integrity of the work being carried out.**

80. **The Tribunal considered that the method of attracting contractors to tender was reasonable. The written statement of services states that the Council will comply with its procurement process and this gave notice to the homeowners. The use of the Quick Quotes process did not appear to the Tribunal to be inappropriate. A reasonable number of contractors had been invited to tender and, on each occasion, three had submitted tenders.**

The Meeting of Owners

81. **When the initial tender for works had been received, a meeting of owners was held on 28th August 2019. Prior to the meeting, homeowners had been written to on 16th and 28th August 2019. The correspondence had disclosed that the cost of the works for each proprietor would be in the region of £4,100. It set out two options for homeowners. The first was to accept the quotation received and to do the work. The second option was to hold the works for twelve months with monitoring by a structural engineer which would cost £96 for each homeowner.**

82. **The note of the meeting shows that the Applicants were present and that, in total, seventeen proprietors of the twenty two were represented. The Note stated "ERC acknowledge failings on timescales and notifying owners. No immediate Health and Safety risk was identified throughout**

the investigatory period. No works were proposed or considered until 2018." The Note states that the Council is the majority owner of the properties, owning twelve of the twenty two flats, but that it would not force work without consultation with owners unless there were immediate health and safety risks.

83. The note of the meeting shows that a vote was taken and that the unanimous decision was taken to adopt the second option ie. monitoring for twelve months.

84. The Applicants said that they had been told at the meeting that, if the works were delayed for a year, the likely increase in costs would be just over 2%. Mr McBride, who was at the meeting, said that this was the case. Applicants were subsequently written to in February 2021 and advised that, as a result of the ongoing monitoring of the wall, a health and safety issue had been identified and that it had decided to re-tender for works to the wall. The letter stated that, based on the lowest tender from the previous year, and using a tender adjustment, an increase of costs amounting to 2.13% would be expected.

85. Mrs McAlpine said that, in view of the health and safety issues identified in the Balfour report, she would have expected the Property Factor to draw that to the attention of owners and that there may have been a different outcome to the vote.

86. The Applicants said that they had relied on the information given at the meeting in relation to the likely increase in costs as a consequence of waiting twelve months. They said that they may have voted differently if they had known that the costs would have grown to almost £7,000 in less than a year.

87. The Applicants both said that, at the time of the meeting, they did not think that they had any responsibility for payment of works to the wall and they both considered that the cost should fall to the previous owners.

88. The Tribunal considered that the Applicants were somewhat disingenuous in stating that they may have voted differently had they known that costs could substantially increase by waiting for a year before undertaking the works. They had candidly said that, at the time of the meeting, they did not consider that they were liable for any of the costs.

89. The Balfour Report was clear in stating the potential safety risks and the Tribunal did not consider that the Applicants required it to be interpreted or explained. It seemed surprising to the Tribunal that the Council voted to postpone the work to allow a process of monitoring given the terms of the Balfour Report in relation to safety and also given the contents of the 2016 document which stated that works would proceed because of the Council's majority ownership. It could be argued that, as responsible

property factors, it should have promoted proceeding with the work given that the wall could only deteriorate if left alone, not improve.

90. The Applicants said that they did not know that they could have abstained from the vote and that this was not explained to them by the Property Factor.

91. The Tribunal noted the concerns of Applicants with regard to the representations made as to the possible percentage increase of costs. This was a reasonable assumption for the Council to make but, in communicating with homeowners, it is unfortunate that the information was not given with appropriate caveats. Ms Taio said that the main driver for the increase in costs was the fact that the successful contractor in the first tendering exercise chose not to participate in the later exercises. The Council based its projection of increased costs on the basis of that tender. It should have recognised that there was a possibility that that a contractor would not necessarily re-tender.

92. The Tribunal considered it significant that homeowners were advised at the owners' meeting that there were no immediate health and safety implications given that the Council had the Balfour Report which had recommended that steps be taken to protect the public. It was also patently untrue for the Property Factor to state that no works "were proposed or considered until 2018." The Council's internal document of 2016 proposed that works be done that year and also stated that, because of the Council's majority ownership of the flats in the development, the works would go ahead. This was also at odds with what the Council stated at the owners' meeting.

93. The Council saw no significance in the Applicants' statement that they did not know that they could have abstained from any vote. It is entirely possible for anyone to abstain from a vote at any meeting. Had they abstained, it is unlikely given simple arithmetic, that the outcome of the meeting would have been different.

Disclosure of Costs and instruction of works

94. The Applicants had been advised of the cost for works being approximately £4,100. They had taken the decision at a meeting of owners to defer final consideration of instructing repairs until a process of monitoring by a structural engineer had been concluded.

95. The Property Factor decided to re- tender as a result of the deterioration of the wall as disclosed in the report of G3 Consulting Engineers dated 19th November 2019 and received tender returns in March 2020. Ms Taiwo said that the Applicants and other homeowners were not advised of the costs brought out in the tender returns because of the inability of such works being carried out as a result of the restrictions imposed because of the Covid-19 pandemic. The sum payable by each homeowner as a

result of the March 2020 tender was in the region of £6,600. Ms Taiwo said that the homeowners were not consulted about the tender exercise being carried out in advance of the completion of the twelve month monitoring exercise because it was a health and safety issue and works had to be done. The Tribunal considered that the Property Factor should have kept all homeowners fully involved in the process. They were written to and advised that, because of health and safety issues, the works were being re-tendered without waiting the full period of monitoring for twelve months. The Council should have written to homeowners and advised them of the precise nature of the health and safety issues and they should then have been advised of the increased tender price. Apart from anything else, owners of properties were entitled to know of the existence of increased safety issues. The Tribunal also considered that the Property Factor had a duty to advise homeowners of the potential of increased costs regardless of whether or not it was able to instruct works at that time. It is entirely feasible that a homeowner, having been made aware of the possibility of costs of around £4,100 with a possible uplift of just over 2% would have been making arrangements to meet such a cost. It therefore fell upon the Property Factor to advise homeowners as soon as it was aware that costs were to increase.

Guarantee for Works and Collateral Warranty

96. The Applicants stated that the Property Factors should get a guarantee for the work which is being carried out to the wall. They also said that a collateral warranty should be obtained. They led no evidence with regard to the norm for guarantees for such work or the need for a collateral warranty.

97. Ms Taiwo said that the wall had been designed by G3, the structural engineers and that they are also supervising the works. She said that the Council's clerk of works is also involved in the project. She said that there would be a defects liability period of a year. She said that such arrangements are normal with similar contracts that the Council enters into. She said that it was not considered necessary to obtain a collateral warranty.

98. The Tribunal noted that no evidence had been led by the Applicants on the matter of a guarantee and accepted the evidence of Ms Taiwo on the matter when she said that the approach taken on this contract was the same as the Council would take on any such project. It also noted that the wall had been designed by a firm of structural engineers who would have professional indemnity insurance.

99. Collateral warranties are agreements which are associated with a contract and provide for a duty of care to be extended by a contracting party to a third party who is not in the original contract. No evidence had been led with regard to the requirement for a collateral warranty and it did not seem to the Tribunal that, on the face of it, one was relevant. The

Property Factor has contracted as a principal acting on behalf of the owners.

Delay in matters being progressed

100. For the reasons previously stated, the Tribunal did not consider any delay prior to the Applicants' ownership of their respective properties. It found no difficulty in finding that there had been delay on the part of the Property Factor in progressing matters after the Applicants had become homeowners. If the later point of ownership of March 2018 is considered, it was not until October that owners were written to (almost a year after Mr Moad became a homeowner). Although the Tribunal could not consider periods of delay prior to the Applicants' ownership of the respective properties, it did consider that it could take into account the period where the Property Factor did not action works to the wall after the Applicants had become homeowners.

101. Both Mrs Jack were candid in stating on more than one occasion that the reason there was inaction was as a result of a high turnover of staff. There was reference to a gap of almost a year where there was not a specific officer in the Council dealing with matters.

Trees

102. The Applicants stated that there has been an issue with a tree which required to be removed and that the Council removed the wrong tree. Ms Taiwo accepted that this was the case and that it had been down to an error by a junior member of staff. She said that the correct tree was eventually removed and that delay in doing so had not resulted in any impact on the contract for the work to the wall.

103. The Tribunal had no evidence that the issue with the removal of trees had caused any financial impact to the contract.

Provision of information

104. Ms McAlpine said that she had asked for information with regard to the contract for work to the wall and the Tribunal noted that she had lodged documentation which evidenced that she had required to make a freedom of information request to get information on a contract for which she was paying.

105. Ms Taiwo said that there was commercially sensitive information which could not be made public. She did not accept that the Applicants

were entitled to information on the contract other than by making a freedom of information request.

106. The Tribunal considered that it was entirely reasonable that a homeowner be given some information on a contract for which s/he was liable to pay for even though some information would require to be redacted because of commercial sensitivity. For example, there seems to have been no reason why the specification of works could not have been provided and a copy of the successful tender.

107. It seemed to the Tribunal that the Council had a misunderstanding as to its role as property factor. It was a public authority and subject to freedom of information legislation but, as a property factor, it appeared to the Tribunal that, in relation to provision of information to homeowners, it should behave no differently than a private commercial property factor in its responses to requests for information.

Consumer (Scotland) Act 2020

108. Ms McAlpine's position was that this Act meant that the Council owed her a duty of care and that she was a consumer prior to becoming an owner. The Tribunal had no difficulty in finding reference to the 2020 Act to be irrelevant. It required to determine the Application in terms of the Property Factors (Scotland) Act 2011 and according to the Applicants' status as homeowners as defined in that Act. In any event the 2020 Act, by itself, provided no remedy for the Applicants.

Consideration of the Code of Conduct.

109. 2.1 You must not provide information which is misleading or false.

110. The Tribunal did not consider that false information had been provided by the Property Factor. Falsehood suggests a conscious decision to lie. It is entirely possible to "passively" mislead and the Tribunal found that, in relation to provision of information to the Applicants, they had been misled. At the point where the Applicants became owners (not prior to ownership) the Property Factor misled them because they did not tell them about the Council's view that work required to be done to the wall and they should certainly have told them about the Balfour Report. The Council also stated at the owners' meeting that no work had been planned to the wall prior to 2018. This was a misleading statement.

111. 2.4 You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

112. The Tribunal considered that there is a procedure to consult with homeowners. There is evidence of the Applicants being written to about actual works- construction of the wall. This section is about property factors providing additional work or services and charges relating to such works. The Tribunal had no evidence of this.

113. 3.1 If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).

114. The Applicants' position was that, in relation to the changes of ownership of their properties, not all financial information was provided. The paragraph of the Code is directed at a homeowner who is such at the time of the change of ownership and the Tribunal does not consider that it is directed to individuals who become homeowners after the change of ownership. In any event, although the Council had knowledge of work requiring to be done to the wall, there was no specific information relating to the "account" of homeowners which was not provided.

115. 3.3 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

116. The Applicants' position was that the Property Factor did not respond to a request for financial information with regard to the

contract for the wall and that this necessitated a freedom of information request. As previously stated, the Tribunal considered that the Property Factor, when acting as such, should respond to requests from a homeowner differently than one form a member of the public. Ms McAlpine should have been provided with information on the contract albeit that some parts of the documents provided may have been redacted.

117. 6.1 You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

118. No evidence was produced by the Applicants to suggest that the Property Factor did not have procedures in place to allow homeowners to advise it of matters requiring repair etc.

119. The Property Factor had a duty to inform the Applicants about the detail of the deteriorating condition of the wall as reported by G3 structural engineers and the increase in the tender price. In coming to this view, the Tribunal considered that the definition of "works" included the monitoring process agreed at the meeting of homeowners.

120. 6.3 On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

121. The Applicants took issue with the Quick Quote system used for the tender process. The Tribunal accepted that the written statement of services set out that the procurement process of the Council and that the Applicants would have been aware of this and Ms Taiwo said that, for contracts such as this, the Quick Quote process of Public Contracts Scotland was appropriate.

122. A competitive tendering exercise was carried out through the Quick Quote process and it attracted responses from contractors. The Tribunal saw no issue with the tendering process.

123. 6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

124. The written statement of services clearly sets out the core service provided by the Property Factor. It does not include periodic property inspections and/or a planned programme of cyclical maintenance. It therefore follows that, in terms of the written statement of services, a programme of work does not require to be prepared. The Tribunal had no evidence that the Property Factor and the homeowners of the development had agreed to modify the written statement of services to change the core service provided.

125. 6.6 If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

126. This matter had been dealt with previously in relation to Ms McAlpine requesting information and having to resort to a freedom of information request. The Council had not made information on the tendering process available.

127. 6.9 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.

128. The works in question are still in progress and the Applicants' issue was not so much on pursuing a contractor in respect of defects but more with regard to whether or not it was appropriate for a guarantee and a collateral warranty to be provided.

129. The Tribunal accepted the Council's position that the contract was dealt with on the same basis as similar contracts for the Council, that there was a defects liability period and that the wall was designed and its construction is being supervised by a structural engineer.

130. There was a discussion about the Applicants' assertion in the application that the Property Factor had not complied with Section 1 of the Code which deals what should be contained in the written statement of services. It was pointed out to the Applicants that this section dealt more with the required content of written statements of services rather than whether or not a Property Factor had not complied with the Code.

131. The Applicants produced no evidence that the written statement of services was deficient in relation to its content.

Disposal

132. The Tribunal determined that for the reasons stated, the Property Factor had failed to comply with the Code in respect of paragraphs 2.1,3.3,6.1 and 6.6. In coming to its determination, the Tribunal had regard to the oral and written evidence together with the representations and submissions made by parties.

133. The Tribunal determined that, in general terms, the Property Factor had not complied with the property factor's duties in terms of the Act. It had information on the condition of the wall which it did not share with homeowners.

134. The Applicants' position was that they should pay nothing for the work to the wall and, in addition, be awarded compensation.

135. The Tribunal had sympathy with the Applicants. They had purchased properties without the knowledge of impending works to the wall and had relied on the statements provided by the Council to the sellers' solicitors that there were no works in contemplation with regard to common parts. Notwithstanding the sympathy which the Tribunal has, it requires to determine matters in terms of the Act and, as a consequence of the Upper Tribunal cases referred to, cannot include actions of the Property Factor prior to the Applicants becoming homeowners.

136. In arriving at a disposal, the Tribunal had regard to the action (or inaction) of the Property Factor after the Applicants became homeowners and considered it appropriate to make an award of compensation. Fixing a level of compensation is a matter of balance and an exercise of judicial discretion and, in doing so, the Tribunal took into account the fact that, had the Applicants been advised sooner about the required repairs, the cost they would have had to pay would have been in the region of £4,100 and that the final cost will be in the region of £6,800. Set against that is the fact that the Applicants participated in the owners' meeting where it was decided not to proceed with the works albeit that the Council should perhaps have been more forceful in its advice on the matter. It was also significant that, at that time, the Applicants did not consider that they should be responsible for any costs for the wall.

137. In all the circumstances, the Tribunal considered that a property factor enforcement order should be made requiring the Property Factor

to pay the sum of £2,500 to each Applicant and that payment should be effected by deductions from the costs to be paid by the Applicants upon completion of the works to the wall.

138. The Council had accepted the defects in its procedures in providing information prior to house sales. It had made offers of compensation to the Applicants in respect of these defects. As a consequence of the Tribunal's determination that the Applicants were not homeowners prior to acquisition, it follows that the compensation offered by the Council was not *quoad* its role as property factor but rather as a public body providing information. The Tribunal has no jurisdiction to make an order in respect of such offers of compensation but considers that they are separate from the compensation proposed in the property factors enforcement order. It also noted the different offers made to each Applicant. Ms McAlpine's was for a sum of around £1,000 and Mr Moad's was for a sum equating to a quarter of final costs. It is to be hoped that the Council will adopt a reasonable approach and consider that there should be no difference between the offers made to each Applicant and, that, as a consequence, the offer to Ms McAlpine should reflect that made to Mr Moad. It is a matter for the Applicants to consider whether or not to pursue the Council in respect of the representations which they each relied on prior to purchasing their respective properties but, as previously stated, this is not something which the First-tier Tribunal can deal with.

Appeals

A homeowner or property factor 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.

Martin J. McAllister
Legal Member
26th September 2021