Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber references:

FTS/HPC/LM/20/0827, FTS/HPC/LM/20/0829, FTS/HPC/LM/20/0830, FTS/HPC/LM/20/0833, FTS/HPC/LM/20/0836, FTS/HPC/LM/20/0837, FTS/HPC/LM/20/0840, FTS/HPC/LM/20/0841, FTS/HPC/LM/20/0843, FTS/HPC/LM/20/0848, FTS/HPC/LM/200/849, FTS/HPC/LM/20/0852, FTS/HPC/LM/20/0853, FTS/HPC/LM/20/0855, FTS/HPC/LM/20/0856, FTS/HPC/LM/20/0859, FTS/HPC/LM/20/0860, FTS/HPC/LM/20/0857

The Parties:

Ms Sarah Gundry, Joan Henderson, David Nicholas Richardson, K Mason, Simon Cole, Jennifer Gibb, Linda Lucas, Jacek Gondzio and Joanna Karpinska-Gondzio, Callum McNair and Lindy McNair, David Watson and Gillian Watson, A J Spencer Kennedy and Joan Kennedy, Neil Mackenzie, Alison Johnston, Dorothy Jill Millar, Michael McNeill, Gordon Braidwood, Hamish McKenzie , Alwyn Nina Taylor ("the Homeowners")

and

James Gibb Residential Factors, a trading name of James Gibb Property Management Limited, registered as a limited company in Scotland (SC299465), having their registered office at Bellahouston Business Centre, 423 Paisley Road West, Glasgow G51 1PZ and having a place of business at 4 Atholl Place, Edinburgh EH3 8HT ("the property factors/James Gibb")

Property: Ashfield Grange, 119 & 121 Grange Loan, Edinburgh EH9 2EA and 2 & 4 Blackford Avenue, Edinburgh EH9 2ET ("the Property")

Tribunal Members – George Clark (Legal Member/Chairman) and Mike Links (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011 ('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed in their duties under Section 2.5 of the Code of Conduct made under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act"). The property factors have not failed in their duties under Sections 1F, 2.1, 5.3, 5.4, 5.5, 6.1 and 6.4 of the Code of Conduct. The property factors have failed to carry out the Property Factor's duties.

The Tribunal does not propose to make a Property Factor Enforcement Order.

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 as "the Code of Conduct" or "the Code"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

The property factors became a Registered Property Factor on 23 November 2012 and their duty under Section 14(5) of the 2011 Act to comply with the Code arises from that date.

These are 18 conjoined and identical applications and the Tribunal's decision applies *mutatis mutandis* to all 18 cases. For ease of reference, the Tribunal uses the term "application" throughout this Decision. The applications follow on from two complaints made to the property factors by one of the Applicants, Mr A J Spencer Kennedy, in his capacity as Chair of the Proprietors' Association for Ashley Grange Development. In order to avoid confusion, he is hereinafter referred to as "the homeowner".

The Tribunal had available to it and gave consideration to: (i) the application received by the Tribunal on 9 March 2020, with supporting documentation, namely a Chairman's Statement dated February 2020, copies of the Burdens Section of the Deed of Conditions affecting the development of which the Property forms part, the property factors' Proposal dated 6 June 2005, the property factors' Written Statement of Services (Issue 09 May 2019), the property factors' Development Schedule, Complaints letters dated 21 August and 11 November 2019, the property factors' responses and email exchanges between the Parties from 17 October 2019 to 7 February 2020 (ii) further productions by the Homeowners received by the Tribunal on 5 October 2020, comprising a number of photographs, rental particulars of a garage at 48C Colinton Road, emails from the homeowner to Ms J Bole dated 14 May and 7 July 2019, excerpts from Gloag & Henderson " The Law of Scotland" (7th edition, 1969) and a copy of an article on "Secret" Commissions dated 4 May 2019 (iii) written representations by the property factors, received by the Tribunal on

19 October 2020, with supporting documentation, namely copies of their Newsletter "The Address" for Winter 2012 and Autumn 2013, their Welcome Letter to a new homeowner dated 22 August 2017 (suitably redacted), their Welcome Pack issued with said Welcome Letter, excerpts from their Newsletter "The Address" regarding Block Insurance renewal and commission 2014-2019, their Claims Guide, and AGM Minutes of 2016, 2017, 2018 and 2019.

Summary of Written Representations

(a) By the homeowners

Chairman's Statement. The Homeowners' complaint was fully set out in the Chairman's Statement of February 2020. From September 2005 until 16 December 2019, the factors of the Development had been James Gibb. In appointing them, the Ashley Grange Proprietors' Association ("AGPA") were considerably influenced by the statement in their Proposal and Brochure that "we are probably the only agent that does not take a benefit from 'Agents Commission'" on the Block insurance they arranged. James Gibb assigned a manager to each development as the person responsible for the development's business and the point of contact for owners. There had been a succession of them since 2012, and 5 from Spring 2018 to Autumn 2019.

AGPA expressed concern about the high turnover. The manager who left at the end of July 2019 had not been satisfactory as, while he seemed pleasant, knowledgeable and helpful at meetings, not much happened between meetings. His replacement apparently left after 3 days and AGPA were not consulted about who was to look after their business short term or long term.

The first complaint was made by the Homeowners on 21 August 2019. They accepted that many of the issues raised had since been resolved, but there were four matters still outstanding, namely the ingress of water to the garages, an insurance claim for flooding, the block insurance arrangements and the failure to have a roof inspected.

The ingress of water to the lower-level garages was first reported in October 2015. There had been no progress towards identifying the cause and the remedy by summer 2019. One of the AGPA committee members instructed a consulting engineer he knew professionally. This led to a report and indicative costs being obtained. The cumulative delays by the staff of James Gibb have led to the water ingress being for a much longer period than would have been the case if they had managed the matter competently and timeously. The owners of the 6 lower garages have been unable to keep items dry in their garages for more than 4 years.

On 21 December 2018, a faulty ballcock in a tank above the common stair at 2 Blackford Avenue caused extensive flooding to the stair. Emergency contractors stopped the flooding and removed the soaked carpet. Thereafter, James Gibb did not supervise the insurance claim properly. The stair was unlit from December 2018 until July 2019. Approval of the insurance claim took far longer than it should have

done. The work was eventually carried out in December 2019. James Gibb received the funds to pay the bills on 18 December 2019 but had not paid the contractors by the end of January 2020. Any competent factor would have ensured the insurance claim was handled promptly and correctly and the necessary remedial work done without delay.

The Block Insurance was managed by James Gibb. The committee of AGPA were pressing them for sight of a reinstatement valuation from May 2019 onwards. They also asked to be consulted before renewal of the insurance in May 2019. They were not consulted. The factoring Invoice for the quarter to 31 August 2019 was the first intimation that the premium had increased by about 46% from about £1,100 to over £1,600. The reinstatement revaluation report dated March 2019 was only sent to the homeowner in September. He has had no adequate explanation as to why there was such a huge increase, why it was not noted by James Gibb's staff and why the homeowners were neither consulted nor informed.

Before submitting the complaint, the homeowner had asked the property factors for a copy of the Development Schedule, which he had never seen. None of his committee colleagues or the previous Chair had seen it either. In his letter of 21 August 2019, he had asked James Gibb to send him a copy and to say when and how it was intimated to the homeowners, but had not received it until late September, which was after he had written to James Gibb on 16 September giving them notice terminating their appointment as factors. James Gibb purported to rely on that Development Schedule to impose conditions and to disclose commission. Mr Kennedy considered that they cannot do so in that neither past nor present committee members were in fact aware of that document and its contents. The property factors did not send copies by post either to existing owners or to new owners. It is only to be found by going into a private part of their website. Some owners do not use the internet. The homeowner's submission was that there had been inadequate disclosure of the Development Schedule. He still considered that the 4 weeks' notice of termination he gave in his letter of 16 September 2019 was adequate, but the Homeowners were held to a 3-month period, which expired on 16 December 2019.

On 24 September 2019, James Gibb emailed the homeowner to say that 3 months' notice was required. They said nothing about the competence of the decision to terminate. On 9 October they asked for information about AGPA's decision making process. They then said they wanted to discuss the voting process. On 19 November, they wrote to all Homeowners saying that no meeting had been held, so no valid notice to terminate had been given. The homeowner called an emergency meeting the following day, at which a motion to retrospectively ratify the notice of 18 September had been carried by 17 votes to 1. The homeowner emailed the property factors that evening, with copies of the letter calling the meeting and the Minute of it, saying that termination and handover would take place on 18 December.

On Sunday 15 December, the homeowner emailed the property factors asking for confirmation that keys, documents and the sinking fund would be transferred the

next day. James Gibb responded, saying “no agreement has been reached to terminate on 16 December 2019”.

On 13 January 2020, three committee members met with James Gibb, who said that there would have to be a further 3-month period of notice before termination. As a result, an Initial Writ was served on James Gibb with intimation of a motion for interim interdict. That was prevented by James Gibb agreeing on the morning of the hearing that they would agree to termination as at 18 December 2019 if the homeowners met their own legal expenses. The case was taken out of court. The total legal expenses amounted to £3,179. The homeowner was liable for £2,279 of that amount, as a result of James Gibb’s failure to accept the notice to terminate their appointment, as they only paid judicial expenses.

The homeowner submitted that, in the circumstances he had outlined, it would be appropriate for the Tribunal to make a Property Factor Enforcement Order (“PFEO”).

To reflect the period when the factoring service had been very poor or non-existent, all factoring fees should be refunded for the period from August 2018 to December 2019. They had failed for months to advance the issue of water penetration to the garages. Progress had only been made on this matter, the flood claim and the annual roof inspection after owners took matters into their own hands. If the promised monthly inspections took place, nothing happened as a result and the property factors had not told Homeowners when and by whom they were conducted.

Given that James Gibb had been taking commission on the annual block insurance premiums without the actual knowledge of the owners, the PFEO should require them to make payment to the owners of all such sums, in that they amounted to secret commissions.

If the Tribunal accepted that there had been delay by the property factors in progressing the repairs needed to address the water ingress to the garages, then that delay has caused the owners loss. Had repairs been instructed three years earlier, it is likely the cost would have been less and the PFEO should require the property factors to reimburse the garage owners this extra cost.

The property factors had a standing instruction to arrange an annual roof inspection and were regularly reminded by the committee in early 2019. The roofs had been inspected in August 2018, with no action recommended apart from some minor repairs. In autumn 2019, the property factors were told of water ingress to flat 119/5. They sent a contractor to look at and repair the roof above that flat. That contractor expressed his view to nearby owners that the roof was cracked and would require a full repair, mentioning a cost of about £6,600 per flat. Had the property factors, as instructed, arranged an inspection in summer 2019, it is likely that the recommendation would have been for extra layers to be applied to prolong the life of the roofs at a cost in the region of £1,500 per flat. The property factors should be held responsible for the extra cost to owners occasioned by the failure of the property factors to implement their instructions to have the roof inspected in summer 2019.

The owners of the six flats at 2 Blackford Avenue had been forced to live with a squalid, concrete stairway and inadequate lighting for about a year since the flood on 21 December 20018. Had the property factors handled this matter competently, the period between flood and full restitution would have been less than six months. The PFEO should compensate them for their inconvenience and distress, perhaps £1,000 per flat.

The same six owners are the owners of the six lower garages where water ingress has occurred and, if the Tribunal held that the delay in having repairs done had occurred through the fault of the property factors, the loss of satisfactory use for that period of delay should be included in a compensation order in the PFEO and, if that period was held to have been three years, the compensation should be £750 to each of the six owners.

The property factors' conduct in the matter of the termination process and, in particular, their various decisions to maintain the stance that the notice to terminate was invalid, had caused the Homeowners considerable uncertainty, anxiety and inconvenience. One explanation was that all the senior employees who were privy to the dispute completely misunderstood the relevant law relating to Deeds of Conditions and tenements. The only other explanation which occurred to the Chairman was that they did understand the legal position but chose to ignore it, so as to prolong their appointment and their entitlement to factoring fees and to obstruct the change to new factors. This should be reflected by the PFEO including an order to pay compensation to each owner. A sum of £500 was reasonable, with a further £750 to each of the five committee members, as they had borne the brunt of dealing with the stressful situation, considering countless emails, attending many meetings and considering complex legal and tactical aspects.

The homeowner, as Chair of AGPA, had carried the ultimate responsibility for the termination procedure. But for his legal background, it was likely that the committee would have consulted solicitors much sooner, at considerable expense. He had found it all extremely stressful and it had affected his health and well-being. At a conservative estimate, he had spent over 100 hours dealing with the matter. Were he in practice, his charging rate would be about £300 per hour. Any PFEO should provide for a suitable amount to be paid to him in addition to the sums payable to him as owner and as a committee member.

Despite the Homeowners' best efforts to avoid court action, they required eventually to employ solicitors. The homeowner had undertaken to meet their fees and outlays. When the court action was resolved, the property factors had only paid judicial expenses of £900. The solicitors charged on an agent and client basis. Their fee note came to a total of £3,179. It was entirely reasonable that the property factors should be ordered to pay the difference of £2,279 to the homeowner and the PFEO should reflect that.

The new factors commenced block insurance cover on 16 December 2019 but James Gibb did not terminate the cover they had put in place until about 31 January 2020. If they seek to charge the Homeowners for premiums after 16 December 2019, the PFEO should require them to refund that premium.

Response to the first letter of complaint. The substance of the first letter of complaint dated 21 August 2019, insofar as it relates to the matters contained in the application, has been covered in the foregoing summary of the Chairman's Statement. It reiterates that neither the homeowner nor his committee colleagues can trace or recall the Development Schedule and requests a copy. It cites delays in dealing with the garage water ingress problem and the flood in the stair at 2 Blackford Avenue, a failure to provide a quotation from alternative window cleaners and the failure to instruct a roof inspection in August 2019.

The property factors issued their response to the letter of complaint on 11 October 2019. They stated that they had now received a report from AED Consultants relating to the retaining wall, which was having an impact in relation to the ingress of water to the garages. They referred to a meeting at their offices on 9 October, when it had been agreed that Ms Jeni Bole of James Gibb would continue to work on this matter. They appreciated that matters had taken longer to progress, but, as the homeowner had stated, it was quite a complex matter to resolve. The property factors partially upheld the complaint in respect of the water ingress to the garages. They did not uphold the complaint regarding the flooding in the stairway at 2 Blackford Avenue. The insurer had appointed a Loss Adjuster to progress the claim and the duration of a claim from submission to resolution was outwith their control and was not something they could influence. The property factors understood that matters were now being progressed and a schedule of works was to be submitted.

The property factors partly upheld the complaint relating to window cleaning. Quotations had been requested and one was attached. The property factors asked whether this was something the owners wished them to instruct. The complaint about terrazzo repairs was accepted and the property factors apologised for the delay in having the work progressed. They noted that the work had now been completed and that an inaccuracy in the billing for it had been made.

The property factors enclosed a copy of the building reinstatement revaluation report, apologised for the delay in its being provided and partly upheld that aspect of the complaint.

The property factors confirmed that the last roof inspection had been in the summer of 2018, but the company who had carried it out were no longer on their list of approved contractors. The property factors had already begun to seek competitive quotations from alternative contractors and had intended presenting them to the committee for a decision. The slight delay had been due to very wet weather over the summer period and contractors had been slow to provide quotes due to excessive workload. This aspect of the complaint was partially upheld.

The property factors did not uphold the complaint in relation to changes in Property Manager. Over recent years, the industry had experienced staff electing to leave, as the role of a property manager can be very pressurised. They provided the name of the person who would be assuming the management of the development until

termination. He was an experienced senior manager and would be assisted by the Operations Manager and the Operations Director.

Recognising that the level of service had fallen below the high standards they sought to deliver, the property factors extended their sincere apologies and offered all owners at the development one month's credit of management fees should the 3-months' termination period be met.

Homeowner's Response. The homeowner emailed the property factors on 17 October 2019, expressing disappointment at the response to the complaint. He said that the insistence on three months' notice could readily be viewed as simply obstructive. The property factors had offered to waive one month's factoring fees. The homeowner said that this was almost derisory and suggested a handover date of Friday 29 November, with no management fees being charged for the final quarter to that date. He repeated his request to be told when and how the Development Schedule was intimated to the homeowners and said that he had still been unable to access any documents on the "private" part of the website. The property factors' response regarding the flooded stairway had not addressed the delay between December 2018 and June 2019. They had also not explained why the huge increase in the block insurance premium had not been picked up by anyone at James Gibb and communicated to the committee. He asked the property factors to provide the names of contractors contacted to provide quotes for the roof inspection and that any quotes received be forwarded to him. He commented that it was disappointing that from 7 July until 16 September 2019, the Homeowners had not known who was going to be managing the development.

On 21 October 2019, the property factors referred to a meeting at which they had confirmed that the termination period would still be 3 months. They confirmed that they had asked for the evidence of the decision which had been made to terminate their appointment. If a meeting of owners had been held, they would require a copy of the letter calling the meeting, which should detail the reason for calling it, minutes of the meeting and any proxies/mandates sent in by owners who were unable to attend. If no meeting had been held, they would need copies of any letters issued to owners again to show the purpose of making contact and any proxies/mandates returned in favour of their dismissal. If the documentation was received within 7 days, the property factors would accept the termination letter initially issued and the 3 months' notice period would be based on that date. Otherwise, they would not be able to accept the termination until the date that this information had been received and again from that date, they would require 3 months' notice.

Homeowner's second letter of complaint. The homeowner emailed a second complaint to the property factors on 11 November 2019. It related to matters that had come to light since his first complaint of 21 August. He commented that the property factors had still not responded to his question as to when the Development Schedule was issued to all proprietors. For years, the property factors had sent to each owner, by post or email, their quarterly invoices, minutes of committee meetings, notices calling General Meetings and letters about unusual or expensive maintenance work. Owners with internet access would, therefore, have no cause to go to the website at

all, far less the private part of the website. The homeowner had told the property factors that his attempts to access it, after a meeting on 17 September 2019, had been unsuccessful and no committee member could recall any mention of the Schedule or alterations to it. Minutes did not record it being mentioned to the committee by any of the many Property Managers over the years. This supported his belief that James Gibb had failed to adequately draw to the homeowners' attention the content of the Schedule and, unless the property factors could demonstrate adequate intimation of the three months' notice of termination condition, they could not show that it was incorporated into the contract. It followed that the letter of 16 September 2019, terminating the contract on 16 October was valid. There appeared to be a clear breach of Section 1F of the Code of Conduct.

When the committee in 2005 was considering changing factors, they had been heavily influenced by the statement by James Gibb that they did not take a benefit from "Agents Commission". The Homeowners had believed that still to be the case and it was only when they saw the Development Schedule in the past few weeks that it became apparent that the property factors were receiving 27.5% of the net premium on the Block Buildings Insurance Policy. This appeared to be an undisclosed commission in breach of Section 5.3 of the Code of Conduct.

The committee had, in recent times, had unminuted discussions about the poor service from the property factors. They had viewed it in the light of the factoring fees, which they believed to be the property factors' only remuneration. They had had discussions about changing factors but had been deterred from doing so because of their belief, now shown to be erroneous, that James Gibb did not take commission and that other firms would charge more for insurance. The property factors had also not responded to the request in the first letter of complaint for an explanation as to why nobody at James Gibb spotted the huge increase, consulted the committee prior to renewal or before the invoice was issued.

Almost three months on from the homeowner's complaint, there had still not been a roof inspection. The Property Manager had apparently sent somebody to look at the roof and that person had told nearby owners that a repair would cost £40,000. If the Property Manager had a formal report from that person, he had not shared it with the committee or with the person suffering the water ingress.

The stair at 2 Blackford Avenue was still in the state it was in after the flood in December 2018, the boundary wall/garage dampness problem was stuck, with owners not even getting the length of ascertaining what work is needed and the latest window cleaners seemed worse than the previous ones. The property factors' handling of the termination arrangements had been extremely unsatisfactory. They had ignored the points made by the homeowner in emails about the legal position and had threatened on two occasions to postpone the handover unless the committee provided promptly information about the owners' decision, information to which the property factors were not entitled, but which had already been provided to the Property Manager on 10 October 2019. The terms of the email in which the property factors claimed they would have to postpone termination were false and misleading.

On 17 November 2019, the homeowner advised the property factors that he wished the first complaint to be escalated to the final stage. When he had given notice on behalf of AGPA terminating their appointment, he had warranted his right to do so and the property factors had no right to question the internal processes of the Association. He reiterated that he had repeatedly been unable to get to the Documents Section of the private part of the website.

Final response to first letter of complaint. On 20 December 2019, the property factors issued their final response to the homeowner's first complaint. They did not uphold any aspect of the complaint.

In relation to the period of notice of termination, they explained that at a meeting on 9 October, the homeowner had advised that no meeting of owners had taken place to decide whether to dismiss the property factors. This, they said, was required "in line with the requirements of the Deeds". The homeowner had also confirmed that for some owners he had received only verbal communications. At this meeting, the property factors had explained the process required for appointment and dismissal of a factor and the notice period required in terms of their Written Statement of Services/Development Schedule. On 17 October, the homeowner had confirmed that he had considered with his committee colleagues the position set out in the email of 11 October, but he had failed to exhibit any evidence of formal consultation with owners as per the requirements of the Deed of Conditions.

On 20 October, the property factors had confirmed that the termination date would still be 3 months as discussed at the meeting of 9 October and that they required evidence of the decision that had been made to terminate their appointment. If a meeting of owners had been held, they would require copies of the letter calling the meeting which should detail the reason for calling it, the minutes of the meeting and any proxies/mandates sent in by owners who were unable to attend. If no meeting had been held, they would need copies of any letters issued to owners, again to show the purpose of making contact, and any proxies/mandates returned in favour of their dismissal. If the documentation was received within 7 days, the property factors would accept the termination letter initially issued and the 3 months' notice period would be based on that date, failing which 3 months' notice would apply from the date that the requested information was received.

On 20 November, the homeowner had sent an email to the property factors, stating that their original response was "simply wrong in law". He had included a paragraph of text which bore to be a Minute of a Special General Meeting held earlier on that day, but no copy of the actual Minutes was attached. He had also provided a paragraph of text from an email of 19 November, being the Notice calling the SGM with no details of recipients or confirmation of how those owners not on electronic mail were communicated with. The actual original email had not been attached to his email of 20 November to the property factors, but in their final response to the complaint, they added it as an Appendix.

The property factors referred to the Deed of Conditions affecting the Development. They highlighted portions of Clauses Eleventh and Twelfth, which said that that the factor should be appointed by the developers so long as they remained the owners

of any of the flats and thereafter by a majority of the proprietors at a meeting convened as provided for in Clause Twelfth. Clause Twelfth stated that after the developers had ceased to be a proprietor of any of the flats, the proprietor of any two flats would have the power to call a meeting on giving at least twenty-one days' notice in writing to the other proprietors. The property factors also set out the "Termination of Agreement" section of their Written Statement of Services, which stated that the termination notice period was given in the homeowners' Development Schedule, and the relevant portion of that Development Schedule, which provided that a termination notice period of three months was required.

The property factors stated that no further information had been sent to them confirming appropriate process was followed in order to terminate their services and, concluding that the proprietors at Ashley Grange had failed to follow the correct procedure to dismiss them, the property factors did not uphold this aspect of the complaint.

With regard to the complaint that they had failed to confirm when the Development Schedule was sent to owners, the property factors stated that it had been added to their web portal on 27 December 2017 and had been updated on 24 May 2018 and 14 August 2019. Any updates to the Development Schedule were notified to homeowners via their Newsletters and a review of the homeowner's activity on their client portal confirmed that he had visited the site on a number of occasions between 15 March 2017 and 6 December 2019. They did not uphold this aspect of the complaint.

The property factors did not uphold the complaint that they had failed to demonstrate that the termination clause formed part of their contract. The information on how to terminate the service arrangement was clearly stated in the Development Schedule, cross referenced in the main body of the Written Statement of Services, which formed the basis of the contractual agreement between the Parties.

In response to the complaint that no roof inspection had been carried out since the original complaint, the property factors stated that the last roof inspection had been carried out in the summer of 2018. As the company who carried it out were no longer on their list of approved contractors, they had already begun to seek competitive quotes and had intended presenting these to the committee for a decision. The slight delay had been down to the very wet weather over the summer, and contractors had been slow to provide quotes due to excessive workload. The property factors asked in their response whether the committee still wanted the presentation or if their preference was to wait until the change of factor had taken place, when the new factors could arrange it with their own approved contractors.

The property factors were of the view that conflicting instructions had been provided to them and were unclear as to what action the committee required them to take on this matter. In his email of 17 October, the homeowner had asked them to let him know which contractors they had contacted and to forward any quotes they had received, but they understood that the homeowner had previously confirmed to the Property Manager that he was not to carry out any repairs or works, but in an email to the property factors on 20 November, whilst the complaint investigation was

underway, the homeowner had said “What is happening about the roof inspection that should have been done in August? Has the roof been inspected and by whom? Who is the anonymous roofer who tried but failed to sort the leak at 119/5?”

Finally, in response to the complaints in emails regarding the legal position for termination, the property factors said that they had found that the homeowner’s points regarding the legal position had not been ignored and that the team had tried hard to explain to him that he had failed to follow due process.

The property factors stated that they must comply with the conditions set out in the Title Deeds and in their own Written Statement of Services/Development Schedule and act in the best interests of all owners. This formed the last stage of their complaints process and, should he remain unhappy with the response, the homeowner could escalate the matter to the Tribunal.

Response to the second letter of complaint. On 27 December 2019, the property factors wrote to the homeowner, confirming the outcome of their investigation into the complaint. They referred to the issue that the homeowner had identified with the communications issued by the property factors. Their response was that they aimed to issue all documents by letter to all owners, but in some situations where owners receive correspondence by email, they were unable to attach large files by that method, so placed them on the web portal. They would always provide hard copy to owners who required it or requested it. They did not uphold this part of the complaint.

In relation to insurance commission, the property factors referred to the provisions of Section 5.3 of the Code of Conduct, requiring them to disclose to homeowners in writing any commission they received from the company providing insurance cover. They stated that details of the arrangements in place regarding commission were clearly set out in the Development Schedule, the relevant part of which they included, which stated that they do not take any commission beyond that taken by their broker and that, instead, they negotiate a share of the broker’s commission, in order to keep premiums as low as possible. The agreed split is negotiated each year and has no effect on the overall premium. The extract from Section 09 of the Development Schedule set out the current commission split between the property factors and the broker and they added that the broker undertook an annual tendering process for the block insurance to ensure they obtained the most competitive rates. The property factors did not uphold this part of the complaint.

In relation to the complaint about the increase in the insurance premium, the property factors advised that it was due to the increase in the reinstatement valuation for the Development. They had completed a reinstatement revaluation, an independent survey conducted by surveyors. The estimated reinstatement cost for 2018/19 had been £5,001,347 and the reinstatement survey had increased that figure for 2019/20 to £7,078,000, resulting in the increase in premium for building insurance. The property factors had informed all owners that the revaluation project was being completed and the cost of the survey had been applied to the August 2019 Invoices. They also pointed out that the reinstatement values were shown on the annual insurance certificate which is provided to all owners and did not uphold this part of the complaint.

The property factors upheld the complaint that a request for copies of Invoices for window cleaning had not been met, apologised for that omission and enclosed them with the response.

Homeowner's Response. On 30 December 2019, the homeowner advised the property factors that he remained dissatisfied with the response to his second complaint and asked that it be escalated to the next stage. Later that day, in response to a request to provide further details of the points on which he remained dissatisfied, he emailed the property factors, repeating that he had tried without success to explain to James Gibb's Edinburgh Operations Manager at a meeting on 10 October that, despite his best efforts to access the private part of the website, he had been unable to access documents, although he was able to get as far as paying some quarterly invoices electronically. Her response did not say why any owner should have cause to go to the website when the property factors send out all important documents by letter or email and she had not explained why no Property Manager had ever mentioned the Development Schedule or the change in commission arrangements. The homeowner also asked when the last reinstatement valuation prior to 2019 had taken place and complained that no-one had thought fit to send him or the committee the 2019 revaluation or to tell them about the increased premium of which James Gibb were aware in May. He added that the window cleaning invoices were now of no value, as the time for challenging them had passed.

Final response to second letter of complaint. On 7 February 2020, the property factors sent their final response to the second letter of complaint. They attached a Step-by-Step Guide on accessing the client portal and reviewing items and confirmed that the portal had at all times been fully operational. They did not uphold this aspect of the complaint.

They also did not uphold the complaint that they had failed to advise when changes in insurance commission were made. They referred again to their Written Statement of Services, which said that commissions for the provision and management of insurance products are detailed in the Development Schedule, that they do not take any further commission on top of this and that each year the share of the broker's commission awarded to James Gibb is negotiated between them and the broker, with no effect on the premium. They enclosed a copy of an earlier Newsletter from 2014 which reaffirmed the position, stating that their broker's commission remained at last year's figure of 22.7% of net premium plus a broker's fee of 2.5%, adding "As you know, we do not take additional commission beyond this; we simply negotiate a share of the broker's commission to keep your premiums as low as possible. This year, we are taking a slightly smaller share at 20.5%. We do not make any other charges for the provision of insurance products nor do we have any financial interest in the business affairs of our brokers or insurers." The property factors also incorporated an extract from the Development Schedule, "Section 09 (WSS 7.5 – Block Insurance Commission), showing the then current commission split.

In relation to the complaint that they had not commented on why clients should have to go to the portal for documents when they send out other documents, the property

factors referred to the Code of Conduct, which requires that all factors must provide each homeowner with a written statement but does not say whether this is to be issued in hard copy, electronic format, via the client portal or some other means. They believed that having the Written Statement/Development Schedule available to all their customers on a client portal, essentially a reference library, ensures it is easily and readily accessible, as well as being environmentally friendly, with a hard copy being available to all clients on request. They did not uphold this aspect of the complaint.

The property factors did not uphold the complaint that they had made no attempt to advise how clients who do not use the internet can get access to documents. They regularly featured updates to their Written Statement of Services/Development Schedule in their Newsletters and included, as an example, a copy of their Autumn 2015 Newsletter, in which they confirmed "Remember that you can find, view or download your WSS from our website…If you don't have access to our website and would like a hard copy of the document, please let us know and we'll post one out to you."

The property factors did not uphold the complaint that they had not provided information requested by the homeowner as to when the last reinstatement valuation prior to 2019 was carried out. They confirmed that this had taken place in 2013 and provided an extract of the charge for this work that appeared on the factoring invoice dated 28 May 2013.

The property factors did uphold the complaint that their response had not dealt with concerns regarding the termination procedure. They pointed out that they had provided a very detailed explanation in their final stage response to the first letter of complaint but acknowledged that the original response from the Edinburgh Operations Manager could have included more detail. They extended their apologies for this but stressed that at no time had they "put obstacles in the way of a smooth handover" or the termination itself. They also partly upheld the complaint that window cleaning invoices had been provided too late to challenge the contractor and apologised for the delay in sending copy invoices. They were aware that the Chairman had at the time challenged the work done by the contractor and their Property Manager had sought to immediately address the homeowner's concerns.

The property factors confirmed that this formed the last stage of their complaints process and signposted the homeowner to the Tribunal, should he remain unhappy with their final response.

(b) By the property factors

The property factors' written representations were received by the Tribunal on 19 October 2019 and responded to the application under the various sections of the Code of Conduct with which the homeowner contended the property factors had failed to comply.

Section 1F. The property factors stated that their Written Statement of Services contains a dedicated section (Section 11.0) on Termination of Agreement. This contains 6 sub-sections, Section 11.1 states that "In association with the requirements of the deed of conditions for your development the contract…can be terminated, in writing, to the local Director. The termination notice period is given in Section 11 of your Development Schedule". The Development Schedule provides that "A termination notice period of three months is required by the development".

The property factors contended that these documents stated clearly the process for termination and referenced the Deed of Conditions as the key legal document applicable. The quoted Sections from the Written Statement of Services and Development Schedule were in accordance with Section 1F of the Code of Conduct and no breach existed. The global terms of business and undertakings detailed as required by the Act are contained in their core Written Statement of Services". The development specific terms are detailed in dedicated Development Schedules, reference to which is made throughout the core document. No mention was made in the Chairman's Statement, which formed the basis of the application, to any lack of awareness of the Written Statement of Services. The homeowner's contention that there had been no adequate disclosure of the Development Schedule was denied.

The Autumn 2013 of "The Address" (their Newsletter), circulated to all owners, confirmed the finalisation of the drafting process of the Written Statement of Services and advised that it was available on the development portal. It also highlighted that hard copies were available on request. The Newsletters are issued concurrently with the quarterly invoices and contain key updates and other information. It is known, by those receiving communication by email or post then paying their bills, that the Newsletters have been received. The claim in the Chairman's Statement that copies of the Development Schedule were not issued by post to new owners was strenuously denied. New owners after August 2013 were sent hard copy versions as part of the initial Welcome Pack. As the property factors seldom have email addresses for new owners prior to occupation, they are all issued by post. The property factors included with their representations a copy (redacted) of the covering letter sent to a new owner and of the Welcome Pack.

The Newsletters are issued in hard copy to all owners who have not opted for paperless communication. To all receiving by email, they were formerly sent as pdf attachments, but now the covering email contains a dedicated link to access them and copies are also available on the website. Access to the client portal is directly via the website and requires clients to enter their unique development account number and JG+ code, both of which are on every general letter and bill generated on the property factors' database. The portal requires access codes as it contains development specific documentation, such as the Development Schedule, as well as confidential client-specific information, including copies of invoices and payment history. The information is not hidden, it is protected, and is a necessary security measure, no different from on-line banking requirements. The property factors repeated that the homeowner had successfully gained access to the portal, as a recorded client footprint exists for each log in and can be evidenced.

Readily available information on the website includes the property factors' global documents such as the core Written Statement of Services document. Development specific information is accessed via the Client Portal link, Reference to the website and the Portal appears on invoices and on covering emails issuing invoices and is also on the sign-off banner on all emails sent by the property factors. The development Portals are a dedicated store for all information, which can be accessed readily. Hard copies are issued to clients who do not have internet access. News which is relevant to all developments, such as updates to the main Written Statement of Services/Development Schedules, are highlighted in the Newsletters, so attention is drawn to them. Key documents are referenced in "The Address" and are available on the client Portals or, on request, in hard copy.

In respect of the termination notification, the property factors referred to the explanations given in their letter of 20 December 2019, being their final response to the first letter of complaint. They fully accepted that all homeowners have an absolute right to make decisions relative to the factoring of their development. This had never been disputed. Their termination process is to ensure that all owners have received proper notification and opportunity to have input to their development decision in terms of their Deed of Conditions and that evidence to confirm that this has occurred is provided. They would not be following their factors' duty of care if they did not ask for evidence that all owners had been consulted and a majority decision reached. It would be entirely inappropriate for the factor to accept such instructions from a single owner without supporting evidence, when the Title states a majority decision is required.

The assertion in the Chairman's Statement that the property factors chose to ignore the legal position so as to prolong their appointment and their entitlement to factoring fees and to obstruct the change to new factors was not accepted. The letter of 20 December 2019 and email of 14 January 2020 demonstrated their acceptance that the development wished to terminate their services and their reasons for requiring provision of evidence to support the consultation of the ownership. They did not accept that their requirement for a 3-months' notice period relates to extending the period for the purpose of receipt of management fees. As they invoice quarterly in arrears, it is required to ensure all maintenance and services charges can be ingathered up to a cessation date, in order to wind up all development finances.

The property factors contended that there had been no breach of Section 1F of the Code of Conduct.

Section 2.1. The homeowner's submissions did not contain any specific details or stated instance to which a direct response could be made. In the absence of any evidence to support the claim, no breach of Section 2.1 of the Code of Conduct existed.

Section 2.5. The property factors referred to their responses to both complaint notifications, where responses to communications had been outwith the terms of their service level agreement and conceded that a breach of Section 2.5 had occurred.

Section 5. The property factors referred to Section 8 of their Written Statement of Services which states that they do not take any commission beyond that taken by the broker. “Instead, it shares the broker’s standard commission. It is able to do this by taking some of the administrative work in-house” (Section 8.4) and “Our broker’s commission…is detailed in Section 09 of your Development Schedule…Each year, the share of broker’s commission awarded to James Gibb is negotiated between the parties. This, of course, has no effect on the premium.” They also referred to Section 09 of the Development Schedule showing the agreed internal split and emphasised that the broker is wholly independent from James Gibb. As stated in Section 8.7 of the Written Statement of Services, no other form of payment or benefit relative to insurance receivable by the property factors exists.

The distinction between the position now and what it was in 2005, when the property factors tendered for the factoring work for the development is that in 2005, the broker retained 100% of the commission, whereas it is now shared.

Every Summer issue of the Newsletter, issued with the May billing, contains details of insurance renewal process and terms, including comment on the commission rate. Section 5.3 of the Code of Conduct states that property factors must declare any commission they receive. Declaration of this fact is contained in the property factors’ Written Statement of Services and a full breakdown of the allocation of commission between the broker and the property factors is set out in the Development Schedule. Accordingly, the property factors did not accept the homeowner’s allegation that the existence of commission was undisclosed or hidden.

Section 5.4. The property factors stated that, as required by Section 5.4 of the Code of Conduct, they do have a procedure in place for submission of claims. The incident at 2 Blackford Avenue was a communal claim which was notified to the Development Manager. She notified the insurer’s Claims Department and instructed an emergency repair. Due to the extent and likely cost of remedying the water damage, a Loss Adjuster was appointed to assess and manage the claim. All decisions and approval for works in any claim are made exclusively by the insurer and Loss Adjuster and a factor has no remit or delegated authority in this regard. Homeowners were given updates by the Manager and had been notified of the Claim Reference and could also contact the insurers or Loss Adjuster directly. The homeowner’s submissions did not make any reference to lack of awareness in this respect and the property factors contended that no breach existed under Section 5.4.

Section 5.5. The property factors reiterated the points made under Section 5.4 about their having no delegated authority or influence in decision making or the duration of the claims process. In this case, there were multiple trades involved, requiring a schedule of works and a quote process under the instruction of the Loss Adjuster. The property factors did not dispute that the restoration works took an extended period of time to complete and that this would have been a cause of distress to the affected owners, but they did not accept the assertion that this was due to delay on their part, as the direction and authority for proceeding with insurance works rests exclusively with the insurer and the Loss Adjuster appointed by them. The property factors contended that there had been no breach of Section 5.5.

Section 6.1. The property factors referred to Section 4.2.1 of their Written Statement of Services which lists the methods by which homeowners may report matters that require attention. Works that are anticipated to be within their delegated authority to act are instructed, the amount of the delegated authority (£20 + VAT per household) being set out in the Development Schedule. Larger works will be subject to comparative quotation and/ or agreement for instruction. Multiple minor works had been instructed over the management term and carried out in a satisfactory manner, but the property factors accepted that isolated incidents, including a delay to terrazzo repairs, were reported, but they were addressed and resolved, including under the complaints process and resolved at that stage. Accordingly, no breach of Section 6.1 existed.

Section 6.4. The property factors stated that their Written Statement of Services did not stipulate production of a planned programme of cyclical maintenance as part of the core service, but that works required or desired would be identified by the Development Manager during inspections, and records of previous contracts for recurring cyclical works were held for reference and referral when the next cycle was due. Liaison with the committee on such works was ongoing, with pending contracts for consideration in the following year raised at AGMs for consideration and direction, so that there was an awareness of planned works, preferred contractors who have been approached, and planning for tendering and anticipated finance requirements.

With reference to the replacement of the roof covering of the flatted blocks, the property factors referred to a roof renewal proposal from the then Chairman of the committee dated 25 April 2016, which they produced, along with the Minutes of AGMs in 2016, 2017, 2018 and 2019. It was recorded in the Minutes of the AGM of 2016 that this was put on hold until the subcommittee had obtained a quotation. In the 2017 AGM Minutes the project was put on hold pending an inspection to determine the condition of the roof. The 2018 AGM Minutes referred to an inspection to be carried out by the company who had been engaged previously. It was also reported that the existing guarantee had expired, the letter of 25 April 2016 having noted that the company who held the guarantee were, at that time, not being recommended on the basis of cost. The 2019 AGM Minutes noted that the inspection indicated that the roof was in reasonable condition and that minor works had been approved.

The Chairman’s Statement had referred to a contractor attendance at Block 119 in Autumn 2019 and to alleged communication regarding a repair of c.£6,600 per flat. The property factors stated that this was not supported by paperwork held by them and the assertion that, had an inspection been carried out in 2019, the cost would probably have been in the region of £1,500 per flat was not accepted, on the basis that the comparative costs were not supported by factual cost comparison.

Property factor's duties. The homeowner had argued that the property factors had failed to comply with several Sections of their Written Statement of Services. The property factors responded to each of these in turn:

- **Section 4.1 Routine Maintenance**
  The property factors stated that the homeowner's submission made no specific reference in support of breach of this Section and the submission recorded that significant minor works were instructed over the years. The Chairman's Statement had referenced window cleaning and the property factors had upheld the homeowner's complaint in its complaint responses. The annual roof inspection had also been highlighted and had been addressed during the complaints process. The inspection had been carried out in summer 2018 and quotes were being sought in 2019, but the termination notice had been received by the time the complaint response was issued in October 2019, the property factors had requested whether this matter was to be pursued further by them. They accepted that isolated incidents had been reported and addressed including under the complaints procedure and resolved at that stage, so contended that no breach of Section 4.1 existed.
- **Section 4.4 Major Projects**
  The property factors' view was that their management of major projects had been in accordance with the terms of Section 4.4 of their Written Statement of Services. The larger works referred to in the application referred to water ingress to lower tier garages at 2 Blackford Avenue. It was not disputed that water ingress had occurred, with one garage being particularly affected. Various attempts to track, trace and source the root cause had been carried out, with consideration being given to pipework to an external tap, upper car park forecourt drainage, structural weakness or defect in the two-tier garage construction and the boundary wall with the neighbouring property. This had involved variously consulting engineers, consideration of the legal obligation to contribute to the mutual boundary and potential contingency in the event of refusal by the neighbours, excavation of test areas and bore holes for soil sampling. It was a complex and laborious process, requiring consultation and financing with professional advisers and homeowners at all stages. It was not disputed that investigative works had taken time and that this will have been a cause of distress to the affected owners, but the property factors had been committed to progressing the matter to conclusion and there had been no breach of Section 4.4.
- **Section 4.5.1 Routine repairs**
  The view of the property factors was that the homeowner's submissions did not contain any specific details or stated instance to which direct response could be made and, to their knowledge, all routine matters had been dealt with in terms of this Section. Reference in the complaint submissions to delay in work to terrazzo repairs had been covered in the property factors' submissions under Section 6.1 of the Code of Conduct and in this regard, the complaint had been upheld, so there was no existing breach under Section 4.5.1 of the Written Statement of Services.

- **Section 4.6 Property Inspections**
  The property factors referred to the Development Schedule, which stated that routine property inspections would be carried out by the Property Manager on a monthly basis. They said that on-site inspections did take place, routine as well as periodic visits, but that, partly due to their inability under present circumstances to check their archived paper records, they could not produce evidence of all completed reports by way of verification. They did, however, concede that information that could be verified in this regard would not be in keeping with their service level agreement.
- **Section 8.5 Block Insurance**
  The property factors referred to Section 09 of the Development Schedule for the arrangements regarding sharing of commission with the broker, as set out in their submissions in respect of Section 5 of the Code of Conduct. They contended that no breach of Section 8.5 of their Written Statement of Services had occurred.

The Hearing

Summary of Oral Evidence

A Hearing was held by way of a telephone conference call on the morning of 24 November 2020. The homeowner, Mr Kennedy, participated in the call and the property factors were represented by their Operations Director, Miss Angela Kirkwood and Miss Jeni Bole, their Technical Manager (Legal).

The Tribunal Chairman told the Parties that they could assume that the Tribunal members had read and were completely familiar with all of the large volume of written submissions and the documents which accompanied them and that it would not be necessary to lead the Tribunal through that evidence in detail again. The Tribunal did, however, want to be clear as to which facts and circumstances were being adduced in support of each Section of the Code of Conduct and the Written Statement of Services that were the subject of complaint in the application. The homeowner accepted that the Tribunal's conclusions in respect of a number of the alleged breaches would turn on the question of whether the Tribunal considered that the homeowners had knowledge of the existence of the Development Schedule.

Looking first at Section 1.F of the Code of Conduct, the homeowner confirmed that his complaint related to the Development Schedule. The Tribunal asked the property factors when the Development Schedule had been incorporated into the Written Statement of Services and they confirmed that it had been in 2013. They also confirmed that their App, allowing access from a Smartphone had come in during 2017. They thought that some 4 or 5 owners had purchased since 2013, so would have received their copies of the Written Statement of Services and Development Schedule by post.

The property factors stated that, as the Development Schedule was an Appendix to the Written Statement of Services, they would never send one out without the other.

They also regularly referred in Newsletters to the Development Schedule. They adopted the same process across their entire portfolio of 47,000 properties.

The homeowner said that he came upon this issue from a different angle, namely that when he wanted to complain, neither he and his committee members nor the former chairman could find it.

In relation to Section 2.1, the homeowner confirmed that his complaint was about an untrue statement made by the property factors in a letter of 19 November 2019 that if no meeting had been held to decide the question, the notice to terminate was not validly given, as it did not comply with the procedures in the Deed of Conditions. He argued that the provisions in the Deed of Conditions referred to a meeting to appoint factors and not to their dismissal or the termination of their contract. The property factors replied that it was their understanding that the Tenements (Scotland) Act required decisions to be taken by majority and added that, for example, they would not simply take the word of the committee in relation to agreement to major works. The homeowner responded that a Deed of Conditions regulates relations amongst owners, but that it cannot be relied upon by outsiders. He could not understand why the property factors felt they had any right to anything more than the termination letter.

There was no further discussion of Section 2.5 of the Code of Conduct, as the property factors had already conceded as part of their response to the homeowner's complaint letters that a breach had occurred.

The homeowner confirmed that his complaint under Section 5.3 related to his contention that the property factors had taken hidden/secret commissions. If the property factors had not stated in their tender for the contract in 2005 that they were perhaps the only factors who did not take commission on block insurance premiums, he would have accepted the position. The property factors had a higher burden to ensure that the Homeowners were aware that commission was being taken, rather than hiding it away in the Development Schedule. When the committee discussed the factoring costs in connection with a possible change of factor, they did so, believing that a change might result in a much higher premium, as a new factor might add a commission, which, they understood, the present factors did not. The property factors told the Tribunal that brokers earned their living from receipt of commissions and that had always been the case. They confirmed that profit sharing with the broker had started after the company was purchased from the Gibb family. The property factors found that they were dealing directly with quite a number of claims, so it was fair that the broker's commission should be shared. The property factors stated that the issue of commission was clearly set out in their Written Statement of Services, the Development Schedule and their Newsletters. Any increase in premiums was potentially due to a revaluation of the buildings and was nothing to do with commission. The owners were not any worse off, as the property factors took only a share of the broker's commission. They added that their original tender had stated that they did not take commission but referred to the fact that insurance was dealt with by brokers. The homeowner expressed concern that such a large proportion of the commission was going to the property factors, with only 1-2%

being retained by the broker. He remained of the view that the owners believed, erroneously as it turned out, that the property factors were giving owners a benefit by not charging commission.

The failure to comply with Section 5.4 was, the homeowner said, in relation to the insurance claim following water ingress in one block of flats and the complaint was about the inordinate delay in resolving the claim. It was for the property factors to show that the delay occurred through circumstances that were not of their making. He did not know when the claim had been pulled together and submitted. The property factors stated that notification of the claim had been made straightaway, as it was apparent when the emergency work was carried out that it was a major common repair. The insurer had appointed a Loss Adjuster and, ultimately, any delay was beyond the property factors' control,

The homeowner confirmed that his complaint under Section 5.5 was the same issue as for Section 5.4.

In relation to his complaint under Section 6.1, the homeowner was highlighting the terrible lack of progress regarding the problem of water ingress to the garages. Discussion of that issue was held over until the portion of the Hearing dealing with Section 4.4 of the property factors' Written Statement of Services.

Under Section 6.4 of the Code of Conduct, the homeowner contended that a huge bill was now anticipated as a result of the property factors' failure to ensure the roof was inspected in summer 2019. The property factors referred the Tribunal to the Minutes of the 2019 AGM, where it was noted that the Factor's Report stated that an inspection in November 2018 had found the roof to be in reasonable condition. They also repeated that the figure of £6,600 per flat mentioned in the homeowner's application was not supported by the paperwork they held.

The homeowner told the Tribunal, with regard to his complaint under Section 6.4 of the Code of Conduct, that monthly inspections did not always happen. The property factors responded that this had been conceded in the response to the complaint. The discussion then turned to the matter of the roof repair.

The homeowner told the Tribunal that when the Guarantee for previous work was about to expire in 2016, the owners had come close to carrying out a major job, as it would bring with it a fresh guarantee, but had decided instead to have regular inspections. This had happened for a couple of years, but not in 2019. An owner had reported a leak, and someone came out to inspect it, He reported to nearby owners that the roof needed work which would cost about £40,000 per block. The Homeowners were never given a quotation for any other contractor to inspect the roof. They had been under the belief that they might be able to use a short-term remedy to give them a few more years.

The property factors said that they had not found anything to suggest that the conversation to which the homeowner referred had taken place. They had not heard anything to support the contention that extensive works were required, and they referred the Tribunal to the AGM Minutes of April 2019 and the Factor's Report to that meeting of an inspection in November 2018. They had never received a report

from contractors which supported the contention that extensive replacement work was necessary. The view of the homeowner was that the owners had lost an opportunity to buy more time for the roof.

The Tribunal then heard representations in relation to the complaint that the property factors had failed to carry out the Property Factor's duties. This related to Sections 4.1, 4.4, 4.5.1, 4.6 and 8.5 of the property factors' Written Statement of Services.

Under Section 4.1, the homeowner's complaint related to the roof inspection due in 2019, window cleaning and minor work, much of which had been upheld at the complaint stage and, to the extent that it related to the roof inspection, it had been discussed at the Hearing under Section 6.4 of the Code of Conduct.

Section 4.4 deals with major projects and the homeowner referred to the matter of water ingress to the garages. He did not know how it could have taken so long to deal with this issue and no timeline had been provided by the property factors. It was for them to explain the inordinate delay. He could not determine what proportion of the delay was down to the property factors and what was down to contractors. The property factors agreed that it had been a protracted issue. Some remedial attempts had been unsuccessful and, latterly, it had involved employing various professionals, but efforts had been made to establish the cause of the water ingress and to find a remedy.

The homeowner had nothing new to add to his written submissions in respect of his complaint under Section 4.5.1 of the Written Statement of Services. The property factors reminded the Tribunal that the issue of delays in a terrazzo repair had been upheld at the complaints stage.

The homeowner confirmed that his complaint under Section 4.6 referred to the routine inspections and in particular the standing instruction to have the roof inspected annually. The property factors reminded the Tribunal that they had conceded at the complaints stage that the information on inspections that they could verify would not be in keeping with their service level agreement.

Section 8.5 of the Written Statement of Services relates to commission on block insurance premiums and the Parties agreed that this had already been dealt with under Section 5.3 of the Code of Conduct.

Closing Remarks

The homeowner told the Tribunal that the remedy against an agent who has taken secret commissions is to refund them in full. The cost of repairing the garages will be substantially higher than it would have been had the property factors dealt with the matter three years ago and the loss of use of the garages is ongoing. He also repeated the loss of amenity to those owners affected by the delay in bringing the insurance claim for the common stair to a satisfactory conclusion. There had been a complete failure to provide proper accounting following termination a year ago and the homeowner asserted that the Tribunal should make an Order to provide an accounting. There was a mystery about what had happened to the property factors' records in relation to the flood claim at 2 Blackford Avenue. There had been

deliberate obstruction and deceit on the part of the property factors over the termination process by their refusal to accept the notice of termination and co-operate with the new factors.

The property factors said that sight of the core document, namely the Written Statement of Services, had not been disputed by the homeowner. It makes several references to the Development Schedule and it is also regularly referenced in Newsletters. They had seen a report of the homeowner's footprint on the Portal. Between 2017 and 2019, there were 131 entries showing activity by him and that included having downloaded the Development Schedule from the Portal on 20 October 2019. This established that he had managed to access it, albeit after the date on which he served the purported notice of termination. The issues regarding the water ingress to the garages were very complex and had become protracted, but it was clearly a matter that could not be easily resolved. The condition of the stair where there had been a flood was unpleasant for owners, but the stair was not unusable. The property factors had provided their final invoices, so there was no issue regarding their accounting. As regards the termination process, they had a duty to ensure that all proprietors had been notified of the process. That had been their sole intention. They had not been calling into question the homeowner's word. All they had sought was documentation to satisfy them that the correct process for deciding to terminate the contract had been observed.

The Parties agreed to meet outwith the Hearing to discuss the more detailed final accounting that it appeared the homeowner required and that this would not be a matter for the Tribunal to consider.

The Tribunal Members advised the Parties that they would give very careful consideration to all the evidence, written and oral, provided to them and that the Tribunal would issue its decision in due course. The Tribunal Members then considered their Decision.

Findings of Fact

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the Property which forms part of a development of 24 flats erected circa 1971 and known as Ashfield Grange, at the corner of Grange Loan and Blackford Avenue, Edinburgh. There are 4 blocks, each of six flats, comprising Numbers 2 and 4 Grange Loan and 119 and 121 Blackford Avenue. The development includes several blocks of garages.
- The detailed provisions for maintenance, insurance and use of the flats and garages and other parts of the Development are contained in a Deed of Conditions by Malcolm Sanderson (Scotland) Limited recorded GRS (Midlothian) on 12 March 1971.
- The property factors, in the course of their business, managed the common parts of the development. The property factors, therefore, fall within the

definition of “property factor” set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 (“the Act”).

- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 23 November 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act and have failed to carry out the property factor’s duties.
- The homeowner made an application to the Housing and Property Chamber of the First-tier Tribunal for Scotland (“the Tribunal”) received on 9 March 2020 under Section 17(1) of the Act.
- The concerns set out in the application have not been addressed to the homeowner’s satisfaction.
- The Tribunal intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.
- The property factors’ Written Statement of Services can be accessed on their website. The Development Schedule, containing, *inter alia*, bespoke provisions for the development is to be found, using individual access passwords, in the JamesGibb+ part of the website.

Reasons for Decision

Section 1F of the Code of Conduct provides that the Written Statement of Services should set out clear information on how to change or terminate the service agreement.

The first matter for the Tribunal to determine was whether the Homeowners must be taken to have been aware of the existence of the property factors’ Development Schedule. If the Tribunal was satisfied that they had actual or constructive knowledge of its existence, then they had to be regarded as having intimation of its terms, which would mean that the Tribunal could not uphold any complaint in relation to the period of notice of termination required by the property factors or the split, between the property factors and the broker, of the broker’s commission on the block insurance premiums, as both are clearly set out in the Development Schedule.

The homeowner stated that neither he, nor any of the committee members or the former Chairman of the Ashfield Grange Proprietors’ Association had any knowledge of the existence of the Development Schedule when a letter was sent by the homeowner to the property factors, on 16 September 2019, giving them four weeks’ notice of termination.

The property factors told the Tribunal that the Development Schedule had been in place since 2013, when they first produced a Written Statement of Services designed to comply with the requirements of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors. They provided the Tribunal with copies of their Newsletters, "The Address", for Winter 2012 and Autumn 2013. The Winter 2012 edition led with a section on the launch of their new website. It also contained a full-page article on the 2011 Act, which had come into force on 1 October 2012 and advised customers that the property factors would in the coming months be sharing with them their Written Statement of Services.

The Autumn 2013 edition of "The Address" began with a column advising customers on how to access the customer portal on the website, where they would find all important information relating to their development, including Written Statements of Service. It stated that customers who did not use the internet or preferred to have paper copies to just let them know and they would be happy to send a copy of relevant information. The article also stated that the property factors would keep customers informed, through "The Address" of new uploads to the portal. In a separate article, the Newsletter advised that the property factors had now finalised each development's Written Statement of Services and added "For ease of use (and to avoid printing over 63,000 sheets of paper!) we have uploaded each WSS to your client portal for your information and perusal. Of course, if you do not have access to our website, and you wish a copy of the Statement, please get in touch with us and we will be happy to send you a copy".

The property factors also provided a copy of the covering letter that they sent by post to new owners, along with a welcome pack which included a copy of the Written Statement of Services and the Development Schedule and details of how to access the Client Portal Area.

The Development Schedule is referred to in Clauses 2.2, 4.1, 4.5.1, 5.1.1, 5.3.1, 5.3.4, 5.4.7, 8.5, 8.12 and 11.1 of the Written Statement of Services. Clause 5 refers the owner to the Development Schedule to ascertain the amount of the property factors' annual management fee, Clause 8 states that the property factors share the broker's commission and refers owners to the Development Schedule for details of the broker's commission, and Clause 11, which deals with Termination of Agreement refers to it for the required notice period of three months.

The view of the Tribunal was that the Homeowners must have had actual or at least constructive knowledge of the existence of the Development Schedule. It is referred to ten times in the Written Statement of Services and those purchasing after 2013 would have received it in hard copy. The Tribunal could not accept that none of the Homeowners had sought to ascertain what was in the Development Schedule, which contained all the information specific to their development, including the level of the management fee. The property factors' Newsletters made it clear that there was a Written Statement of Services, which could be accessed via the portal but also that any customers who did not have access to the website could ask for a hard copy to be sent to them.

Having determined that the Homeowners had actual or at least constructive knowledge of the existence of the Development Schedule, it followed that the Tribunal must determine that the Homeowners had actual or at least constructive knowledge of its contents, including the requirement for a three-month notice period for termination and the commission sharing arrangement with the brokers. Accordingly, the Tribunal could not uphold any part of the application which was dependent on the Homeowners being ignorant of any matter covered in the Written Statement of Services or the Development Schedule.

The Tribunal was satisfied that the Written Statement of Services set out clear information on how to terminate the agreement. It referred to the Development Schedule for the period of notice that was required, and it should have been obvious to the Homeowners that they would have to consult this further document to check the period of notice they had to give. The Tribunal accepted that the period of notice might not be the same for every development and it was perfectly reasonable that it should be in a separate Development Schedule, provided it was clear in the Written Statement of Services where it was to be found. **Accordingly, the Tribunal did not uphold the homeowner's complaint under Section 1F of the Code of Conduct.**

Section 2.1 of the Code of Conduct states that property factors must not provide information which is misleading or false. The property factors had not offered any written evidence directly in relation to this Section, as they contended that the homeowner's submissions did not contain any specific details or stated instance to which a direct response could be made. They argued that, in the absence of any evidence to support the claim, no breach of Section 2.1 of the Code of Conduct existed. At the Hearing, however, the homeowner confirmed that his complaint was about an untrue statement made by the property factors in a letter of 19 November 2019, that if no meeting had been held to decide the question, the notice to terminate was not validly given, as it did not comply with the procedures in the Deed of Conditions. He argued that the provisions in the Deed of Conditions referred to a meeting to appoint factors and not to their dismissal or the termination of their contract and that, accordingly, the property factors were not entitled to anything more than the letter of termination. The property factors responded that it was their understanding that the Tenements (Scotland) Act required decisions to be taken by majority. and added that, for example, they would not simply take the word of the committee in relation to agreement to major works.

The Tribunal agreed with the homeowner's view that the provisions in the Deed of Conditions regarding meetings appeared to apply only to the setting up and conduct of a meeting to appoint factors and not to the termination of their services. The view of the Tribunal was, however, that it was dealing with a difference of opinion as to legal interpretation and that the comments made by the property factors in their letter of 19 November 2019 were reflective of a genuinely held belief and, if that belief was mistaken but not unreasonable, it was not fair to state that they had given false or misleading information, as there had been no intent. The property factors had also referred the Tribunal to the Tenements (Scotland) Act 2004 and the requirement for decisions to be by majority. The view of the Tribunal was that it was not unreasonable for them to seek such evidence as was reasonably necessary to enable them to accept

that the letter terminating their appointment had been sent following due process. They had told the Tribunal that they would not simply take the word of the committee in relation to agreement to major works. The Tribunal saw the sending of the termination letter as an analogous situation. The Tribunal did feel that the property factors should have accepted the Minute of the Meeting of 20 November 2019, at which retrospective sanction had been sought and obtained to the sending of the termination letter, but had they done so, they would have been entitled to insist, applying the terms of the Development Schedule, that a notice period of period of three months must then follow. The property factors took a different view from the committee on the legal position regarding termination and it was regrettable that this had resulted in litigation, but that action had been settled, with an award of expenses, albeit at the judicial rate, so the Tribunal could not determine that the fact that the property factors' interpretation was incorrect entitled the homeowners to any form of compensation. **Accordingly, the Tribunal did not uphold the complaint under Section 2.1 of the Code of Conduct.**

Section 2.5 of the Code of Conduct states that property factors must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, their aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if they require additional time to respond. Their response times should be confirmed in the written statement. The property factors had conceded in their responses to the letters of complaint, that they had fallen short of their service level standards. **Accordingly, the Tribunal upheld the complaint under Section 2.5 of the Code of Conduct**.

Section 5.3 of the Code of Conduct states that property factors must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit they receive from the company providing insurance cover and any financial or other interest they have with the insurance provider. They must also disclose any other charge they make for providing the insurance. The homeowner's complaint under this Section was entirely dependent on the Tribunal accepting the complaint under Section 1F that the property factors had not given adequate notice of the existence of the Development Schedule. The Tribunal had held that the Homeowners had actual or constructive knowledge of the Development Schedule and its contents. It clearly sets out the split of the broker's commission between the broker and the property factors. The Homeowners had not suggested that they were unaware of the Written Statement of Services and, as already noted, it contained 10 references to the Development Schedule and made specific reference to the fact that the property factors shared the broker's commission. The property factors had made full disclosure of the arrangements regarding that commission and had confirmed that they did not receive any commission, administration fee, rebate or other payment or benefit from the company providing insurance cover and that they had no financial or other interest with the insurance provider. They made no other charge for providing the insurance and confirmed in Section 8.4 of the Written Statement of Services, that they shared the broker's standard commission. **Accordingly, the Tribunal did not uphold the complaint under Section 5.3 of the Code of Conduct.**

Section 5.4 of the Code of Conduct provides that, if applicable, property factors must have a procedure in place for submitting insurance claims on behalf of homeowners and for liaising with the insurer to check that claims are dealt with promptly and correctly and Section 5.5 of the Code of Conduct requires property factors to keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves. The Tribunal dealt with the complaints under these Sections together. It was not disputed that the property factors had a procedure in place for submitting insurance claims and liaising with the insurer to check that claims are dealt with promptly and correctly. The homeowner's complaint was about the inordinate length of time it had taken to bring to a conclusion an insurance claim in respect of the common stair at 2 Blackford Avenue. The property factors agreed that it had taken a long time but stated that they had intimated the claim immediately and had arranged for emergency repair works to be carried out, but the insurer had decided to appoint a Loss Adjuster and at that point the property factors ceased to have any control of the process. The Loss Adjuster's client was the insurance company, and the Loss Adjuster was not under an obligation to pass on information on a routine basis to the property factors. The view of the Tribunal was that no evidence had been provided to suggest that there had been any undue delay on the part of the property factors and that the explanation provided by the property factors was a reasonable one. **Accordingly, the Tribunal did not uphold the complaints under Sections 5.4 and 5.5 of the Code of Conduct.** The Tribunal expressed their hope, however, that the property factors would contact the Homeowners to confirm the date on which the claim was lodged and the date on which they were advised of the appointment of the loss adjuster. They had not had this information to hand at the Hearing but had offered to provide it.

Section 6.1 of the Code of Conduct states that property factors must have in place procedures to allow homeowners to notify them of matters requiring repair, maintenance or attention. They must inform homeowners of the progress of the work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific reports are not required. In relation to his complaint under Section 6.1, the homeowner had told the Hearing that he was highlighting the lack of progress regarding the problem of water ingress to the garages. The Tribunal was of the view that the issue regarding the water ingress to the garages would be more appropriately covered in its deliberations on whether the property factors had failed to carry out the property factor's duties, as the standards expected of them in relation to major repairs were set out in much more detail in the Written Statement of Services.

It was not disputed that the property factors had the necessary procedures in place. The property factors had accepted in their response to the homeowner's complaint, that there had been isolated instances including a delay to terrazzo repairs, but these had been addressed and resolved, including under the complaints procedure, where a complaint about window cleaning had also been partly upheld. The Tribunal noted that the property factors had offered a refund of one month's factoring charges by way of recompense. This had not been accepted by the homeowners but was regarded by the Tribunal as reasonable in all the circumstances. **Accordingly, the**

Tribunal did not uphold the complaint that the property factors had failed to comply with Section 6.1 of the Code of Conduct.

Section 6.4 of the Code of Conduct says that if the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then property factors must prepare a programme of works. The homeowner told the Tribunal that monthly inspections did not happen. The property factors responded that there was no programme of cyclical maintenance, but they had conceded in their response to the complaint under Section 4.5.1 of the Written Statement of Services that the archived records to which, in present circumstances with COVID-19 restrictions they had only limited access, would indicate that they had not met the agreed service level regarding monthly inspections. The discussion then turned to the matter of the roof repair.

The homeowner contended that a huge bill was now anticipated as a result of the property factors' failure to ensure the roof was inspected in summer 2019.

The Tribunal noted that the only incontrovertible evidence on this matter were the Minutes of the AGMs of the Ashley Court Proprietors' Association. The Parties were agreed that there had been an inspection in August 2018, when only minor repairs had been recommended, and that there had not been an inspection in the summer of 2019. The property factors' Report to the 2019 AGM stated that the Property Manager had inspected the roof with a contractor in November 2018 and had found the roof to be in reasonable condition. The Homeowners had provided no evidence to back up their contention that they were now facing a huge bill. They had relied on an apparent chance remark by a contractor to some of the owners that replacement of the roof would cost £40,000 per block but they had not brought any of the owners as witnesses to the Tribunal, so the Tribunal could not determine that the conversation took place but, more importantly, could not determine the context of any such remark and whether the contractor on the roof was suitably qualified to assess its condition and to provide costings for repair works. The property factors had told the Tribunal that the figure of £6,600 per flat mentioned in the homeowner's application was not supported by the paperwork they held.

The question of roof maintenance was raised at the AGMs. Agreement to form a sub-committee to oversee the roof maintenance project had been obtained at the 2016 AGM, with the question of roof renewal put on hold until the sub-committee had obtained quotations. In 2017, the owners at their AGM decided that an annual inspection would be carried out to determine the condition of the roof and any maintenance would be carried out accordingly to preserve the roof for as long as possible. In 2018, it had been agreed to have a roof inspection carried out by the company who had carried out the last inspection and, at the AGM of 25 April 2019, it was noted that an inspection had found the roof to be in reasonable condition, with minor work to replace cowls to vent pipes and renew baskets over the box gutters having been approved by the committee.

The Tribunal's view was that, in July and November 2018, there had been no matters of serious concern raised following inspections. The property factors were instructed to carry out annual inspections, but that did not mean that they had to be

exactly 12 months apart. The inspection in November 2018 had provided further reassurance and there was no evidence to suggest that there had been a marked deterioration between then and November 2019, when the reported conversation between a number of owners and a contractor had taken place. It appeared that the contractor had been on the roof to carry out a repair, not to provide a report on its general condition. The property factors had stated that the figure of £6,600 per flat was not supported by the paperwork they had (possibly no more than an invoice for the work he carried out) and, had the contractor reported to the property factors that he thought the roof should be replaced, the duty of the property factors would have been to report back to the homeowners and seek instructions as to whether to obtain a formal report and quote from that company, together with competitive quotes from other contractors. This process would have started in November 2019. The instructions to instruct a roof inspection every year were not disputed but, on a strict interpretation, provided the inspection took place sometime in 2019, the property factors would have fulfilled their obligation and the fact that an inspection had been carried out in November 2018 meant that, even if the interpretation of the instructions were to ensure inspections at least every 12 months, the property factors had until November 2019 to fulfil that mandate.

By the time of their response on 11 October 2019, to the homeowner's first letter of complaint, the property factors were aware of the intention of the owners at Ashley Grange to change factors and, in that letter, they stated that they had already begun to seek quotations from alternative contractors for the roof inspection and had intended presenting these to the committee for a decision. The slight delay had been down to the very wet weather over the summer period and, in addition, contractors, through excessive workload, had been slow to provide quotes. The property factors asked the homeowner to let them know if the committee still wished the presentation or if it was their preference to wait until the change of factor had occurred. The view of the Tribunal was that this was a reasonable question to ask, as the new factors would, in all probability, have their own list of approved contractors.

The view of the Homeowners was that, had the roof inspection been carried out by August 2019, 12 months after the previous inspection, they would not be facing huge bills. The Tribunal determined that this could be no more than speculation and that, in order to establish any sort of claim for loss, the Homeowners would have to establish that the condition of the roof in August 2019 was significantly better than it was in November of that year. The Tribunal was not persuaded by the argument that the Homeowners had been denied the opportunity of repairing the roof at a much lower cost. The Homeowners had indicated their belief that the cost might have been £1,500 per flat, but, as with the figure of £6,600, this, too, must be regarded as speculation. It was unfortunate that the 2019 roof inspection had not been carried out by the time the owners gave notice to the property factors, but there was no evidence to suggest that the owners had been prejudiced or that, had it been carried out in August, the roof would have been found to be in materially better condition with resultant savings in the cost of recommended works. The Tribunal was also unable to make a finding that the roof inspection should have taken place in August. The evidence suggested that the agreement was annual inspections, without further

specification as to month. **Accordingly, the Tribunal did not uphold the complaint that the property factors had failed to comply with Section 6.4 of the Code of Conduct.**

Failure to Comply with the Property Factor's Duties

"Property Factor's Duties" means, in relation to a homeowner, duties in relation to the management of the common parts of land owned by the homeowner. Alleged failures are judged by reference to the Written Statement of Services.

The Homeowners complained that the property factors had failed to comply with five Sections of their Written Statement of Service, namely Sections 4.1, 4.4, 4.5.1, 4.6 and 8.5. The complaint under Section 8.5 (Block Insurance) had already been dealt with by the Tribunal under Sections 5.4 and 5.5 of the Code of Conduct, so was not considered further by the Tribunal.

Section 4.1 of the Written Statement of Services applies to Routine Maintenance. It provides that roof inspections and gutter cleaning will be provided on an as required basis and that statutory inspections of the emergency lighting and fire-fighting equipment will be arranged by the property factors in accordance with the individual requirements. Gardening and cleaning services will be provided in accordance with the Development Schedule. The Development Schedule refers to the James Gibb+ Client Portal for detail in respect of gardening and cleaning. The Homeowners had complained about the arrangements for window cleaning and the failure to carry out a roof inspection in 2019. The matter of the roof inspection had already been dealt with by the Tribunal under Section 6.4 of the Code of Conduct. The homeowner had accepted at the Hearing that the issue regarding window cleaning and some minor maintenance matters had been resolved at the complaints stage. The Tribunal did not, therefore, consider further the complaints under Section 4.1.

Section 4.4 of the Written Statement of Services applies to Major Projects and, as it sets out in much more detail the process that the property factors will follow, the Tribunal decided that it was better considered at this stage rather than under Section 6.1 of the Code of Conduct. The complaint related to water ingress to the lower-level garages within the development.

The Homeowners stated in their applications (in the Chairman's Statement) that the problem of water ingress had first been reported to the property factors in October 2015 and that, by summer 2019, there had been no progress towards identifying the cause and the remedy. The homeowner repeated at the Hearing that he did not know how it could have taken so long to deal with this issue and no timeline had been provided by the property factors. It was, he said, for them to explain the inordinate delay. He could not determine what proportion of the delay was down to the property factors and what was down to contractors, but cumulative delays by the property factors had cause the water ingress to continue for much longer than would have been the case if they had managed the matter competently and timeously.

The property factors agreed that it had been a protracted issue. They did not dispute that water ingress had occurred, with one garage being particularly affected. They

described in their written representations the various attempts that had been carried out to track, trace and source the root cause, with a number of possibilities having been explored. It was a complex and laborious process, requiring consultation and financing with professional advisers and homeowners at all stages. It was accepted that this would have been a cause of distress to the affected owners, but the property factors had been committed throughout to progressing the matter to conclusion. Some remedial attempts had been unsuccessful, and a number of professionals had had to be employed, but various things had been investigated and progressed by the property factors, who did not accept that they were responsible for any delay in resolving the matter.

The Tribunal noted that the blocks of garages were not common property so, strictly speaking, did not come under the terms of the contract with the property factors. This was noted in the Minutes of the 2017 AGM. In their Report to the AGM, the property factors had said they were happy to assist with repairs to the garages, and charges would be apportioned accordingly amongst the individual garage owners. They reported that the water ingress issue with one of the garages would require further investigation by removing a section of surface from the front of another garage, this being the next area to be investigated, as several water tests and investigation work had not resulted in water ingress.

The matter was discussed again at the 2018 AGM, when the property factors reported that meetings had been held with a waterproofing solutions company, who had recommended the excavation of a test area at the corner of one of the garages and the retaining wall with an adjoining property. The anticipated cost of this work was approved at the Meeting. One of the owners told the Meeting that he had had a friend who was a structural engineer look at the garage and surrounding area and felt that the boundary wall with the adjoining property might be leaning over and coming away from the garage. The structural engineer had suggested a bore hole test. There was a reference in the Minutes of the 2019 AGM to a structural survey of the boundary wall, but it was not clear from the Minutes whether this was directly related to the water ingress issue.

The Tribunal considered whether to reject the complaint regarding the garages as incompetent, since they are not common property and were, therefore, not included in the contract between the owners and the property factors but, as it was clear that they had been involved and there was evidence that all the owners had agreed in 2018 to contribute to the cost of some of the investigative work, the Tribunal determined that the work of the property factors in relation to the water ingress issue should be deemed to be covered by the requirement to carry out the property factor's duties, even though the costs would be borne primarily by the owners of the garages and not by the owners as a whole.

The view of the Tribunal was that the evidence showed clearly that this had been a very complicated matter, with an element of "trial and error", which, unless early steps at remedial work happened to be successful, was likely to be a lengthy process. The onus of proof lay with the homeowner and he had not satisfied the Tribunal that the property factors had been responsible for any delays in the matter. It appeared to the Tribunal, from the evidence that they had provided, that the property factors had acted

reasonably in their attempts to assist the garage owners and the owners as a whole. Unfortunately, the matter had not reached the stage of a project specification and cost estimates, but it had not been established that this was due to delay on the part of the property factors. **Accordingly, the Tribunal did not uphold the homeowner's complaint in relation to Section 4.4 of the Written Statement of Services.**

Sections 4.5.1 and 4.6 of the Written Statement of Services relate to Routine Property Inspections and refer for the detail to the Development Schedule, which provides that routine inspections of the development will be conducted by the Property Manager on a monthly basis. The property factors had conceded that in this regard they had failed to meet their agreed service level requirements. **Accordingly, the Tribunal determined that the property factors had failed to comply the property factor's duties in respect of Section 4.6 of the Written Statement of Services.**

Property Factor Enforcement Order

Having upheld in part the homeowner's complaint and determined that the property factors had failed to carry out the property factor's duties and to comply with the duty incumbent on them, by Section 14 of the Act, to comply with the Code of Conduct, the Tribunal had to consider whether to make a Property Factor Enforcement Order. Both the failure to comply with the property factor's duties under Section 4.6 of the Written Statement of Services and to comply with Section 2.5 of the Code of Conduct had been conceded by the property factors in their responses to the complaints and written representations. The Tribunal determined that, as the factoring arrangement had ended, the making of an Order was, in all the circumstances of the case, unnecessary, as it would achieve no purpose. The failures on the part of the property factors had been inconvenient and annoying for the homeowners but were not such as would merit an Order requiring the property factors to compensate them. **Accordingly, the Tribunal decided not to make a Property Factor Enforcement Order.**

Finally, the Tribunal noted the request by the homeowner that he and the committee be awarded payment, as part of any Order, to compensate them for the time it had taken to deal with the termination process and the other issues raised in the application. It was an academic point, as the Tribunal had decided not to make an Order, but the Tribunal thought it appropriate to add that, unless their agreement with the homeowners provides for remuneration, committee members of proprietors' associations are acting on an entirely voluntary basis and they would be wise to ensure that they do not at any point assume personal liability for expenditure such as legal fees without obtaining in advance appropriate assurances from the owners they represent that they will be fully reimbursed.

Right of Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland

on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

9 December 2020