

Housing and Property Chamber

First-tier Tribunal for Scotland



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/22/2146

Property at 2 Whitehalls Lane East, Cove, Aberdeen, AB12 3TG ("the Property")

Parties:

Mr Manuel Suarez, 2 Whitehalls Lane East, Cove, Aberdeen, AB12 3TG ("the Homeowner")

James Gibb Residential Factors, Bellahouston Business Centre, 423 Paisley Road West, Glasgow, G51 1PZ ("the Property Factor")

Tribunal Members:

Josephine Bonnar (Legal Member)

Elaine Munroe (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 2.5 of the Code of Conduct for Property Factors.

The decision is unanimous.

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

The Property Factor became a Registered Property Factor on 07/12/2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. The Homeowner lodged an application with the Tribunal in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. The application states that the Property Factor has failed to comply with Sections 1.1a, A, B, C and F, 2.4, 2.5, 3.3, 7.1 and 7.2 of the Property Factors Code of Conduct (“the Code”). The application also states that the Respondent has failed to carry out its property factor duties. Documents were lodged in support of the application including copies of letters and emails to the Property Factor and a copy of the Homeowner’s title deeds.
2. On 3 August 2022, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. Parties were notified that a case management discussion (“CMD”) would take place on 10 October 2022 at 10am by telephone conference call. Both parties lodged written submissions and the Property Factor lodged a bundle of documents in advance of the CMD.
3. The CMD took place at 10am on 10 October 2022. The Homeowner participated, joining the conference call late as he had not received the dial in details. The Property Factor was represented by Mr Ian Wallace.

Summary of discussion at CMD

4. The Tribunal noted that several of the complaints relate to the written statement of services (“WSS”). As neither party had lodged a copy of this, or a copy of the Property Factor’s complaints procedure, the Tribunal advised the Property Factor that these should be lodged prior to the hearing.
5. In their initial response, the Property Factor stated that the application should not be considered because the Homeowner had not exhausted their complaints procedure. The Tribunal noted that the Homeowner stated in the application that he had not received a response to his complaint. In response to questions from the Tribunal, Mr Suarez confirmed that he sent a letter detailing his complaints on 29 August 2021. However, he was unable to recall whether it was the “Property Factor duties letter” and/or the “Code letter” (both lodged with the application) which had been sent on that date. He said that he did not receive a response. On 23 June 2022 he sent both letters to the Property Factor and submitted his application to the Tribunal the following day, as he felt that they had been given enough time to respond to his complaints. He told the Tribunal that he did not receive a response to these letters either. He confirmed that all correspondence from the Property Factor is by email.
6. In their response, the Property Factor provided a copy of a letter dated 7 September 2021. Mr Wallace advised that this was a response to the letter of 29 August 2021 and was sent by email. He also stated that a response dated 22 July 2022 was sent to the later letter. The Tribunal noted that both parties

required to provide evidence to establish which letters were sent and received on 29 August 2021 and 23 June 2022 and what responses were issued and received. The Tribunal noted that the Property Factor's submissions only addressed the Code complaints. It was therefore necessary to establish whether (and when) the duties complaint letter was sent. If it was sent before the application was lodged, the Tribunal required the Property Factor to provide a response to this complaint.

7. The Tribunal noted that the Homeowner challenges the Property Factor's authority to act. In their response the Property Factor states that "Life Property Management (acquired by James Gibb in August 2019) were appointed as managing agent" by the developer "for a period of five years from completion of the development in its entirety." They lodged a copy of an extract from the deed of conditions which confirms that the developer has this power and makes provision for termination and the appointment of a new manager by the homeowners at a meeting. In response to questions from the Tribunal, Mr Wallace said that he did not know when they were appointed but could investigate and confirm the position. Mr Suarez advised the Tribunal that he purchased the property in 2021 and was aware at the time of purchase that there was a property factor. He said that he has asked them repeatedly to provide evidence of their authority to act and this has not been forthcoming. He also wants to know when the 5-year term comes to an end because his property was built 7 years ago.
8. The Tribunal proceeded to discuss the Homeowners complaints with the parties. As it is not clear whether there was notification of the complaint about property factor duties, and as no response has been submitted in relation to this, the Tribunal indicated that this would not be discussed until the position had been clarified.
9. **Section 1 of the Code.** Mr Suarez advised the Tribunal that he received the welcome pack from the Property Factor when he purchased the property, with the WSS. His complaint is that this document is not clear in relation to authority to act, core services, billing arrangements and other matters. He does not understand why he is paying for services that he does not receive. The Tribunal noted that this is disputed by the Property Factor and that the WSS will require to be lodged prior to the hearing for this complaint to be considered.
10. **Section 2.4 of the Code.** Mr Suarez said that there has been no meeting convened with Homeowners since he purchased the property, although the title deeds provide for decision making at meetings. He has been advised by other homeowners that there have been no meetings for several years. The Tribunal noted that the Property Factor refers to the procedure specified in their WSS in the response.
11. **Section 2.5 of the Code.** Mr Suarez lodged several emails with the application and stated that he had not received response to these emails. Mr Wallace advised that Mr Suarez has asked for the same information on multiple occasions and that he has been given the information requested. The Tribunal noted that Mr Suarez should provide copies of any responses received to the

emails lodged, even if these were just acknowledgements, and that the Property Factor should also lodge copies of all responses issued to the emails.

- 12. Section 3.3 of the Code.** Mr Suarez said that the information provided by the Property Factor does not explain how the costs are shared among the homeowners. He said that he was sent an invoice following his purchase of the property for £350. His neighbour was only asked for £150. He also advised that his principal issue in relation to the accounts is the insurance charge and how this is calculated. The Tribunal noted that the Property Factor had lodged copies of some invoices issued to Mr Suarez which appear to show the total sum due for each service or charge and the share due to be paid by Mr Suarez. This varies from 1/1 for late payment fees to 1/681 for some of the ground maintenance. Mr Suarez advised that he has not been told how these shares are calculated.
- 13. Section 5.** Mr Suarez advised the Tribunal that the Property Factor have not provided him with clear information regarding his share of the insurance. Furthermore, he disputes that he should have to pay common insurance as he has his own insurance for the property. He does not accept that the deed of conditions requires him to pay the common insurance.
- 14. Section 7.2.** Following discussion about this section, Mr Suarez said that he had misunderstood the terms of it and confirmed that he wished to withdraw this complaint.
- 15.** The Tribunal determined that the application should proceed to a hearing to be conducted by telephone conference call and that a direction should be issued for further information and documents.

Further procedure

- 16.** The parties were notified that a hearing would take place by telephone conference call on 23 January 2023 at 2pm. Prior to the hearing both parties lodged documents in response to the direction.

Day 1 of the Hearing – 23 January 2023

- 17.** The Tribunal dealt with some preliminary matters at the start of the hearing.
 - (a)** The Tribunal noted that some of Mr Suarez's submissions referred to the 2021 Code. As the application only relates to alleged breaches of the 2012 Code, Mr Suarez was advised that these submissions could not be considered. The Tribunal also advised parties that, as Mr Suarez did not purchase his property until May 2021, the Code complaints would only be considered in relation to actions or failures which occurred between this date and 16 August 2021.

- (b) The Tribunal noted that further documents, including correspondence had been lodged by both parties which appeared to establish that the property factor duties complaints outlined in the letter of 23 June 2023 to the Property Factor had been referred to in earlier correspondence. It therefore appeared that the Property Factor had been notified of these complaints before this date. Ms Cameron advised the Tribunal that the Property Factor was still of the view that the application was premature, as the Complaints Procedure had not been exhausted. However, the letter of 7 September 2021, which had been lodged by the Property Factor, had not actually been issued to Mr Suarez. It had been prepared and was on their system, but not issued. This was an administrative oversight. Ms Cameron said that the information requested in his letter of 29 August 2021 had already been provided. In the circumstances, the Tribunal determined that they would consider all complaints and decide whether the application was premature at the end of the hearing.
- (c) In response to questions from the Tribunal, Mr Suarez said that the property is located in a development which is part of several developments by different builders. He referred the Tribunal to a photograph of his property. (Page 22/23 on 3rd Applicant submission ("App3"). It shows a building with an upper flat and a lower flat. Each property has its own front door. Mr Suarez said that both also have a back door. On the ground floor, he has a utility room and a stair to the upper level. The remainder of the flat is on the upper level. He has a storage space on the ground floor under the stairs. In the development, there are detached houses, terraced houses, and properties like his. Ms Cameron confirmed that there are several styles of property in the development. Mr Suarez's property is described as a self-contained apartment because it has its own front and back door. She said that the two properties share a roof. The Tribunal noted that the title deeds submitted do not state that the roof is common to the properties. It therefore appears, in terms of common law and Section 2(3) of the Tenements (Scotland) Act 2004, that the roof is owned exclusively by Mr Suarez. The Tribunal also noted that each proprietor owns part of the solum and that there are other common areas such as walls and common paths. Ms Cameron said that the Property Factor's interpretation of the deeds is that the roof is shared. The Tribunal noted that Mr Suarez states in his application and submissions that his property is not a flat. The Tribunal noted that it is described as a flat in the Land certificate. Mr Suarez confirmed that he accepted this to be the case, but that the roof is not common. Ms Cameron referred the Tribunal to pages 8 and 9 of their submission on 9 September 2022 ("Resp 1") which relates to insurance and includes an extract from the title deeds regarding insurance and explains why it is in place.

18. **Section 1 of the Code.** Mr Suarez referred the Tribunal to Page 3 of App 3, which outlines his position. This is headed "James Gibb has not provided any valid document justifying that has right to act as property factor for the homeowners' association.". Mr Suarez told the Tribunal that the Property Factor has not provided evidence that they have authority to act. Life Property were appointed for three years in 2014. There then had to be an AGM to decide who was to be the factor after that period. That did not happen. Mr Suarez accepts

that a factor is required but the homeowners should decide who that is to be.

19. Ms Cooper referred the Tribunal to the WSS on pages 6 and 24 of the Property Factors 30 December 2022 submission ("Resp 2"). Page 6 includes a section on authority to act which states that "James Gibb was appointed to manage the communal areas of your development. Our management is the result of either appointment by the developer, by a decision of homeowners in accordance with the deed of conditions and/or relevant legislation, by custom and practice or by formal business acquisition." There are sections on core services, emergency repairs and delegated authority in relation to non-emergency repairs. Page 24 is the development schedule which states that they were appointed on 1 February 2016 and that the level of delegated authority is 25% of the expenditure in the current year.
20. Mr Suarez said that there is no evidence of the Property Factor's current authority to act and, if they have no such authority, their actions are a fraud or a scam. He added that the WSS and schedule were not on the website when he submitted the claim but can't recall what was contained in the version of the documents he received.
21. Ms Cooper told the Tribunal that a welcome letter was issued to Mr Suarez on 16 June 2021 which had details of all relevant documents. It signposted him to the portal where he could access the documents. The Tribunal noted that the date on the WSS lodged by the Property Factor is June 2022. Ms Cameron said that the only changes from the previous version was to reflect changes in the law and the new Code. The sections on authority to act have not changed. She referred to Resp 2, page 67 to 69 which shows portal activity. It shows Mr Suarez downloaded the WSS on 15 July 2021.
22. The Tribunal referred the parties to a document lodged by Mr Suarez which appeared to be an extract from title deeds. It is entitled "Part IV – Management of Community". (Page 5 App 3). It refers to the developers appointing a manager when they cease to be the owners of any properties for a period of 5 years. It also states that, following this initial period or the resignation of the manager, the homeowners may appoint or terminate the appointment of a manager, at a meeting. This was sent to Mr Suarez in response to one of his enquiries. The Tribunal noted that the title deeds for the property did not appear to include this exert. Following an adjournment, Ms Cameron said that this exert was taken from another title deed for another property and was sent to Mr Suarez in error. It is conceded that it is not part of the deed of conditions for his property. She referred to Page 53 of Resp 2, a document compiled by Scotia Homes which relates to the appointment of Life Property. Paragraph 4 of this states that the first manager will be appointed for a period of 3 years from the sale of the first property or the date of the first annual general meeting, whichever is later. Thereafter they could be replaced or re-appointed at a general meeting. Ms Cameron said that the last AGM took place in 2018. There was also an AGM in 2016. James Gibb purchased Life Property Management Ltd in 2019. There were no AGMs during the pandemic. There are plans to have a meeting in due course. As there are 680 properties, a large venue is required. In the meantime, there has been no evidence of the homeowners in the

developments wanting to make a change or hold a meeting. To her knowledge there have been no requests from Mr Suarez or any other proprietor.

23. Mr Suarez told the Tribunal that there is a requirement to hold meetings. He added that there is no need for all 600 properties to have the same factor. He does not believe that they would have arranged a meeting even if he had requested this. The Tribunal referred Mr Suarez to page D162 of the title deeds. This states " 4.3 Any actings of the manager are valid notwithstanding any defect in that person's appointment". Mr Suarez said that he maintains that the Property Factor has no authority to act. Ms Cameron advised the Tribunal that she had located a copy of the AGM minutes from 2018. This indicates that one attendee asked about the length of the Property Factor's appointment and was told that the period started from the date of the last sale of a property which had not yet taken place as the development is still ongoing. Ms Cameron conceded that this was at odds with the Scotia information leaflet which states that the initial period is for 3 years from the first sale. She also confirmed that the Scotia document was not sent out to Mr Suarez, although they have tried to speak to him in person or on the phone about his issues, without success.
24. Although the application form refers to other parts of section 1 of the Code, Mr Suarez said that he was not insisting on these and that his complaints under section 1 had been covered.
25. **Section 2.4 of the Code.** Mr Suarez said that the Property Factor does not have a procedure for consultation about works. Ms Cameron referred to the WSS contained in Resp 2. She said that the consultation arrangements are covered by Sections 2 and 4. She also said that there has been no major work at the development, aside from the routine maintenance, since 2019. Anything which might be classed as major work has been dealt with by the developer, at no cost to homeowners. There have been minor works in relation to door entry systems, bin stores etc but these did not require consultation. Ms Cameron added that the provisions in the WSS meet the expectations of the Code.
26. Mr Suarez said that the cost of grass cutting is excessive - £50000 a year. However, no quotes have been obtained from other contractors in relation to this. He added that the procedure is not good enough and there should be greater consultation. Delegated authority based on 25% of the annual budget is excessive. Ms Cameron said that they address any issues which arise in relation to contractors and get them to resolve complaints. They have not re-tendered for grounds maintenance as there is no requirement to do so. The contractors are locked into the current price. If they re-tender, prices will go up. There have been no complaints about the ground maintenance contractor or the level of delegated authority. Ms Cooper said that she has checked and there was only one complaint about a hedge which required to be trimmed which was addressed.
27. **Section 2.5 of the Code.** In response to questions from the Tribunal, Mr Suarez said that he had sent emails to the Property Factor requesting information about the requirement to have insurance and had not received a proper response. He was unable to direct the Tribunal to the relevant

documents in his submissions and the Tribunal indicated that they would return to this complaint.

28. 3.3 of the Code. Mr Suarez said that he does not understand why he had to pay a float of £350, when a neighbour in a larger house only had to pay £150. Ms Cameron referred to page 54 of Resp 2, the leaflet from Scotia Homes. This states that the float for flats is £350 and for houses is £150. It is the developer who set this up and fixed the figures. It was accepted that a copy of this document was not given to Mr Suarez. Ms Cameron then referred the Tribunal to page 70, an email to Mr Suarez dated 29 July 2021. This is a response to his enquiry and explains the purpose of the float. She referred to page 20 of Resp 1. This is an enquiry from Mr Suarez about the float. Pages 11 and 12 are a letter from the Property Factor which explains several things, including the fact that the float charge will be included in the first invoice.

29. Mr Suarez told the Tribunal that he is not sure whether he specifically asked the property factor to explain why he was paying £350 as opposed to £150.

Day 2 of the Hearing – 25 April 2023

30. On Friday 21 April 2023, Mr Suarez lodged further submissions and documents. The Property Factor objected to these being allowed because of the proximity to the hearing which did not give them sufficient time to consider these.

31. The continued hearing took place on 25 April at 10am by telephone conference call. The Property Factor was again represented by Ms Cameron and Ms Cooper. The Homeowner participated. Following discussion, the Tribunal advised parties that the late submission would not be allowed because it had been lodged late and the hearing had already started.

Section 3.3 of the Code (continued)

32. Mr Suarez again advised the Tribunal that he could not direct them to an email where he asked the Property Factor to explain why his float was higher than someone living in a house in the same development, although he is sure that he did so. He said that the information provided in the email of 29 July was generic and did not answer his question. He also asked about the charge on an invoice for MS services. He referred to an email in App 3. The Tribunal noted that this email is dated 19 December 2022. It therefore was sent after the 2021 Code ceased to apply and could not be considered in relation to an application which only related to the 2012 Code.

33. In relation to the float, Ms Cameron said that they could not answer a question which had not been asked. She added that the flats pay a higher float because they received additional services. Mr Suarez disputed this, saying that he does not share communal services. Furthermore, the Scotia document which is relied upon ought not to be still relied upon as it only related to the first few years following the appointment of the Factor. However, they did not arrange an AGM

to deal with the issue of re-appointment. Ms Cameron said that the main difference between Mr Suarez's property, and the houses, is the common insurance. That is the additional service.

Section 2.5 (continued)

34. The Tribunal noted that Mr Suarez had not been able on the first day of the hearing to refer the Tribunal to an enquiry he had made to which no response had been received. He now referred to an email dated 1 August 2021, page 69 on Resp 2. Mr Suarez told the Tribunal that his concerns relate to points 3 and 6 on this email. The first asks for details of the insurance - how his share is calculated, the sum insured, the premium paid, any excesses, the name of the company and the terms of the policy. Point 6 asks about information on how to terminate the contract with the Property Factor.
35. Ms Cameron was unable to direct the Tribunal to an email or letter which specifically responded to this email. However, she said that there had been a great deal of correspondence between Mr Suarez and various members of staff and both issues had been discussed. There had been multiple discussions about the insurance. He had been referred to the Factor's client portal which contained all the specified information. Mr Suarez told the Tribunal that the insurance information was not on the website in August 2021. It is there now. Ms Cameron then referred the Tribunal to pages 67 and 68 of Resp.2. This shows that Mr Suarez downloaded all the insurance information and documents on 12 December 2021. In response to questions from the Tribunal, Mr Suarez conceded that he had been referred to the portal in an email on 29 July 2021 but said that they did not respond to his email of 1 August 2021 and that he had not been able to find the documents on the portal at that time. It was difficult to navigate.
36. Ms Cameron said that, although she could not direct the Tribunal to a response to point 6, the procedure for terminating the contract is in the WSS. Mr Suarez said that he did not think the section in the WSS was very clear.

Section 5.2

37. The Tribunal noted that the complaint under this section of the Code also related to the alleged failure to provide information and documentation in relation to insurance. Both parties advised that they had nothing to add to the evidence already provided in relation to section 3.3.

Property Factor Duties

38. Mr Suarez advised the Tribunal that this complaint relates the Property Factor charging him for common insurance and a related 24 hour response service. There had also been an issue in relation to a charge for Arrow Business Communications, but the Property Factor had conceded that this was an error and the charge was refunded.

39. Mr Suarez said that there is no legal justification for the common insurance being treated as mandatory. The Tribunal noted that the relevant provisions are specified in the title deeds for the property, page D146 of item 9 in the burdens section, a Deed of conditions by Scotia Homes. Mr Suarez said that this provision does not mean that the insurance is compulsory, and he has arranged his own insurance. He also said that his property is no different from a semi detached house and it would not be usual to have common insurance for that type of property. He also objects to paying for the 24-hour response service as he has his own insurance and is not required to use this service.
40. Ms Cameron told the Tribunal that the Property Factor is of the view that there is justification for both the common insurance and the 24 hour response service. She referred the Tribunal to page 6 of Resp. 1, extracts from Mr Suarez's title deeds. In Section A the property is described as a first floor flat with pro indiviso shares in two common areas, shared with number 1 Whitehills Lane East and 97 Charleston Road, North. She referred to page 31 of resp1, an email to Mr Suarez dated 20 January 2022. This states that he must have common insurance because he shares a roof with his neighbour and some internal common areas. The Tribunal was also told that the 24 hour response service was linked to the common insurance. It is required so that homeowners can report damage which might lead to an insurance claim out of hours. The Property Factor does not apply any mark up to this or any other contractors' charges. The service is beneficial as it allows a contractor to be arranged whose charges will then be included in the claim. It might not be possible for a different contractor's charges to be covered.
41. Mr Suarez said that the Property factor is forcing him to have common insurance and pay for the 24 hour service. Although he cannot prove it, he believes that they make money from the contractors they appoint.

The Tribunal make the following findings in fact:-

42. The Homeowner is the heritable proprietor of the property and purchased it in May 2021.
43. The Property Factor is the property factor for the development in which the property is located.
44. The Homeowner submitted a complaint to the Property Factor in terms of their Complaints procedure on 29 August 2021. He did not receive a response.
45. The property is a flat in a block built by Scotia Homes.
46. The roof of the block is owned exclusively by the Homeowner. The owner of the lower flat is liable to pay a share of the maintenance and repair of the roof.
47. The development is required to have a manager or property factor in terms of the title deeds.

48. The Property Factor became the property factor when they purchased the company appointed by the developer to be the manager.
49. The Written Statement of Services (WSS) sets out the basis of the Property Factor's authority to act and level of delegated authority.
50. The Property Factor has not convened a meeting of homeowners since they purchased the business in 2019 although the title deeds require them to arrange an annual general meeting.
51. The Homeowner has not called a meeting of homeowners, asked the Property Factor to do so, or asked for a vote on replacing the Property Factor.
52. The WSS includes a procedure for consulting homeowners about works to be carried out.
53. The consultation procedure has not been used as the Property Factor has not required to instruct work above the level of delegated authority.
54. The Property Factor failed to respond to an email dated 1 August 2021 which included enquires regarding the common insurance policy and the procedure for terminating the contract with the Property Factor.
55. The information regarding the common insurance was available on the client portal and the Homeowner had previously been referred to the portal and provided with a link.
56. Information about terminating the contract was available in the WSS and title deeds.
57. The title deeds state that homeowners of flats in the development do not require to arrange building insurance if this is arranged by the manager on their behalf.
58. The Property Factor is entitled to arrange building insurance in terms of the title deeds for all flats in the development and has done so.

Reasons for Decision

59. The Tribunal considered whether the application is premature, as claimed by the Property Factor. The claim is based on the Homeowner's failure to exhaust the Complaints Procedure. The Property Factor initially relied on a letter to the Homeowner dated 7 September 2021, in response to a complaint dated 29 August 2021. In the last paragraph, there is reference to further stages in the process which must be followed before an application can be made to the Tribunal. Mr Suarez told the Tribunal that he did not receive this letter. At the hearing, Ms Cameron confirmed that it had been drafted but not sent. However, she stated that the Property Factor is still entitled to rely on the failure by the Homeowner to exhaust the process. The Tribunal is not persuaded by this argument. The Homeowner complied with the requirement to make a formal

complaint before lodging his application. He did not receive a response. This may have been due to error or oversight, but he was unaware of the reason. He had complied with his part of the process and, in the absence of a response, was entitled to proceed with his application.

Section 1 – The written statement should set out: A, Authority to Act. (a) a statement of the basis of any authority you have to act on behalf of all the homeowners in the group; (b) where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works and situations in which you may act without further consultation.

60. Section 1 of the Code relates to the WSS and what must be included within the WSS. Although the application refers to other sections, the Homeowner confirmed at the hearing that he was only challenging the Property Factor's authority to act as factor and the level of delegated authority.
61. Section 2 of the WSS lodged by the Property Factor is headed "Authority to act". It sets out how they were appointed although this is clearly a general clause which applies to all properties that they factor as it gives 3 or 4 options. Section 1 of the development schedule states that they were appointed on 1 February 2016. Section 2 provides that the level of delegated authority is "25% of total expenditure in the current year".
62. During the CMD and hearing, it was apparent that the Homeowner's complaints in relation to this section were not just about the content of the WSS. He stated that the level of delegated authority is excessive and said that the Property Factor does not have authority to act, because the title deeds only provide for a short term initial appointment, after which they must be replaced or re-appointed at a meeting of homeowners.
63. The level of delegated authority is ultimately a matter of agreement between a property factor and the homeowners as a group. If homeowners are unhappy with the level stipulated by their factor, they can challenge it. If the property factor is unwilling to change it, that might be grounds for termination of the contract. However, one homeowner is not entitled to insist on a change. Mr Suarez requires to call a meeting or at least ask the Property Factor to do so, or to contact all homeowners, so that a vote can be taken. He has not done this. In any event, the level of delegated authority is clearly set out in the WSS. No breach of the Code is established in relation to the level of delegated authority.
64. The position is less clear in relation to the Property Factor's appointment. The Tribunal noted that the representatives of the Property Factor who gave evidence were unsure of the position. The development schedule says that their appointment started on 2016. The representatives were able to show that Life Property were appointed by the developer, Scotia Homes. James Gibb purchased Life Property in 2019 and became the property factor on this date. However, the deed of conditions which is to take precedence in the event of any inconsistency with the provisions of the others (Entry 9, Clause 3 of the title deeds) states that the manager appointed by the developer is to act as manager

until the first AGM. The Scotia Homes information sheet, which appears to be dated 2014, states that Life Property were appointed for a period of 3 years from the date of sale of the first property or until the first AGM, whichever is later. It is not clear when the first property was sold, but it was more than 3 years ago. The Scotia Homes Deed of Conditions is dated 2013. There was no evidence that a vote has ever been taken at an AGM. According to the Property Factor, the last meeting that took place was in 2018, before the purchase by James Gibb. However, there was also no evidence that any homeowner (including Mr Suarez) has requested a vote or a meeting on the issue of re-appointing or replacing the Property Factor. The deeds of conditions state that the development must have a manager, so the contract cannot be terminated until a replacement has been identified and appointed, by majority vote. Page D162 (Section 4.3) also states that any actings of the manager are valid notwithstanding any defect in their appointment. The Tribunal is therefore satisfied that, although they are obliged to hold AGMs and seek re-appointment, their failure to do so does not prevent them continuing to act as factor for the development, until the contract is terminated, and another factor appointed. The Tribunal is also satisfied that, although it would be preferable to have more specific and detailed information regarding their appointment in the WSS and schedule, they have set out some information regarding this which would appear to be sufficient to comply with the Code.

Section 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 emergencies).

65. As the Property Factor points out, there is a consultation procedure in the WSS and provision for services which can be provided without consultation. The Property Factor also told the Tribunal that no works have been carried out which would have required consultation, because the developers have dealt with any issues, at no cost to the homeowners. However, it is not really the written procedure which is the subject of the complaint. The Homeowner objects to the level of delegated authority. At first glance, this seems high. However, what might be appropriate in a block of 12 flats may be quite different from a development of over 600 properties. Mr Suarez stated that the ground maintenance costs £50000 per year and that this is excessive and should be re-tendered. The Property Factor states that to re-tender would be to increase costs, as the contractor is tied into the agreed price. In any event neither party produced any evidence in support of their position and the homeowner's share of an annual £50000 ground maintenance charge is about £75 per year, a relatively modest sum. The onus is on a purchaser of a property to seek information about factoring charges before completing the purchase. Mr Suarez should have taken advice from his solicitor before he proceeded with the purchase if he had concerns. In any event, he has not established that the Property Factor does not have a consultation procedure or that they have carried out work, above the level of delegated authority, without consultation.

Section 2.5 – You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

66. The evidence at the hearing related to an email dated 1 August 2021. This had been submitted by Mr Suarez with his application, although he told the Tribunal at the hearing that it had not. It also formed part of the Property Factor's bundle of documents. The email lists six separate enquiries. Mr Suarez said that his complaint relates to a failure to respond to number 3, which relates to the insurance, and 6, which is about terminating the factoring contract.

67. The Tribunal notes that the email was sent in response to an email dated 29 July 2021 from the Property Factor. The latter appears to be a response to an enquiry dated 15 July 2021, about the float payment and the contents of an invoice. The email dated 29 July 2021 provides information about the various charges in the invoice. The only information about the insurance is an indication that Mr Suarez is liable for 0.59 of the annual premium for his building. The email also advises that full information about the development and common charges can be found on the portal and a link is provided. It is not clear what happened after the email of 1 August 2021. Mr Suarez said that there was no response. Ms Cameron said that she could not confirm if a response was issued, since there was a great deal of correspondence with various members of staff. A few months later, in December 2021, Mr Suarez downloaded the insurance documents from the portal.

68. In the absence of any evidence that a response was issued to the email, the Tribunal is satisfied that a breach of section 2.5 has been established. Even if some of the information requested had already been provided, was contained within the WSS, or could be accessed on the portal, a response to that effect ought to have been issued. As both the insurance information and the procedure for terminating the contract were available elsewhere, the Tribunal is of the view that the breach of this section was a minor one.

Section 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 and copying.

69. At the CMD, Mr Suarez spoke about the invoices issued and said that they do not clearly show what is being charged and how his share is calculated. During the hearing, he said that his complaint related to the calculation of the float payment. The Tribunal noted that the invoices issued by the Property Factor are quite clear. They show the name of the contractor, the nature of the work, the total sum due and the Homeowner's share, both as a fraction of the whole

and the sum due by him. The share of the whole sum payable varies depending on the nature of the work. He might be liable for 100% of a late payment fee that he has incurred but 1/681 of the ground maintenance since this involves the whole development. In relation to the float, there is correspondence between the parties which establishes that he asked what the payment of £350 was for and was issued with a response. He did not ask why he was asked to pay £350 when a neighbour only had to pay £150. As a result, he was not provided with this information. If he had asked, it would have been easy for the Property Factor to answer. The Scotia Homes information leaflet set out the level of the floats payable and this has not altered. No breach of section 3.3 is established.

Section 5.2 – You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for this.

70. The required information is available to homeowners on the client portal. It appears that the Homeowner was aware of this in August 2021, although he did not get a response to his email asking for the details. Mr Suarez initially told the Tribunal that he had looked for the information in August 2021, and it was not on the portal. He then stated that it may have been there, but he could not find it, as he found the portal difficult to navigate. He does not appear to have contacted the Property Factor to ask them to assist with this difficulty and he was able to access the documents and download them a few months later. The Tribunal is satisfied that no breach of this section has been established.

Property Factor duties.

71. The Homeowner claims that he is being forced to pay for common buildings insurance which he does not want and which he is not obliged to have, in terms of the title deeds.

72. Disputes between the Property Factor and the Homeowner regarding interpretation of the deeds of conditions are outwith the remit of the Tribunal. The Deeds of Conditions make provision for such disputes. The principal deed states at page D65, clause 8, that all disputes shall be referred to arbitration. If the Homeowner and the Property Factor are unable to agree on whether common insurance is mandatory, they should refer this matter to an arbiter. However, the Tribunal requires to consider the terms of the title deeds, as well as the contents of the WSS, when assessing whether the Property Factor has failed to carry out its property factor duties in relation to the complaint.

73. The Homeowner initially argued that his property is not a flat and should not be part of the common insurance policy. He said that it should be treated like a semi detached house. The Tribunal was not persuaded by the argument. The

property is described as a “first floor flat” in the title deeds. The building in which the flat is located is also a “block” in terms of the principal deed of conditions (Page D127). A flat is defined as “ a flatted dwellinghouse within a block”. The Homeowner shares areas with 2 neighbours. There is an obligation on the homeowners of flats to pay for the maintenance and repair of certain parts of the building, including the solum and the roof, whether or not they have a right in common or use the area (D144, Part 1B).

74. The principal Deed of Conditions stipulates that all owners must have insurance. However, in terms of Clause 2.1 on page D146. “ Each proprietor of a flat or commercial unit within a block may be relieved of the insurance obligation contained in clause 5 of Part 1A of the Schedule but only in the event of the manager or the association agreeing a block insurance policy for all the flats and commercial units within a block and the block common parts.”
75. The property is, in terms of the title deeds, a flat within a block. It is therefore eligible for common insurance. This has been arranged by the Property Factor, for all flats in the development. It is also part of the contract between the homeowners, in terms of the WSS. The Homeowner is not prohibited from having his own insurance policy, but this is not required.
76. The Property Factor may have caused some confusion by telling the Homeowner that he is obliged to have common insurance because he has a shared roof. This is not completely accurate . The title deeds are silent on ownership of the roof. As a result, common law, and the Tenement (Scotland) Act 2004 apply. Section 2(3) of the 2004 Act states that “ A top flat extends to and includes the roof over the flat”. However, it appears from the Deed of Conditions, that the owner of the ground floor flat is still liable to contribute to the maintenance and repair of the roof. This is entirely logical. As the owner of the ground floor flat, he “shares” the roof insofar as it is the roof of the building in which his property is located. In any event, there is other common property – solum, walls, the area between the lower and upper flats.
77. The Tribunal is satisfied that the Homeowner cannot unilaterally opt out of the common insurance policy. At the very least, he and his neighbour would have to agree that they both wanted to do so and approach the Property Factor to request that their block be removed from the policy. If they refused, then arbitration regarding the correct interpretation of the insurance provisions could be considered. The 24hour response service is part of the insurance arrangement. The Homeowner cannot opt out of this provision while his property is part of the common insurance policy unless a decision is taken by majority vote of the homeowners to dispense with this service.
78. The Tribunal determines that the inclusion of the Homeowner’s property in the common insurance policy, when he would prefer to arrange his own insurance, is not a failure to carry out their property factor duties.

Proposed Property Factor Enforcement Order

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

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.

Josephine Bonnar, Legal Member
7 May 2023