Housing and Property Chamber
First-tier Tribunal for Scotland

Decision on homeowner's application:

Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/17/0353

Property at 18 Broom Drive, Clydebank G81 3HY ("the Property")

The Parties:-

Myra Martin, 43 Kirk Crescent, Old Kilpatrick, G60 5NJ ("the Applicant")

West Dunbartonshire Council, Regeneration, Environment & Growth, Council Offices, Garshake Road, Dumbarton G82 3PU ("the Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Ann MacDonald - Ordinary member

DECISION

1. The Respondents have failed to comply with section 14(5) of the Property Factors (Scotland) Act 2011 through breach of sections 1 and 2.5 of the Code of Conduct for Property Factors.

2. The Respondents failed in March and by no later than 2 June 2015 to identify and by no later than mid July 2015 to carry out the full extent of repairs to the roof of the building of which the Property forms part, which was a failure to carry out a property factor's duty as defined in section 17(5) of the Property Factors (Scotland) Act 2011.

3. The Respondents have otherwise not failed to comply with section 14(5) of the said Act, nor failed to carry out any property factor's duty (as defined in section 17(5) of said 2011 Act) as alleged in the application.

Introduction

4. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the rules in the

schedule to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

5. By application received on 12 September 2017, the Applicant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") for a decision that the Respondents had failed to ensure compliance with the Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act"). The application alleged breaches of sections 1, 2.4, 2.5, 5.4, 6.9, and 7.4 of the Code. The alleged breach in respect of section 1 was a failure to provide the written statement of services at all.

6. The Applicant also sought a decision that the Respondents had failed to comply with certain other property factor's duties owed to her. In particular she alleged that the Respondents had breached their duties to her in not carrying out and completing repairs to the roof of the building of which the Property forms part, to a satisfactory standard.

7. The application included a covering letter which provided more detail and also a letter from her husband to the Respondents, received by them on 9 August 2017, which provided more detail of her complaint.

Findings of Fact

8. Having considered all the evidence, the Tribunal found the following facts to be established:-

(a) The Property is a flat within a building containing four flats numbered 18, 20, 22, and 24 Broom Drive, Clydebank. The Property is in the eastern most half of the building on the first floor. The Property includes common parts of the block and the area surrounding it. It takes access directly from the ground floor and its front door, at the side of the building, opens out onto a patio area. The patio area is separated from the ground of the neighbouring building by a larch-lap style panel fence.

(b) The Applicant and her husband, Anthony Martin, were co-owners of the Property from 2006 to April 2017. They resided there during that period. The Respondents continue to own one of the four flats making up the building, namely No.24. The others were transferred into private ownership in January 1985 (No.20), May 1997 (No.22) and December 1998 (No.18, being the Property).

(c) By Feu Disposition registered in the Land Register on 29 December 1998, the Respondents transferred the Property to the Applicant's predecessors. The relevant terms of that Feu Disposition are set out in entry number 1 in the Burdens Section of the Land Certificate (pages D12 to D13). In terms of clause 9(a) of the Feu Disposition (page D12) the Respondents were given the role of factor so long as they remained proprietor of any dwelling house within the building.

(d) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 17 December 2012. Their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

(e) In terms of clause 9(c) of the Feu Disposition (page D13) the factor is:
"responsible for the general management and administration of the Block and, without prejudice to that generality shall have the powers conferred on him and has the duty to perform the duties imposed on him by the [Feu Disposition] and any other functions assigned to him in relation to the building by the persons entitled to appoint him."

(f) In terms of clause 6(b) of the Feu Disposition (pages D7 to D8) it is provided:
"Subject to the following [the Respondents not being the factor] the Factor shall have full power and authority to instruct and have executed from time to time such works as he in his judgement shall consider necessary for the repair, maintenance and renewal of the Common parts or any part thereof. . .".
The costs of such works are shared equally between the owners of the four flats.

(g) In February or early March 2015 there was a storm. The roof of the building had clay tiles. The storm dislodged numerous tiles from the roof. Many of these fell onto the patio outside the front door to the Property. The Applicant and her husband reported this to the Respondents. The Respondents sent a maintenance officer to inspect the building. By letter of 18 March 2015 the Applicant was notified of anticipated replacement by the Respondents of "missing/slipped slates at various locations above No.18" with an estimated cost to the Applicant and her husband of £64.51 with the work to be completed within 40 days.

(h) Repair work was carried out pursuant to that notification. This was in April or May 2015. After the repair had been carried out the Applicant and her husband ("the Homeowners") noticed that a tile had appeared in the guttering above their living room which faced the front of the building and that there were other loose tiles around the chimney area. There were missing or damaged tiles at the back and front of the building and around the chimney which were visible. Water was coming down a wall in a bedroom of the Property. The Homeowners tried to contact the Respondents' maintenance officer by visiting the Respondents office at Cochno Street, Clydebank . They informed the Respondents that the repair work had been inadequate but were unable to speak to the maintenance officer. Eventually a further visit by or on behalf of the Respondents took place.

(i) Following a further inspection by or on behalf of the Respondents, by letter of 2 June 2015 the Applicant was notified of anticipated replacement of "damaged cast iron guttering at the front of the property

above No.18/20 living room windows" with scaffolding required and an estimated cost to them of £159.69 with the work to be completed within 40 days. The Homeowners telephoned the Respondents again after receipt of this letter. They tried unsuccessfully to speak to the Respondents' Maintenance Officer, Roy Elliott.

(j) After the letter of 2 June, some scaffolding was put up and taken down in summer 2015. The Homeowners visited and called the office on numerous occasions to seek to have the repairs carried out. It is possible that some repairs were carried out but if they were, their extent is unknown.

(k) When the Homeowners returned at the end of July 2015 from their holiday the water was still coming into the Property. It came down the chimney wall and into the living room and the corner of the back bedroom. At this time they had to instruct emergency work from the Respondents to the interior of the Property. This alleviated the water ingress to some extent. The insurers for the Property refused to carry out work until the roof works had been completed. The Homeowners required to contact the Respondents' office on numerous occasions to seek a further assessment of the problem.

(l) The Respondents' Mr Alistair McFall inspected the building. He expressed the view that the work carried out should not have been passed. By letter of 11 August 2015 the Applicant was notified of "additional roof repairs and redressing [of] additional leadwork" with an increase of estimated cost from that in the letter of 2 June to £206.80. No repairs were made pursuant to the letter of 11 August 2015.

(m) On or about 6 October 2015 a roof inspection was carried out by the Respondents. By letter of 8 October 2015 the Applicant was notified of replacement/renewal of missing or slipped tiles "around the full block", bedding in of all ridge tiles and hip tiles and the renewal of a damaged cast-iron gutter at the right gable of the building. She was also notified of the intention to erect scaffolding around the complete block. She was notified that the work would be completed within 40 days. Following this letter scaffolding was erected around the complete block. None of the repairs notified were carried out. Water ingress continued to affect the Property.

(n) The scaffolding around the block was completed in early December 2015. At that time the Respondents' "Sold Property" department and the Craft Supervisor decided that the roof was beyond repair and required complete replacement. No further work was carried out pursuant to the 8 October 2015 notification. The Homeowners were not informed of this decision at the time or of the reason for the lack of work. On 14 December 2015 on behalf of himself and the Applicant, Mr Martin made a complaint to the Respondents.

(o) Without any prior warning the Homeowners were informed of the decision to replace the roof by letter from the Respondents' Customer Liaison Officer Margaret Hollywood dated 25 January 2016. The letter advised them of an estimated cost to them of £5000. It did not seek their views on whether the roof replacement was appropriate.

(p) By e-mailed letter dated 1 February 2016 to Ms Hollywood the Applicant made a detailed complaint to the Respondents. Receipt of the letter was acknowledged by Ms Hollywood by e-mail on 2 February 2016.

(q) By letter dated 11 February 2016 the Respondents' Customer Relations Officer Leanne Rea responded to the complaint of 14 December 2015.

(r) By e-mailed letter dated 16 February 2016 the Applicant made a further complaint to the Respondents' Ms Rea.

(s) Despite reminders from the Homeowners dated 18 March and 4 April 2016 the Respondents replied to the letters of 1 and 16 February 2016 on 5 April 2016 with their Mr Cairns' letter of 4 April. Mr Cairns was the Respondents' Strategic Director of the Regeneration, Environment and Growth department. The letter waived any charges arising out of the work done pursuant to the 8 October 2015 notification.

(t) The scaffolding was taken down on or about 21 April 2016. During the down-taking the fence of the Property was damaged by the scaffolding contractor. The Applicant's husband was paid and accepted £150 from the contractor for said damage.

(u) The roof replacement with consequential works were fully completed by August 2016. By e-mail dated 9 August 2016 the Respondents' Roy Elliott confirmed that the Respondents would not charge the Homeowners in respect of any of the repair notifications in 2015.

(v) The Homeowners received an invoice dated 27 January 2017 for a sum of £3,916.70 being their share of the cost of "roof renewal works" in 2015/16. This has remained unpaid.

(w) The Homeowners were marketing the Property for sale in February 2015 when storm damage occurred. They had obtained a single survey home report in October 2013. The cost of that is unknown. They obtained further such reports in October 2016 and March 2017. The cost of these is unknown. They sold the Property in April 2017.

Procedure and Preliminary Matters

9. On or about 10 October 2017 Maurice O'Carroll, a convenor of the Housing and Property Chamber of the First-tier Tribunal for Scotland with delegated powers under section 18A of the 2011 Act, referred the application to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's clerk dated 30 October 2017 which also invited

the parties to make written representations to the Tribunal and to lodge supporting documents known as productions. The Respondents made written representations attached to an e-mail to the Tribunal dated 20 November 2017. The Applicant did not make written representations. The Tribunal made directions, dated 11 November (notified on 17 November) and 4 December both 2017, requiring the parties to lodge further productions. Both parties lodged various productions in response to those directions within the time limits specified. With her further productions the Applicant sent an explanatory e-mail to the Tribunal dated 19 November 2017.

10. By e-mail dated 22 November 2017 the Applicant notified the Tribunal that she would be calling her husband, Mr Anthony Martin, as a witness. There was no list or notification of witnesses notified by the Respondents.

11. A hearing was fixed to take place at Wellington House, 134 to 136 Wellington Street, Glasgow on 15 December 2017 at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by the said letters of 30 October 2017.

12. At the hearing the Applicant appeared on her own behalf. The Respondents were represented by their solicitor Christopher Anderson. At the outset, on questioning from the Tribunal, Mr Anderson made it clear that he wished to call Alan Young as a witness. No prior notification of Mr Young being called as a witness had been given to the Tribunal. The Tribunal raised with Mr Anderson the terms of Rules 22(1)(b) and 24(4). Mr Anderson explained, candidly, that he had been unaware of the Rules (or their predecessors). He requested the Tribunal to direct that Mr Young be allowed as a witness. He explained that Mr Young is a Housing Asset and Investment Manager of the Respondents and that he was responsible for all property factoring carried out by the Respondents. Mr Anderson submitted that he was, in effect, his "client". However Mr Anderson was unable to identify any participation of Mr Young in the conduct complained of, or how he assisted the Respondents' case as a witness. He would be there simply to respond to whatever the evidence for the Applicant might be. The Applicant opposed the request. She said that she had first heard from Mr Young when he sent the Respondents' Written Statement of Services in August 2017. All of her dealings in relation to the substance of her complaints had been dealt with by Richard Cairns or Leanne Rea.

13. The Tribunal noted that the power of a party to call witnesses under Rule 24(4) (formerly rule 23(4) of the equivalent 2016 Regulations) was subject to Rule 22(1)(b) (formerly rule 19(1)(b)) which required a party to send to the Tribunal by no later than 7 days prior to any hearing a list of witnesses that the party wishes to call to give evidence, and to any other direction of the Tribunal. In effect the Respondents were seeking a direction granting relief from their failure to comply with Rule 22(1)(b). In making that decision the Tribunal gave effect to the overriding objective in Rule 2(1) namely to deal with the proceedings justly. Two aspects of that objective appeared relevant, namely informality and flexibility of proceedings and ensuring so

far as practicable that the parties are on equal footing procedurally and able to fully participate in the proceedings. The starting point was non-compliance with the relevant rule by a legal representative without any colourable excuse, while the Applicant had complied with the rule. Furthermore no explanation was given to the Tribunal as to the concrete assistance that Mr Young would give to the Respondents' case as it was set out in their written representations. It was not suggested that any particular prejudice would arise to the Respondents' case if Mr Young were not allowed to give evidence. If he was allowed, then unforeseen matters might be raised to which the Applicant might not have reasonable opportunity to consider and respond. The situation had been brought about by the Respondents' failure to have regard to the Rules (or their predecessors). In these circumstances, applying the overriding objective it appeared to the Tribunal justice was served if Mr Young was not admitted as a witness. It directed that Mr Young not be admitted as a witness.

14. Prior to the hearing, the Tribunal raised with the Mr Anderson the documents that had been lodged by the Respondents on 12 December 2017. On having Rule 22(1)(a) and in particular Rule 22(2) brought to his attention Mr Anderson indicated that he did not wish to have the documents lodged late.

Evidence

15. The evidence before the Tribunal consisted of:-

- The application form and its appendices numbered 1(a) to 1(d) and 2 to 6
- Applicant's attachments (a) to (d)
- Applicant's productions with e-mail to Tribunal dated 19 November 2017 in response to Tribunal's direction, including photographs taken by Mr Martin
- Applicant's productions with letter to Tribunal received on 7 December 2017 in response to Tribunal's direction No.2
- Respondents' productions with e-mail to Tribunal dated 22 November 2017 in response to Tribunal's direction
- Respondents' productions with e-mail to Tribunal dated 6 December 2017 in response to Tribunal's direction No.2
- The oral evidence of the Applicant
- The oral evidence of Anthony Martin

The Hearing

16. The Tribunal found that the Applicant gave oral evidence honestly. Her oral evidence, which understandably overlapped with her submissions, is summarised in the reasoning below. The Tribunal also found Mr Martin to be giving an honest account to the best of his ability. Where for example he was unable to recall a matter such as the content of the complaint of 14 December 2015, he was prepared to admit this. Both were cross-examined by Mr Anderson where appropriate. The Tribunal accepted their oral evidence so far as it related to factual matters within their own knowledge except where it was inconsistent with the Applicant's written complaints. In that situation the position as stated in the written complaint, being closer in time to the events described was accepted.

The Written Statement of Services

17. The Applicant complained that the Respondents had breached their duty under section 1 of the Code which provides, among other things,

> "You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner."

18. The Applicant's complaint was that until they received it with the Respondents' letter to them dated 17 August 2017 they had never received the written statement, despite having lived at the Property since 2006. The Applicant said that she had never received it. Mr Martin also said that until then he had not seen the Written Statement of Services which was now lodged with the Tribunal. Mr Anderson declined to cross-examine on this matter.

19. Mr Anderson submitted that his understanding was that when the 2011 Act had come into force the written statement had been sent to the Property but he had no evidence to present in support of this. The Tribunal raised with him the subsequent amendment of the original written statement (in the case HOHP/PF/13/291) relating to the inclusion of VAT in authorised expenditure, which amendment was reflected in the version lodged. Mr Anderson stated that this amended version had not been notified to any customer beyond those in the block to which that earlier case had related. He also advised that while the updated written statement of services was available on the Respondents' website, this availability was not communicated to owners in the regular correspondence with them such as invoices.

20. In all the circumstances the Tribunal had no reason to doubt the evidence of the Applicant and her husband and concluded that that the Respondents breached section 1 of the Code in that respect until on or about 17 August 2017.

Consultation and Communication

21. The Applicant complained that the Respondents had breached their duty under section 2.4 of the Code which provides, among other things,

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

22. The Applicant's complaint was that the Respondents had not consulted with her and had not sought her written approval before instructing the replacement of the building's roof. Nor had she and her husband given delegated authority to the Respondents to do this, even in emergencies.

23. She told the Tribunal that no-one from the Respondents had come and spoken to them about the proposal, nor sought their approval. They had just been told that it was happening. Mr Martin confirmed this. They had received a letter from the Respondents' Margaret Hollywood dated 25 January 2016 which told them that the roof renewal was going to take place. The Applicant also said that if the repairs following the storm in 2015 had been carried out properly the roof would not have required replacement. On questioning from the Tribunal as to her position with regard to the Respondents' Leanne Rea's letter of 11 February 2016 she was not able to say whether or not the roof would have required replacement in any event in 2021.

24. For the Respondents, Mr Anderson submitted that (1) the Respondents had carried out a consultation procedure; and (2) in any event neither written approval nor consultation was required under section 2.4 by virtue of the Respondents having delegated authority under clause 6(b) of the Feu Disposition to act without approval whenever they considered it necessary or desirable for repair, maintenance or renewal of any common part of the building including the roof.

25. With regard to the consultation procedure he submitted at least at first that Ms Hollywood's letter of 25 January 2016 and that of the Respondents' Mr Cairns dated 4 April 2016 were a consultation procedure. On questioning from the Tribunal he accepted that neither invited the Applicant or her husband to express their views on whether the roof should be renewed as proposed.

26. On the issue of written approval and consultation not being required in any event, Mr Anderson submitted that the second exception to the duty in section 2.4 applied, namely the existence of a delegated level of authority to act without approval of homeowners. This delegation was to be found in clause 6(b) of the Feu Disposition. The situations of delegation were whenever the Respondents in their judgment considered it necessary to repair, maintain or renew a "Common Part" (as defined in clause 1(2)). There was no delegation for improvements but here the roof was to be renewed. The Respondents judged that to be necessary and in those circumstances no consultation procedure or written approval was required under section 2.4. Mr Anderson did add that the Respondents as a council and public body could not avoid consultation because of other public law duties and responsibilities.

27. The Tribunal found that in this case there had been no consultation or seeking of written approval of the Applicant and her husband for the roof renewal. The letters from the Council did not contain any invitation to them to express their views before the decision to renew would be taken. Consultation comes before the decision being consulted about is taken. In this case the letter dated 11 February 2016 indicates that the decision to renew had been taken in December 2015 by the Respondents without any approval from the Applicant. She and her husband were then informed of this in the letter dated 25 January 2016.

28. However the Tribunal also found that for the reasons set out by Mr Anderson there was in this case no requirement to consult or obtain written approval for

the renewal of the roof under section 2.4 of the Code. This was because the second exception in section 2.4 applied. That applied to both the duty to have the consultation procedure and the seeking of written approval. There was therefore no breach of section 2.4.

29. Before leaving this matter, the Tribunal expressed its disappointment that there had not been consultation in this case given the concession that it was necessary by virtue of other public law duties of the Respondents. It would also have gone some way to alleviating the palpable sense of dissatisfaction felt by the Applicant and her husband in being presented, without warning, with a potential estimated liability of £5000 for the roof renewal.

Consultation and Communication

30. The Applicant complained that the Respondents had breached their duty under section 2.5 of the Code which provides, among other things,

> "you must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly as possible and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement. (Section 1 refers)."

31. The Applicant complained about a breach of section 2.5 in relation to 3 enquiries or complaints:
    (1) Complaint made on 14 December 2015;
    (2) Complaint made on 1 February 2016 and elaborated on 16 February 2016;
    (3) Complaint made on 4 April 2017.

    She said that these complaints had been made either directly by her or by her husband on her behalf as well as his.

32. With regard to complaint (1) Mr Martin said that he couldn't recall what it said verbatim, but it would have been made on behalf of both of them. The Applicant said that her letter of 1 February 2016 (complaint (2)) had been written in response to Margaret Hollywood's letter of 25 January. It had been acknowledged by Ms Hollywood by e-mail on 2 February 2016 it had been suggested that either a Mr Cummings or the Respondents' Contact Centre would reply. However she had not heard from either Mr Cummings or the Respondents' Contact Centre in reply. Instead she had received the letter addressed to Mr Martin from Leanne Rea the Respondents' Customer Relations Officer dated 11 February 2016. This appeared to respond to complaint (1) and set out the "on-going situation", but did not deal with the content of complaint (2).

33. The Applicant then wrote her letter of 16 February 2016 responding to Ms Rea's letter. Both it and the letter of 1 February 2016 remained unanswered. Mr Martin confirmed that he had sent both to the Respondents by e-mail. Reminders from Mr Martin, being e-mails addressed to the Respondents' Chief Executive Joyce White dated 18 March 2016 and 4 April 2016, were sent to the Respondents. Only on 5 April 2016 did the Respondents e-mail to the Applicants a letter from

Richard Cairns, Strategic Director, Regeneration, Environment and Growth, dated 4 April 2016, which contained some response to complaint (2).

34. With regard to complaint (3), with the Applicant's knowledge, on 4 April 2017 her husband wrote to Mr Cairns complaining about being required to pay for roof renewal and about selling the Property for £8000 less than expected which he attributed to the Respondents' failure to effect repairs in 2015 which had in turn led to their renewal decision. In the same letter Mr Martin sought a "subject access request". He had not received a response until a letter from the Respondents' Data Protection Officer, Richard Butler dated 7 June 2017. In his e-mail to Mr Cairns dated 19 June 2017, copied to Mr Butler he had complained that this was outwith the 40 day period for a response time.

35. The Applicant complained that in these circumstances the Respondents' own timescales had not been complied with. In addition the enquiries and complaints made had been ignored or not dealt with. In particular neither the letter from Ms Rea nor that from Mr Cairns addressed the matters raised in complaint (2). She said that she and her husband had contacted the Respondents shortly after the storm in 2015 to tell them that the damage had been quite extensive. They had come out and looked at the roof and this resulted in a second updated notification. Then, following some work, a broken tile appeared in the front guttering and water had started coming down the chimney. The internal damage which had been caused by this was covered by the Respondents' insurers who had funded internal repairs, completed on 8 September 2016. On the subject access request documentation relating to the roof repairs and replacement had not been provided.

36. For the Respondents Mr Anderson took no issue with the fact that complaints had been made as alleged and that responses had only been made with the letters mentioned by the Applicant. He accepted that in their Written Statement of Services the Respondents had timescales for responding which had not been kept to. With regard to complaint (1), he accepted that the timescale was that set out for a stage 1 complaint namely 5 working days and did not contend that there were any exceptional circumstances to extend this. He accepted that there had been a failure to keep to that timescale. With regard to complaint (2), his submission was the same.

37. With regard to the suggestion that complaint (2) had not been dealt with "as fully as possible" Mr Anderson had no further submission to make.

38. With regard to complaint (3), Mr Anderson submitted "enquires and complaints" in section 2.5 only related to property factor-related enquiries and complaints. The third complaint was not related solely to property factoring. The making of a "subject access request" was a data protection matter. The duty in section 2.5 did not apply to such enquiries.

39. The Tribunal found that section 2.5 had been breached in respect of all three complaints. Section 2.5 required complaints and enquiries to be responded to "within prompt timescales". With regard to complaints (1) and (2), the Tribunal

found that the timescales within the Respondents own Written Statement of Services were good indicators of promptness. There was no dispute that the 5 working-day period for Stage 1 complaints procedure applied. With regard to complaint (1) there should have been a response by 21 December 2015. Instead the response was on 11 February 2016. On complaint (2) there should have been a response by 8 February or in any event by 23 February 2016. Instead the response was on 5 April 2016.

40. With regard to complaint (3), the Tribunal accepted the submission that section 2.5 related to property-factoring enquiries or complaints. A "subject access request" alone would not be covered by section 2.5. However the letter of 4 April 2017 was not restricted to a "subject access request". It also included a complaint in respect of the repairs to the roof and its renewal both of which are property-factor enquiries. The "subject access request" was an enquiry made as a consequence of the complaint and in connection with it. The Tribunal found, therefore, that section 2.5 did apply to complaint (3).

41. Given that the enquiry was one under the data protection legislation the Tribunal found that compliance with the 40 day timescale as required by the data protection legislation would have been a sufficiently prompt timescale for the purposes of section 2.5. Mr Anderson accepted that this required a response by 29 May and this was accepted by the Applicant. Instead the response was on 7 June 2017.

Insurance

42. The Applicant complained that the Respondents had breached their duty under section 5.4 of the Code which provides:

> "If your agreement with homeowners includes arranging any type of insurance, the following standards will apply:
>
> . . . If applicable, you 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 being dealt with promptly and correctly. If homeowners are responsible for submitting claims on their own behalf (for example for private or internal works), you must apply all information that they reasonably require in order to be able to do so."

43. The Applicant's complaint was that the Respondents refused to make a claim on the common insurance policy for the building on their behalf and insisted that the Applicant make the claim.
44. She told the Tribunal that she and her husband had done all of the claims submission work themselves. When they had telephoned the Respondents' "Sold Property" department they were told to put in their own claim. Mr Martin confirmed this and said that he and the Applicant had to put in a claim. In cross-examination from Mr Anderson, the Applicant said that when the Respondents had changed the common insurer they had received a new booklet from the Respondents. She had not read it "cover to cover". Mr Martin said that he had no recollection of a booklet.

45. For the Respondents Mr Anderson confirmed that the Respondents had never activated their power not to arrange a common insurance policy for the building. There was a policy in force. He submitted that where roof repairs were required, owners had to deal directly with the insurance company under the common insurance policy. He submitted that this had been made clear to homeowners every time a fresh quote for renewal of the policy had been received from the insurers. The duty to have a claims procedure in section 5.4 did not apply. Rather the situation was that homeowners were responsible for submitting claims on their own behalf. All Homeowners were supplied with a booklet sent annually which told them of this position.

46. The Tribunal found that the duty in section 5.4 on a factor to have an insurance claims procedure applied only where the factor was responsible for submitting claims. In the present case there was nothing in either the Written Statement of Services or the Feu Disposition making the factor responsible for submitting claims. In these circumstances the duty in section 5.4 to have such a procedure did not apply. There was no breach of section 5.4.

Pursuit of Contractors

47. The Applicant complained that the Respondents had breached their duty under section 6.9 of the Code which provides:

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

48. The Applicant complained section 6.9 had been breached on two occasions: (1) in not pursuing the scaffolding contractor that had erected the scaffold around the building to have him replace a boundary fence of the Property which he had damaged when removing the scaffolding on or about 21 April 2016; (2) in not pursuing the contractors who had carried out the roof repairs notified in March 2015 and carried out in April or May 2015.

Pursuit of Scaffolding Contractor

49. With regard to pursuit of the scaffolding contractor, the Applicant submitted that the scaffolder had damaged the panels of the larch-lap style boundary fence adjoining the patio and parallel to the side of the building. She referred the Tribunal to photographs taken by her husband. She said that these showed damage in two areas. The lowest strip of one of the panels had been detached from one panel. The lowest four strips of the front-most panel in the south-east corner of the Property had been chipped and holed. Under cross-examination she accepted that she had initially refused to accept the contractor's offer to repair the fence. On being asked whether her husband had received £150 as compensation for the damage, she said that they had received it and that they had replaced 3 panels of the fence and repainted the whole fence.

50. Mr Martin told the Tribunal that he had required to take time off work because of the damage. He had met the scaffolding contractor on site. The contractor had admitted some of the damage but not all. He then sent the scaffolder, named Willie, with a cheque for £150 for the damage. He came to the Applicant's door with that cheque. What caused the complaint to the Tribunal

was the fact that the Respondents had insisted that he and Mrs Martin had required to deal with it themselves. When it was put to him that the Respondents had provided "mediation" between them and the contractor he said that he did not see any "mediation" by the Respondents. They had simply passed on a paper with Willie's name and phone number.

51. For the Respondents, Mr Anderson submitted that the damage caused by the scaffolder was consequential damage, separate from the work that the Respondents had instructed. There was no defect in the work, or services provided by the contractor to the Respondents. Therefore there was no claim against the scaffolding contractor for the Respondents to pursue. It was a matter between the Homeowners and the scaffolding contractor.

52. He also submitted that in any event the Applicant had accepted damages of £150 from the contractor and that there was no basis to pursue the contractor for that reason also.

53. The Tribunal asked the Applicant to identify the defect in the work done by the scaffolders that would give rise to a claim by the Respondents. She was unable to do so beyond a suggestion that the defect was the damage to the Homeowners' fence. This highlighted to the Tribunal that there was no inadequate work or service provided by the scaffolders to the Respondents which could give rise to a claim by them against the scaffolders. There was nothing defective in the scaffolding work instructed by the Respondents that would allow the Respondents to seek remedial action. As Mr Anderson submitted, the damage to the fence was an incidental matter causing loss to the Homeowners and giving them (and not the Respondents) a possible claim for negligently caused damage separate from the scaffolding contract. In these circumstances the Tribunal found no breach of section 6.9 in this respect. If the Respondents had been under a duty in section 6.9 to pursue the scaffolders then the payment of the £150 would not have prevented a breach under section 6.9 in not pursuing the scaffolders in the first instance.

Pursuit of Roofing Contractor

54. With regard to pursuit of the roofing contractors, the Applicant submitted that it was plain that the roof repairs carried out in April or May 2015 had been inadequate and defective. She spoke to looking out of her front window and seeing a roof tile in the cast iron guttering which had broken where the tile lay. This had been after those repairs had been carried out. The tile had not been there after the storm. It was possible that broken roof tiles had been around the chimney since the February 2015 storm. After the first and only repair they had phoned to report its inadequacy. The cost of that repair was so cheap that it was a concern. They had phoned two days after the scaffolding for the repair had come down. Their complaint covered the tiles around the chimney and not just the broken tile and guttering. They had phoned the Respondents again after the 2 June 2015 letter to query it. The next correspondence was in October 2015. Some scaffolding had been put up at the front of the building after 2 June 2015 but as far as she was aware no work had been done to the roof between 11 August and 8 October 2015.

55. When she and Mr Martin had returned from holiday in July 2015 the water was still coming into the flat. During October to December 2015 the Respondents had extended the scaffolding to go around the whole building. To her knowledge no repair work was carried out in that time. She had phoned at that time to report the water still coming in. As far as she was concerned there had been just one occasion in 2015 after the storm when work had been carried out. When asked about their post-work inspections, the Respondents' Maintenance Officer Roy Elliott had said that the Respondents had to trust their contractors. This indicated that no post-work inspection of the initial roof repairs had taken place. She did not recall meeting Mr Elliott to speak to him. It was possible that they had spoken over the phone.

56. The Applicant was cross-examined by Mr Anderson. Under questioning as to whether she had received any professional opinion on the condition of the roof before its renewal, she said that their Home Report had said that the roof was "fine". On being asked whether she had any evidence to suggest that inefficiency of repairs was responsible for the roof renewal other than her opinion, she observed that the external damage had been caused by the storm, but otherwise nothing. She also said that the continuing water ingress and repair notifications demonstrated that the lack of repair was linked to the replacement of the roof. She said that the roof was fine until the storm and the lack of sufficiently well carried out repairs. The water ingress became worse and worse as time went on.

57. Mr Martin said he and his wife had requested further work to be carried out after the tile had appeared in the guttering. In his view it was not possible for the tile to have been there after the storm in February or March and for him or his wife not to have noticed it. Water from the storm damage in February 2015 continued until the roof replacement had been completed in August 2016. He and his wife could not get insurance to pay for internal repairs until the roof work had been completed. He was unaware of any work done to the roof from August to October 2015. He could not recall the extent of scaffolding during that time.

58. Mr Anderson submitted that all work of the roofing contractors in 2015 had been carried out appropriately. This was recorded in documentation. According to information which he held, all work had been post-inspected. There had been works additional to but not related to the first post-storm repair. The building had been constructed in 1947 with "Rosemary Tiles" used. These were notoriously easy to break with age. The notification letter of 8 October 2015 notified repairs to be carried out. The decision to renew the roof was wholly separate from those repairs or any storm damage. The Respondent's Building Services Department undertook a thorough survey of the roof which was quite clear that the roof needed to be renewed prior to the anticipated renewal date in 2021. Furthermore, given that the Respondents had made the decision to renew, as a gesture of goodwill they had decided not to charge the Applicant and her husband for the costs of the repairs in 2015. He stressed that this was not an admission that the repairs had been defective and was only a gesture of goodwill.

59. Upon being presented by the Tribunal with Mr Cairns' letter of 4 April 2016, Mr Anderson said that some work had been carried out pursuant to the October 8 notification but accepted that there was nothing in the documents that the Tribunal had to indicate the extent of that work. Mr Anderson did not present any evidence to support the Respondents' written representations to the Tribunal that "the four repairs were to different and distinct parts of the roof".

60. In response the Applicant submitted that the Respondents had not provided any evidence as to post-work inspections of the repairs having been carried out.

61. The Tribunal accepted the evidence of the Applicant and Mr Martin as set out above on this aspect of the section 6.9 case subject to allowance for the possibility, expressed by the Applicant in her complaint of 1 February 2016, that some work had been carried out pursuant to the June 2016 notification. Given the complaints about the work or lack of it, the Tribunal found it surprising that the Respondents had not led any witnesses to speak to what had taken place in respect of the repairs but the Respondents had legal representation and had chosen to present their defence without the benefit of such evidence. In these circumstances the Tribunal was unwilling to accept the that all work notified as proposed to be carried out had actually been carried out merely on the basis of the notifications. The Tribunal made the findings in fact (h) to (n).

62. The Applicant submitted that the Respondents should have pursued the roof repair contractor to remedy defects in their work in April or May 2015. Had they done so she submitted, the roof would not have required renewal. The Applicant's case was based on inferring that the instructions given to the contractors by the Respondents mirrored the notification to her in the letter of 18 March 2015. That notified the replacement of "missing/slipped slates at various locations above No.18" for a total estimated cost of £258.05. The difficulty for the Tribunal was that there was no evidence as to exactly what the contractor had been instructed to carry out.

63. Without knowledge of what a contractor had been instructed to do, it was not possible to say that the contractor's work was inadequate with defects and that the Respondents should have pursued the contractor. In these circumstances the Tribunal found no breach of section 6.9 of the Code.

Retention of Information

64. The Applicant complained that the Respondents had breached their duty under section 7.4 of the Code which provides:

> "You must retain (in either electronic or paper form) all correspondence relating to a homeowner's complaint for three years as this information may be required by the homeowner housing panel [now First-tier Tribunal]."

65. The Applicant's complained section 7.4 had been breached because insufficient information had been produced in response to the "subject access request" of 4 April 2017.

66. Mr Anderson submitted that no breach of section 7.4 had been demonstrated. A "subject access request" occurs under data protection legislation and relates to a person and not a property. Merely because the Applicant had not received everything that she or her husband had been looking for under the "subject access request" did not mean that there had been a breach of section 7.4. He was not aware of any non-retention or disposal of correspondence relating to the Applicant's complaints.

67. The Tribunal found that it had not been demonstrated that the Respondents had not retained or disposed of any correspondence relating to the Applicant's complaints. Accordingly there had been no breach of section 7.4 of the Code.

Duty to complete repairs to satisfactory standard and timeously

68. Aside from breaches of the Code the Applicant complained that the Respondents breached their duty under contract as factors responsible for the management and administration of the building to take reasonable care to ensure the repairs notified in 2015 were carried out to a satisfactory standard. Under their written statement of services (on pages 3 and 4) the Respondents' core services include:
    - the deciding of what repairs are necessary to the common structure and the carrying out of them within specified timescales.

    These services have to be carried out to a reasonable standard (2011 Act, s.17(4)) and it is suggested that a reasonable standard was not met. The Applicant submitted that the Respondents had breached their duty of care in carrying out these services. In support of this she relied on what she had said in relation to the breach of section 6.9 for roof repairs and the other documentary material she had put forward to the Tribunal.

69. For the Respondents, Mr Anderson denied that a reasonable standard had not been met. He too adopted his submission in relation to the section 6.9 ground to apply to answer this alleged breach. He submitted that the Respondents had carried out all of the repairs notified in advance and had done so within the timescales specified in the notifications. The Respondents did not put forward any evidence to support this submission.

70. For the Tribunal the question was whether it had been shown that the Respondents failed to meet a reasonable standard in carrying out the core services stated above. Each service had to be assessed in turn.

71. The essential complaint of the Applicant was that the Respondents had failed to act reasonably in the period from February to September 2015 in (a) deciding what repairs to the roof were necessary following the storm; and (b) carrying them out within reasonable timescales. The complaint is set out in the Applicant's letter of 1 February 2015 and on the second page of her letter of 16 February 2015. Essentially it is (a) that the repairs notified in the Respondents' letter of 8 October 2015 should have been notified in their letters of 18 March (or 2 June) 2015 and (b) having been notified should have been carried out well before any decision to renew the roof in December 2015.

72. Did the decision-making fail to reach a reasonable standard? The Tribunal noted that it did not have the benefit of expert evidence as to what a reasonable inspector would have decided were necessary repairs upon the inspections in March and late May or early April 2015. However, there was other material indicative of what should reasonably have been decided. In her letter of complaint of 1 February 2016 the Applicant noted that she had reported in February 2015 lots of broken tiles lying on the patio after a particularly bad storm. The Applicant and Mr Martin were surprised that the initial repair bill notified in March 2015 was so low given the significant damage of the storm in February. After the repair in April or May 2015 there were still visible missing or damaged tiles at the back and front of the building and around the chimney. The Respondents own re-notification of 11 August 2015 indicated a failure to identify necessary repairs at an earlier stage. Taking these elements together the Tribunal concluded that the decision-making in March and June 2015 was not of a reasonable standard. A reasonable standard would have resulted in the March 2015 (apart from the gutter repair) or at the latest June 2015 notifications being in substantially the same terms as that of the October 2015 notification. In not making such a decision as to repairs and notification by no later than 2 June 2015 the Respondents breached their core service duty to the Applicant under the bullet point above.

73. Furthermore, were the repairs carried out within reasonable timescales? The period of 40 days in the notifications appeared to the Tribunal to be a reasonable standard. Clearly the works notified in October 2015 were not carried out within 40 days of the March or June 2015 notifications. Furthermore the October 2015 works themselves were not carried out within 40 days of the 8 October 2015 notification. Nor was any need for replacement of the roof identified within the 40 days. In not carrying out the repairs within their 40 day timescales the Respondents also breached this further core service duty to the Applicant under the bullet point noted above.

74. Furthermore the Respondents had known that there was internal water ingress to the Applicant's property which made carrying out repairs in the 40 days more important.

Property Factor Enforcement Order

75. In her application the Applicant sought:
    - a waiver of the final bill for the roof replacement of £3,916.70
    - an unspecified sum as compensation for the distress caused by the various breaches
    - compensation for the extra costs in estate agency fees and additional home reports caused by the breaches.

76. At the hearing the Applicant indicated that she had suffered untold upset. She was unable to put a value onto it. With regard to the extra costs, in her letter of complaint of 1 February 2016 the Applicant stated that the Property had been marketed for sale before these difficulties had begun in 2015. She had been unable to find the documents showing the amount of estate agents' fees for that marketing. She was not able to find the home report from that time either. She

was able to produce home reports from October 2016 and March 2017 after the roof had been replaced and just before the sale in April 2017, but did not have a figure for their cost either.

77. Mr Anderson submitted that there was no evidence that the roof replacement and its consequent cost had been caused by a failure to carry out repairs at an earlier time or by a failure to pursue contractors. He had no submission to make on the valuation of distress caused. With regard to the claim for extra costs, he submitted that the last home report from March 2017 could not be related to any breach by the Respondents. There was no evidence of any wasted estate agency fees. On that basis the estate agency fees in the Applicant's statement from her solicitors following the April 2017 sale would have been incurred anyway.

78. Where a Tribunal decides that a factor has failed to comply with the Code or other property factor's duty it must decide whether to propose a property factor enforcement order. Such an order ("PFEO") may require the factor to execute such action as the Tribunal considers necessary as a consequence of the failure to comply or to make such payment as the Tribunal considers reasonable as a consequence of the failure.

79. The Respondents' principal failures were in the failure to make to a reasonable standard the decisions of what repairs were necessary to the roof and the failure to carry them out within specified timescales.

80. The Applicant's position on the roof repair was essentially that as a result of these failures she had lost the chance of having the roof thoroughly repaired and made watertight without the need for full replacement. Essentially her position was that but for the breaches in not deciding and carrying out thorough repairs, she and her husband would not have been presented with the January 2017 invoice for £3,916,70 in respect of their share of the roof replacement. The thorough repairs that should have been carried out would have been at a cost. That cost is reflected in the sums of £1,160.39 plus £64.51 as per the March and October 2015 notifications which it is likely would have been charged had the roof not been replaced. On that basis the loss of the Applicant and her husband was £2,691.80.

81. It is true that there was that there was no direct evidence that failures to carry out thorough roof repairs had caused the Respondents to decide to make the roof replacement. However, had there been no failure in duty, a decision to carry out thorough repair work would have been made by no later than 2 June 2015 with the work being completed by mid July 2015. The Respondents did not provide any evidence that had this taken place the recommendation for full replacement would have been made at that time in any event and that there was no possibility of avoiding the full replacement. In fact the Respondents continued to contemplate repairs rather than full replacement until December 2015. There was therefore a real chance that had the failures in duty not occurred, and thorough repairs carried out timeously, the decision to replace the roof would not have been made and the January 2017 invoice not issued.

82. Set against that the Tribunal noted that in his letter of 4 April 2016 Mr Cairns stated that in December 2015 "due to the level of storm damage and the number of temporary repairs being carried out" it was noted that repairs were "no longer effective" and that "The poor condition of the roof and also the gutters informed the decision to commence a new roof application with our Capital Investment Team". In her letter of 11 February 2016 Ms Lea stated that from August 1998 to "date" there had been "11+ roof and gutters repairs carried out."

83. There was therefore a significant chance that even if comprehensive roof works had been commenced in April or June 2015, there would have been a recommendation for and consequent full renewal of the roof. Doing the best that it could the Tribunal estimated this to be 60%. What the Applicant and her husband lost through the Respondents' breach of their contractual duty, was therefore a 40% chance of avoiding the full replacement and the costs entailed with it. The Tribunal found, therefore, that the value of this lost chance was 40% of £2,691.80 being £1,076.72. There was no evidence that the sale price of the Property had been enhanced by the roof replacement in contrast to the alternative of thorough repair. The Respondents' invoice for the roof replacement has not been paid pending the outcome of this application. Accordingly the Tribunal proposed that the Respondents be ordered to issue a credit note in respect of the invoice issued on 27 January 2017 in the sum of £1,076.32 back-dated to 27 January 2017.

84. Turning to the compensation for distress and inconvenience, this related to that caused by the breaches of (1) the contractual duty to decide, instruct and carry out thorough repairs; (2) section 2.5 of the Code (communication); and (3) section 1 of the Code (written statement).

85. The distress and inconvenience following the first breach was set out in detail on the third page of the Applicant's letter of 1 February 2015 and in her letter of 16 February 2015. The distress and inconvenience had two aspects, namely the extensive trouble to which the Applicant went to attempt to contact the Respondents, and more seriously, the water ingress into the Property. Despite the placing of temporary measures, the effects of water ingress, including internal repairs were not fully removed until August 2016. Taking a broad view of the matter the Tribunal found it reasonable to propose that the Respondents pay the sum of £600 as compensation for the distress and inconvenience caused by the breach of contractual duty.

86. With regard to compensation for extra monetary costs the Tribunal found that there was an absence of evidence of what these were. In those circumstances there was no material or vouching to allow Tribunal to reach a figure for compensation. It therefore declined to propose payment for such items.

87. With regard to the Respondents' failures to comply with sections 2.5 and 1 of the Code, both related to failures in communication. Some chasing was required and no doubt as expressed in the chasing e-mails stress was suffered through the lack of response over considerable periods. No substantial inconvenience was identified for the failure to supply the written statement. Again taking a broad view the Tribunal found payment of £150 to be an

appropriate proposal.

88. The Proposed Order accompanying this decision is referred to for its terms.

Court Proceedings

89. The parties are reminded that except in any appeal, no matter adjudicated on in this decision may be adjudicated on by a court or another tribunal.

Opportunity for Representations and Rights of Appeal

90. The Applicant and Respondents are invited to make representations to the First-tier Tribunal on this decision and the proposal. The parties must make such representations in writing to the Tribunal by no later than 14 days after the day of this decision

91. The opportunity to make representations is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

92. Following the making of representations or the expiry of the period for making them, the First-tier Tribunal will be entitled to review this decision. If it remains satisfied after taking account of any representations that the Respondents have failed to comply with their duties, it must make a property factor enforcement order. Both parties will then have a right to seek permission to appeal on a point of law against the whole or any part of such final decision and enforcement order.

93. In the meantime and in any event, the parties may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016.

Date 5 January 2018 signature

Chairperson