

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/20/1783

**3/2 32/34 Bank Street Glasgow G12 8ND
("the Property")**

The Parties:-

**Mr Stephen Fenelon, 5 Bath Square, Ardrossan KA22 8DP
("the Homeowner")**

**J. B. & G. Forsyth Property Management Services, 213 West George Street,
Glasgow G2 2LW
("the Factor")**

**Tribunal Members:
Graham Harding (Legal Member)
Angus Anderson (Ordinary Member)**

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with section 5.8 of the Code

The decision is unanimous.

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

Background

1. By application dated 23 August 2020 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1, 2.1, 2.4, 2.5, 3.3, 5.2, 5.6, 5.8 and 7.2 of the Code and had failed to carry out its property factor's duties. The Homeowner submitted copy correspondence, a copy Land Certificate and written representations in support of his application.

2. By Notice of Acceptance dated 2 November 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
3. By letter dated 30 November 2020 the Factor submitted written representations.
4. A hearing was held by teleconference on 5 January 2021. This was adjourned to a further hearing as further witness statements had not been intimated by the Tribunal administration to the Factor in advance of the hearing.
5. By letter dated 21 January 2021 the Factor submitted further documents to the Tribunal.
6. By email dated 23 January 2021 the Homeowner submitted productions and further written representations to the Tribunal.

Hearing

7. A Hearing was held by teleconference on 2 February 2021. The Homeowner attended personally. The Factor was represented by one of its principals, Mr William Hutchinson.
8. By way of a preliminary matter the Tribunal sought to establish whether in light of the correspondence submitted by the Factor, the Homeowner accepted that a copy of the Factor's written Statement of Services had been sent to the Homeowner's solicitor when he purchased the property. The Homeowner accepted that this was the case but that it was a meaningless document and therefore was still insisting on his complaint in respect of Section 1 of the Code.

Summary of submissions

Section 1 of the Code

9. The Homeowner submitted that the Written Statement of Services provided by the Factor was a meaningless document and that owners did not know what it meant. There was nothing in the document that told the owners anything. By way of an example the Homeowner referred the Tribunal to Clause 4 that mentioned arranging estimates and sending out to all owners. He said he was struggling to understand for example how many estimates would be obtained and it always seemed to be the same contractors that the Factor used so how did the owners know they were competitive quotes? For his part Mr Hutchinson disputed that the Factor always used the same contractors but had over the past six years used a number of different contractors. There had however been occasions when it had been difficult to obtain additional quotes from contractors when asked to provide them.

10. In response to a question from the Tribunal as to why the fee structure was not included in the Written Statement of Services, Mr Hutchinson explained that this was provided for in Clause 12 and were detailed each quarter on the invoices sent to the owners.

Section 2.1 of the Code

11. The Homeowner submitted that his complaint was specifically with regards to the way in which the Factor arranged the insurance of the property and whether it complied with the terms of the Land Certificate. He explained that the owners were meeting the cost of the commission totalling 30% of the insurance premium. He said he had asked questions about the insurance but it was difficult to get full disclosure and he never got clear answers to clear questions. The Homeowner went on to say that in a recent insurance claim the Factor had replied to his question as to whether a repair was to common property and he had said it was whereas the loss adjustor had said the opposite. And he still did not have a final answer.

12. For the Factor Mr Hutchinson said he failed to understand how the Factor could be said to have provided false or misleading information. He referred the Tribunal to Clause 19 of the Written Statement of Services which dealt with the provision of information about insurance. He said the Factor had been happy to provide the full insurance document and had provided evidence of the broker going to the market for quotes. He said the Homeowner had been emailed with regards to the valuation of the property. He also said that with regards to the insurance claim the excess had been divided between all eleven owners.

13. The Homeowner explained that because each owner only knew what their property was insured for, they did not know what the whole building was insured for and therefore did not know if the building was under-insured. The Homeowner went on to suggest that through the mismanagement of the Factor the building was becoming a slum.

14. For the Factor Mr Hutchinson said that the Factor had not provided any false or misleading information and the building was not a slum. He said estimates were obtained for contracts for repairs and sent out to the owners. He went on to say that as with many tenements it was difficult to obtain majority consent for some repairs. He said that there was slight dampness in the building and the Factor had obtained a damp specialist report but that the recommended work had not been progressed as there was not a majority in favour.

15. The Homeowner submitted that the building looked like a slum and that his two witnesses would confirm this. He submitted that the Factor had failed to deal with a trip hazard on the uneven floor in the close, had permitted contractors to paint over wet walls and had failed to manage the issues with the roof. The Homeowner suggested that the Factor treated each issue individually rather than managing the property as a whole. He said the damp issue should have been attended to before carrying out the repainting. He said the photographs submitted showed this. The Homeowner went on to say

that it was unclear what the pipework that was in the building was for and that there had been no supervision of work carried out.

16. Mr Hutchinson advised the Tribunal that the damp issue was affecting the walls in the close and entrance and the specialist report had been obtained in September 2020 and had been obtained after the painting had been carried out. He said the Factor had obtained an estimate to re-screed the close floor but had not obtained authority from a majority of owners. He said he had obtained to estimates but one firm had ceased trading and he had requested quotes from three others who had not responded.
17. The Homeowner suggested that the owners were not included in the decision making in respect of the building and Mr Hutchinson said that he rejected that submission.

Section 2.4 of the Code

18. Mr Hutchinson said that the Factor would normally carry out repairs up to a total cost of £300.00 without seeking authority from the owners as it was understood that the Factor had delegated authority up to that amount. He said the Factor would also instruct any urgent repairs but for larger repairs estimates would be obtained and sent out to the owners for majority approval. The proposed new door entry system was an example of such an estimate. Mr Hutchinson said that he thought the level of delegated authority was historic and would have been put in place at the time the Factor was appointed.
19. For his part the Homeowner said he had not been aware of the Factor having any delegated authority to carry out repairs up to £300.00 and had only found that out at the hearing.
20. Mr Hutchinson went on to say that the Factor acted both reactively and proactively and mainly corresponded with the owners by email. He confirmed there were eleven flats in the building and that there was no owners' association. Proactive proposals for repairs came from inspections of the property carried out by the Factor and reactive proposals flowed from issues being raised by one or more owners.
21. The Homeowner explained that he was critical of the method of communication used by the Factor. He said that the Factor would issue a circular to the owners proposing a repair and it would then be ages before anything further was heard. He would not know if the Factor had obtained majority consent or not. The Homeowner then referred the Tribunal to the issue around the renewal of the building insurance. He said the renewal did not include obtaining the consent in advance of the majority of owners. The Factor had acted in the absence of approval. The Homeowner went on to say that four of the owners had formed an informal owners' association. They wanted to see the building being managed properly and things done in the correct order and with the consent of the owners.

22. For the Factor Mr Hutchinson said that having obtained estimates for any proposed works these were sent to the owners and agreement was sought. If not received a reminder was sent and owners were advised when a majority had been obtained. He said that although the repair to the back door had been in excess of the Factor's delegated authority the work had been carried out in the absence of majority consent as it had been considered to be a matter of the security of the building.
23. The Homeowner submitted that other Factors were infinitely better with obtaining agreement from owners and that his experience with the Factor was that they failed to take action when required it was always the same old problem and there was never any disclosure provided. He said there was a failure to use properly independent contractors and cited the maintenance of the bin area as an example and suggested it was not being taken care of properly. He felt the Factor was stuck in the Dark Ages and the building was deteriorating.
24. For the Factor Mr Hutchinson said that there had previously been an offer to meet with the Homeowner to discuss any issues and that offer was still open. In response the Homeowner said that he and other owners were dissatisfied and would prefer a different Factor.
25. In response to a query from the Tribunal with regards to the number of quotes obtained for the painting of the building Mr Hutchinson confirmed the Factor had obtained more than two. In relation to a further query from the Tribunal with regards to a procedure consult with owners Mr Hutchinson said that following one or two owners contacting the Factor they had taken on board their comments and sought quotations for the work. These had been circulated to owners and would then ask for funds to be lodged. Mr Hutchinson said that some owners were quicker to pay than others. Once there was a majority in favour and owners had paid the owners were advised and the works instructed. He said that owners were given about three weeks before being sent a reminder and this was followed by a further reminder in another three weeks. This meant there could be a delay of two months before other owners were contacted. If there was no majority then the Factor would let the owners know that they were unable to progress the matter. Mr Hutchinson indicated that it was his practice to send a copy of the quotes from contractors to the owner who had raised an issue in advance of circulating them to the other owners but would not continue to keep them updated individually.
26. For his part the Homeowner commented that he felt there was no transparency and it was not known who was approving or not approving any repairs. He felt that notifications should be sent out by email to all owners together rather than individually. He felt the Factor should take more responsibility rather than blame the owners. The Homeowner went on to say the Factor always used the same contractors and that matters were not properly followed through. As an example, the Factor should have set about fixing the leaks rather than painting over damp walls. The problem was the Factor needed to manage the building as a whole and that was not

happening. He suggested that obtaining requests for other problems made no sense until the principal issue was resolved. He suggested the Factor needed to include all the owners and ensure that everybody had the requisite knowledge.

27. In response to a query from the Tribunal the Homeowner confirmed that he would like owner's responses to issues disclosed to the other owners. In response to a further query from the Tribunal regarding the uneven surface of the close the Homeowner advised that this issue had been raised with the Factor by another owner and not by him. The Homeowner pointed out that the Factor knew what issues had been raised by other owners but the owners did not. There was he suggested no transparency.
28. The Tribunal queried if there were examples in the correspondence submitted by the Homeowner of him not receiving any response about the adequacy of any proposed works. The Homeowner said that one of his witnesses had noticed that contractors had painted over the damp wall and had reported it and it had just been painted over again. The Tribunal indicated that it did not appear that this issue had been put to the Factor by the Homeowner but rather was in relation to a third-party complaint. The Homeowner indicated he was unsure how to respond other than to say nothing was getting done and it was affecting the whole building.
29. The Tribunal queried if the Factor had suggested having a survey of the building carried out. The Homeowner said that had been suggested in connection with the building's insurance. Mr Hutchinson confirmed a more extensive survey could be instructed and the Homeowner thought it would be a good idea and would like to see written approval from the other owners.
30. Mr Hutchinson explained that at present proposals were not passed to all the owners as a group but were sent individually. He went on to say that many buildings had a WhatsApp group and it would not be a problem to set that up but consent would need to be given for joint email circulation. Mr Hutchinson confirmed that he had not been asked to set up a group email.

Section 3.3 of the Code

31. The Tribunal noted that the Homeowner's complaint in this regard centred on the issues surrounding the Factor's arrangements for organising building insurance and the commission claimed. As the evidence was likely to be the same as that in respect of the complaints under Section 5 of the Code it made sense to deal with both sections together.

Section 5.2 of the Code

32. Mr Hutchinson advised the Tribunal that the building was insured for a total of 2.5 million pounds. He explained that when a flat was purchased the surveyor in the Home Report would recommend a reinstatement value for that flat and the insurer was advised accordingly. In response to a query from the Tribunal

as to how the Factor ensured that the reinstatement values were kept up to date Mr Hutchinson said that each year every owner was told of the danger of being under-insured and the values were index linked. Mr Hutchinson said that the Factor did have a procedure in place to check that index linking was not out of sync with building costs but did not elaborate and went on to say the Factor did not advise owners how often there should be a revaluation but would encourage owners in this regard and would act on the instructions of the owners.

33. The Homeowner submitted that there had been no approval for the choice of insurer as when it came to renewal the owners were never asked. He thought the building was now under insured and none of the owners had provided the Factor with the authority to renew the insurance in accordance with the terms of the title deeds.

Section 5.6 of the Code

34. Mr Hutchinson explained that prior to renewal of the building insurance each year the Factor arranged for the insurance broker to test the market place and last year the most appropriate insurer was AXA and the policy was renewed with them.
35. The Homeowner repeated his complaint that the Factor's actions did not comply with the terms of the title deeds in that the Factor did not seek the approval of the owners before renewing the policy and that the owners had not agreed to the commission being paid to the broker and the Factor.

Section 5.8 of the Code

36. According to Mr Hutchinson he suggested a revaluation of the building every three or four years but was unaware of the last occasion it had been revalued. He said it was a decision for the owners and always came down to fees.
37. The Homeowner submitted that the owners were not given an opportunity to be involved equally. He suggested he could obtain insurance with Zurich on the same terms but for a much better premium.
38. In response to a query from the Tribunal Mr Hutchinson confirmed that all the flats were insured. He confirmed there would be no difficulty in instructing a revaluation of the building.
39. The Homeowner insisted that the wrong type of insurance was in place and that the tenement as a whole should be insured and not flat by flat. He said he wanted this corrected and the insurance arranged with the agreement of the owners.

Section 7.2 of the Code

40. The Homeowner submitted that the Factor had failed to follow its complaint procedures. He said he had sent multiple emails but did not receive a response.
41. Mr Hutchinson said that he refuted the allegation. He said that the Factor endeavoured to reply to complaints within 7 working days and that if the issue was not resolved it was referred to management.
42. The Homeowner suggested that he had sent multiple emails and either did not receive a reply or did not get an answer. He said he was not aware of there being a management team.

Section 2.5 of the Code

43. The Homeowner submitted that he had asked direct questions in correspondence to the Factor and although the Factor may have responded they had not provided an answer. Furthermore, the Factor did not make an effort to obtain approval for proposed works. He said there were multiple examples of this. He also said the Factor provided no clarity in their dealings and provided different answers to the same question.
44. For the Factor Mr Hutchinson said that he had already said all he needed to say.

Property Factor's Duties and Other Submissions

45. The Homeowner said that the Factor had been dismissive of a complaint regarding the uneven surface in the entrance close and which constituted a trip hazard. Mr Hutchinson denied this and said that the Factor had obtained quotes for a resin overlay.
46. With regards to the tree in the back garden the Homeowner said that it had grown so big it was covering the whole garden. He said the Factor had been notified by himself, Ms Austin and Ms Gauld but nothing had been done.
47. For the Factor Mr Hutchinson said that they had been notified about the tree possibly by Ms Gauld but did not recall the Homeowner notifying them. He said that the Factor would obtain quotes to deal with it. He went on to say he was unsure of the issue with regards to cables in the building that the Homeowner had commented on. The Homeowner said that there were multiple cables and pipework but that no-one knew what was live or active and after many phone calls they still did not know what they were for. The Homeowner said that he and other owners could ask questions but not get any answers from the Factor. He said he had a meeting with some of the other owners and thereafter the Factor was informed. He said he had assumed that old cabling and gas pipes would have been removed. Mr Hutchinson explained that services were owned and the responsibility of SGN

and Open Reach and not the Factor and any queries should be addressed to the supplier. The Tribunal queried if the Factor had responded to the Homeowner in those terms and Mr Hutchinson replied that the Homeowner had not asked about them.

48. The Homeowner referred to a mains leak under the close and that he had written to the Factor in October 2020 but had not received a reply. Mr Hutchinson said that he had followed up a letter from Scottish Water advising of a possible water main leak by writing to owners suggesting it might be a good time to re-screed the close and had asked Scottish Water to contact the owners. He went on to say the letter had come in some months ago and thought there might have been a delay due to Covid. He said there was no evidence of water in the close. Although there was rising damp it would not rise up to the second floor. The cause of damp he said was common for salts moisturising through normal processes in properties of the age of the building. The remedy was to install a new damp proof course and re-plaster. Mr Hutchinson went on to say if he could not get agreement to even clean the gutters it was unlikely he would get approval to carry out a major repair like that. He said that if there was an underground leak and Scottish Water were on the case it would be best to leave them to fix it as they would deal with it on behalf of the owners. The Homeowner expressed his concern that Scottish Water would excavate but would then not reinstate and wanted to know what would be in place to deal with it all.

Evidence of Lize Austin

49. Ms Austin spoke of complaining in January 2018 about a bicycle blocking the entrance to the building and it taking the Factor two months to resolve. She said she had complained about cobwebs not being removed by the cleaners and again that had taken a while to resolve. She spoke of the paintwork being done in 2019 and after one week there were chips and bubbling as the walls had not been sanded down. She said she had taken pictures of the problem. Ms Austin said that Covid had then struck but that subsequently she had followed up with an email to the Factor in September 2020 showing the defects in the paintwork and this had still not been dealt with.

50. Ms Austin went on to say that she had requested information about the building insurance but that the Factor had never approached her or provided proper information. She explained that she worked in banking and finance and that she found the information that she was given quite irritating. She wondered how she would be left financially in the event of a major claim. She said she had never given her permission for the insurance that the Factor arranged. She said she had asked for the value of reinstating the whole building but it had not been provided.

51. Ms Austin said that the building was deteriorating into a slum compared to other buildings in the street. There was water bubbling through the close. The garden looked terrible. She said the gardeners did not pick up the fallen leaves but just blew them around. She said the bins were often overflowing and if the owners did not complain the problems carried on and nothing was

done. She said that the paintwork worried her but when she enquired with the Factor, they usually said they had to get a majority to approve and if they could not then nothing could be done.

52. In response Mr Hutchinson said that the Factor could not just remove a bicycle to have done so would be theft. He said he had contacted the painting contractor. He confirmed the total sum insured for the building was 2.4 million pounds.

Final Submissions

53. The Homeowner submitted that he had not approved the payment of the commission paid to the Factor and the broker for arranging the insurance and that some factors who did not claim commission did not then charge high management fees. He wanted a new factor to take over the management of the building and felt it did not make economic sense for the Factor to continue. He submitted that the Factor was not using a variety of contractors and that maintenance of the building was not management led.

54. For the Factor Mr Hutchinson referred the Tribunal to his earlier evidence. He suggested that if factors did not claim commission on the insurance, they arranged they tended to charge higher management fees.

The Tribunal make the following findings in fact:

55. The Homeowner is the owner of Flat 3/2 32/34 Bank Street, Glasgow ("the Property")

56. The Property is a flat within the two tenements at 32 /34 and 36/ 38 Bank Street, Glasgow consisting of eleven houses (hereinafter "the Development").

57. The Factor performed the role of the property factor of the Development.

58. The Factor was appointed in terms of a Deed of Conditions recorded by Trustees of Robert Scott Forrest on 25th February 1987.

59. It was a condition that as long as the said Trustees owned any of the houses in the Development, they retained the right to nominate the Factor.

60. Clause (four) of the said Deed of conditions provided that the proprietors of the houses were bound to keep the tenements constantly insured against loss by fire, storm and third-party risks with an established insurance company to be approved by the majority of the proprietors as may from time to time be fixed by a majority of said proprietors and in the joint names of the said proprietors.

61. The Factor issued a Written Statement of Services to the Homeowner's solicitor at the time of his purchase of the property.

62. The Factor's Written Statement of services complies with Section 1 of the Code.
63. Through custom and practice the Factor has deemed authority to instruct repairs up to a total of £300.00 without obtaining the prior consent of the Development owners.
64. Except where there are safety issues any expenditure above £300.00 requires a majority of owners to approve before the Factor will incur such expenditure.
65. The Development does not have an Owners' Association.
66. The Factor writes to each owner individually to seek approval for any expenditure above £300.00.
67. If an owner does not respond the Factor follows up the original request with a further request approximately three weeks later. If the owner still does not respond the Factor sends a final reminder after a further three weeks.
68. If a majority of owners do not approve a specific project the owners are advised by the Factor.
69. If the project is approved the Factor instructs contractors once the owners have paid their share of the cost.
70. Each property in the Development is insured separately. The sum insured for each flat is assessed on an individual basis and updated by an inflationary index or when a Home Report is undertaken, which includes an up-to-date insurance cost. The premium charged to each property is based on the sum insured for that property. There is a joint policy for the whole development.
71. The total amount insured is 2.4 million pounds.
72. The Factor does not have a procedure for informing owners of the frequency with which property revaluation of the Development will be undertaken for the purposes of buildings insurance.
73. Although the Factor reminds owners of the need to keep the sum insured up-to-date at the time of renewal, there is no procedure for advising or reminding owners of the date of the last revaluation.

Reasons for Decision

Section 1 of the Code

74. The Tribunal was satisfied that by sending a copy of the Factor's Written Statement of Services to the Homeowner's solicitors, Taylor & Henderson in their letter of 22 May 2015 the Factor complied with Section 1 of the Code. Furthermore, the terms of the Written Statement of Services provided the Homeowner with the required information necessary to comply with Section

1.1a of the Code. The Tribunal did not accept the Homeowner's submission that the terms were meaningless. The level of delegated authority is not clearly expressed in the Written Statement of Services, but is based on the Deed of Conditions and an apparently historic agreed level, this could be provided more clearly to existing and new owners. Taking everything into account however the Tribunal was satisfied that the Factor was not in breach of this section of the Code.

Section 2.1 of the Code

75. The Tribunal was not satisfied that the Homeowner had produced examples of what could be said to be the Factor providing false or misleading information. The issues around the renewal of the building insurance were not in reality issues of the Factor providing false or misleading information but rather a failure on the part of the factor to comply with the terms of the Deed of Conditions.
76. Irrespective of whether or not the loss adjustor was in agreement the Factor was clear in his response to the Homeowner with regards to the recent insurance claim and therefore in the absence of further information the Tribunal was unable to conclude that the information provided was false or misleading.
77. The Homeowner's remaining submissions under this section of the Code appeared to be more directed at the quality of the Factor's management of the Development rather than directly in respect of providing false or misleading information.
78. Taking everything into account the Tribunal was not satisfied that the Factor was in breach of this section of the Code.

Section 2.4 of the Code

79. It did appear to the Tribunal that there may be issues with regards to the level of the transparency of the information that was provided to owners but it was apparent that the Factor did have a procedure in place to consult with and seek the approval of owners before providing work or services. The Tribunal accepted that before the Factor could email all owners together with details of proposed works it would require the consent of each owner to be included in such a group email. The Tribunal accepted that some owners may not wish to be communicated in this way. It seemed to the Tribunal that a significant problem for the Homeowner and indeed for the Factor was that it was proving difficult to persuade a majority of owners to make the investment in the Development that might be necessary to bring it up to the standard the Homeowner would like. It should be noted that is a not uncommon problem in older tenement properties that are reaching the stage of needing substantial renovations that may not be reflected in increased sale value or rent return.
80. As indicated above it appeared that the Factor's delegated authority for instructing repairs up to £300.00 in value had been agreed historically and the

Tribunal would have preferred to have seen some confirmation that owners were kept advised of this but that in itself would not amount to a breach of this section of the Code. Taking everything into account the Tribunal was not satisfied that the Factor was in breach of this section of the Code.

Section 2.5 of the Code

81. The Tribunal was satisfied that the Factor did respond to enquiries and complaints raised by the Homeowner within prompt timescales. The answers provided by the Factor may not have met with the Homeowner's approval or satisfied his complaint but the Tribunal was satisfied that the Factor was not in breach of this section of the Code.

Section 3.3 of the Code

82. There was no dispute that the Factor produced regular quarterly invoices that detailed all financial charges together with a description of what these were for. The issues the Homeowner had was more with the Factor's failure to follow the terms of the Deed of Conditions with regards to arranging the building insurance rather than a failure to provide a detailed financial breakdown. The Tribunal was therefore satisfied that the Factor was not in breach of this section of the Code.

Section 5.2 of the Code

83. Although the Factor provided the Homeowner with a copy of the schedule attached to the policy and showing his share of the premium as well as the name of the insurance company the Tribunal could understand why the Homeowner was not happy with the information provided as the Factor had not arranged the policy in accordance with the terms of the Deed of Conditions. However, despite this the Factor had provided the information necessary to comply with this section of the Code.

Section 5.6 of the Code

84. The Tribunal was satisfied that the Factor had provided a clear explanation of the steps taken in appointing the insurers by asking the brokers to go to the market to find a suitable insurer. The Tribunal was therefore satisfied that the Factor was not in breach of this section of the Code.

Section 5.8 of the Code

85. It did not appear to the Tribunal that the Factor had in place any procedure for informing the owners of the frequency with which property revaluations would be undertaken. The Factor relied on the individual owners taking it upon themselves to consider whether their property might be under-insured. This was a clear breach of this section of the Code.

Property Factor's Duties

86. The Deed of Conditions at Clause (four) set out the arrangements for the insurance of the Development. It provided for the two tenements to be insured by an established insurance company that was from time to time approved by the majority of owners. The clause did not specify that approval would be required on every renewal but logically any renewal that involved a change of company would need the approval of a majority of owners. Significantly the clause also provides that the tenements were to be in the joint names of the owners and the premium divided equally between each owner. That is not what has happened. Although the building has a total sum insured of 2.4 million pounds it does not appear to be insured as a whole but rather each owner's property is insured separately and each owner pays a premium according to the value his property is insured for. That does not comply with the terms of the Deed of Conditions and therefore to that extent the Factor has failed to carry out its property factor's duties.
87. It was apparent that the Homeowner thought that the Factor was not doing a good job of managing his property. However as was made clear to him the Tribunal does not have power to remove the Factor from office. Assuming there are no properties currently owned by the Trustees of Robert Scott Forrest the power to remove the Factor from office is contained within Clause (two)(tertio) of the Deed of Conditions and requires a majority of owners at a quorate meeting to agree to terminate the appointment of a factor or appoint a new factor.
88. With regards to the other duties of the Factor it seemed to the Tribunal that although other owners may have raised certain issues with the Factor it did not appear from the correspondence submitted by the Homeowner that he had raised these issues directly with the Factor and therefore these were outwith the jurisdiction of the Tribunal in respect of this application.
89. The Tribunal appreciated the frustration felt by the Homeowner and noted his concern with regards to what he saw as the deterioration in the fabric of the building. However, from the evidence submitted and considered at the hearing the Tribunal could not conclude that other than with respect to the issues around the insurance of the building the Factor was at fault. It did appear that like many similar developments there was a reluctance on the part of a majority of owners to make the necessary investment in their property to carry out recommended improvements.
90. With regards to commission claimed by the Factor the Tribunal is aware from past experience that this can be a source of anger with owners. It is however not a breach of the Code or a failure to carry out its property factor's duties for a factor to claim commission. It is also not uncommon in developments where no commission is paid for factor's management fees to be charged at a higher rate.

91. The Tribunal acknowledge that the Factor did not tend to obtain numerous quotes from different contractors but also noted the apparent difficulty in some instances in obtaining quotes. The Tribunal did not consider that it could make any order in this regard but would encourage the Factor to obtain competitive quotes when possible.

92. The Factor must have a procedure in place for advising owners that the buildings should be periodically revalued for insurance purposes. If the cost of a valuation was less than £300.00 it would appear that the Factor already had delegated authority to proceed with such a revaluation. If the cost was greater than that amount then it would require a majority of owners to agree although the Factor could have given consideration to the terms of Clause (two)(tertio) which provides that the Factor is “entitled during the continuance of his appointment to exercise the whole rights and powers which may competently be exercised at or by a meeting of the proprietors...”. It is clearly important that the buildings are not under-insured and there is an onus on the owners and the Factor to maintain adequate insurance. However, given that the Factor has been in breach of Section 5.8 of the Code and its property factor’s duties the Tribunal considers that it would be reasonable for the Factor to meet the cost of such a survey from its own funds.

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) (a) 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.

Graham Harding Legal Member and Chair

18 February 2021 Date