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

Amended Decision on Homeowner's application following Review : Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/19/0834

47 Jubilee Park, Peebles EH45 9BF
("the Property")

The Parties:-

Mr Jerry Rimmer, 47 Jubilee Park, Peebles EH45 9BF
("the Homeowner")

Charles White Limited, Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD
("the Factor")

Tribunal Members:
Graham Harding (Legal Member)
Elizabeth Dickson (Ordinary Member)

DECISION

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

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 2.1, 2.5, and 6.9 of the Code

The decision is unanimous

Introduction

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

The Factor became a Registered Property Factor on 7 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application dated 18 April 2019 the Homeowner complained to the Tribunal that the Factor had failed to carry out its property factor's duties and was in

breach of Sections 2.1, 2.4, 2.5, 3, 3.3, 5.2, 5.3, 5.7, 6.3, 6.4, 6.9 and 7.2 of the Code.

2. The Factor had been notified of the application.

3. The Homeowner provided the Tribunal with written representations in support of his application.

4. By Notice of Acceptance dated 3 July 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.

5. By email dated 7 August 2019 the Factor submitted its written representations to the Tribunal.

6. By emails dated 20, 27 and 28 August 2019 the Homeowner submitted further written representations to the Tribunal.

Hearing

7. A hearing was held at Langlee Community Centre, Galashiels on 4 September 2019. The Homeowner attended personally. The Factor was represented by its Managing Director David Hutton and Ms Sarah Wilson another Director.

8. By way of a preliminary matter the Tribunal noted that the Homeowner's recent submissions had been lodged late and also introduced new issues however Mr Hutton advised the Tribunal that he was aware of these and had no objection to them being considered by the Tribunal.

9. Following the Tribunal's original decision on 17 September 2019 the Homeowner submitted an application for a review of that decision on 26 September 2019 and a review hearing was held at Edinburgh on 10 December 2019. This decision takes account of the outcome of that Hearing.

Summary of Submissions

Section 2.1 of the Code

10. The Homeowner advised the Tribunal that he thought there were multiple examples of the Factor providing information which was false or misleading. He referred the Tribunal to the Factor's Communal Landscape Maintenance Specification dated 2013. He said that document specified what work would be carried out on the communal landscaped areas and that it was reasonable for owners to assume that what was written would be followed by contractors. However, at the Residents AGM held on 28 March 2019 he was advised that the woodland area was not included in the work done by the gardening contractor. The Homeowner went on to refer the Tribunal to the Factor's 2012 and 2013 Newsletters which indicated that there would be an increase in the annual gardening costs as the area that had been planted had more than

doubled. It therefore followed that owners expected that maintenance of the woodland area would be carried out. The Homeowner went on to say if the gardening contractor was not following what was set out in the specification why were owners being charged for work that was not being done?

11. The Homeowner also referred the Tribunal to the Factor's minute of the aborted Residents AGM held on 12 February 2019. The minute recorded that "Owners expressed their unhappiness with the ASY Garden Services, Gemma confirmed she has walked around the development with the ASY and agreed that the development is not up to the standard it should be. As a result of this, Gemma will be putting out the garden contract to tender." The Homeowner contended this statement was misleading as later at the quorate AGM which was attended by the gardener there was no clarification of that statement or explanation as to why the contract was not being re-tendered. The Homeowner went on to say that Gemma Hawcroft subsequently stated in a letter that owners at the meeting had been satisfied with ASY's services but there was no record in the Minutes of 28 March 2019 of that being the case.

12. The Homeowner further submitted that as he had a suspicion about whether maintenance of the common woodland area was being carried out, he had asked the Factor to provide detailed and vouched accounts as stated in the Code and which he took to mean that would stand up to an audit. He said he was provided with an income and expenditure account which he did not consider was sufficient so in an email asked for detailed accounts to be produced at the AGM on 28 March 2019. The Homeowner said that in response Miss Hawcroft had said in an email of 19 February that a copy of the detailed accounts itemising all the items would be sent to all of the owners by 7 March but that had never been fulfilled nor were they produced at the AGM on 28 March. In the Homeowners submission this was another example of the Factor providing false or misleading information.

13. For the Factor Mr Hutton referred the Tribunal to a letter dated 26 July 2012 sent to owners by the Factor's then Property Manager Steve Paterson in which it said that the priority in the remedial work was to ensure that there was a weed-free strip of around 1 metre between the shelter belt and the backs of the fences of individual gardens so stopping the problem of weeds from the communal areas spreading into private gardens. Mr Hutton went on to say that the remainder of the ground was left as natural woodland. It had been confirmed at the AGM on 28 March by the contractor that other than helping the young trees to get established there had been no maintenance of the shelter belt and the contractor did not go in to remove litter. Mr Hutton said if there had been an omission on the part of the Factor it was that there had not been clarity in that it had not been made explicit to owners that the whips were no longer being maintained. Mr Hutton said that the areas in question had been taken over from the builders in 2010 and at that time the gardening contractor was Tweedale Groundcare. ASY had taken over in 2013. Ms Wilson pointed out that although it had been stated that costs were to be doubled in 2012 in fact, they had reduced from £14.39 per owner per month to £12.74 per owner per month.

14. With regards to re-tendering the gardening contract Mr Hutton accepted the content of the minute of the meeting of 12 February but did not consider it was an instruction from the owners to carry out a re-tendering exercise as the meeting had not been quorate. Ms Hawcroft had simply been articulating the feeling of the meeting. Mr Hutton apologised if the statement had been misleading. Mr Hutton went on to say that the meeting on 28 March gave the contractor an opportunity to answer questions from the owners. There was nothing unusual about him being present and there was nothing in the minute of the meeting about re-tendering going ahead. For his part Mr Rimmer confirmed that there had been no discussion at the meeting regarding re-tendering. He also said that there had not been a discussion at the February meeting about re-tendering that had been a statement from Ms Hawcroft following on from that meeting although in her defence he felt it was because she believed the work was not up to standard.

15. With regards to the provision of detailed and vouched accounts Mr Hutton said that as Factor they produced vouched accounts on a quarterly basis. What Ms Hawcroft had sent to the Homeowner had been deemed by him not be satisfactory. Ms Wilson explained that additional documents had been offered to be sent to the Homeowner at a cost of £10.00 in accordance with allowed charges in the Written Statement of Services but as these had not been requested, they had been provided at the AGM on 28 March. Mr Hutton went on to say that the documents provided were the extent of the documents available. The garden contractor was employed on an annual contract for a fixed amount and this was then invoiced monthly so as to avoid spikes thus the owners paid a consistent amount each month. The only exception was if additional works were carried out in which case these would be invoiced separately with more detail. In response the Homeowner said his concern had been to ascertain if owners were getting value for money and wanted to know if the work that was said was being done in the Maintenance Schedule was being done.

16. The Homeowner raised a further issue with regards to this section of the Code in that he believed that the procedure recently followed by the Factor of issuing voting slips to owners in respect of instructing an aborculturist to provide a quotation to create a 5 year maintenance plan was invalid as it was not provided for in terms of the Deed of Conditions affecting the Development. The Homeowner directed the Tribunal to Clauses 17 to 20 of the Deed of conditions. In the Homeowner's submissions decisions could only be made at meetings of owners and not by postal votes. If it was otherwise it would be possible for a small group of owners to take decisions without there being a majority in favour including even dismissing the Factor. The information being provided was therefore misleading and false.

17. For the Factor Mr Hutton said that it had been agreed at the meeting of 28 March that Ms Hawcroft would meet with an arboculturist and would then write to owners with recommendations and seek the approval of a majority of owners. Although there had been no vote at the meeting that suggestion had not been opposed. Mr Hutton went on to say that in any event Clause 20.6 of the Deed of Conditions gave the Factor the right to do anything that could

competently be exercised at or by a meeting of proprietors including deciding to carry out a postal ballot.

Section 2.4 of the Code

18. The Homeowner stated that as he had previously indicated before any tree work consultancy could proceed it would require the approval of the owners and the procedure adopted by the Factor was in breach of this section of the Code. He was also of the view that as the Factor's Written Statement of Services provided for a termination fee when an owner sold a property that too was a breach as there was nothing in the Deed of Conditions that provided for such a charge. Furthermore, the Written Statement of Services was not published until 2014 and the owners had not been consulted about its contents prior to it being published.

19. In reply Mr Hutton submitted that it was his understanding that a termination fee would be illegal but that the Factor was entitled to charge an administration fee for the additional work involved in dealing with the seller's solicitor on the sale of a property. The charge made was explicit in the Written Statement of Services and the Factor's services were their services. Mr Hutton went on to say that he was not aware of there being any prohibition in the Deed of Conditions on the Factor providing and charging for this part of the service.

Section 2.5 of the Code

20. The Homeowner submitted that there were several instances where the Factor had failed to respond to enquiries or complaints within the timescales allowed. He specifically referred to letters of 12, 14, 26 and 29 March, emails of 19 March, 8 May, 9 and 12 July and further letters of 16 and 20 May all 2019. In the Homeowner's submission the Factor had failed to properly address his complaints and enquiries promptly and was therefore in breach of this section of the Code.

21. In response Mr Hutton referred the Tribunal to the Factor's Written Statement of Services which provided for a response time of 28 days for any complaint and in his submission all of the Homeowner's complaints and enquiries had been addressed within that time period. The Homeowner had not followed the Factor's complaints procedure. Following his initial complaint to Miss Hawcroft it had been escalated to stage 2 but the Homeowner had instead written directly to Mr Hutton himself. Mr Hutton said there was a clear procedure and also that there was a distinction to be made between a response and a response that was acceptable to the Homeowner.

Section 3 and 3.3 of the Code

22. The Homeowner said that there had to be clarity and transparency and that was why he had requested that the Factor provide him with the gardener's detailed accounts and work schedule as then he would have known that A.S.Y. were not doing any work in the woodland area. He went on to say that

he had always assumed that the work being carried out by the contractors was as stated in the maintenance schedule and in the Newsletters. He also said that although the Factor made reference to a Shelter Belt there was no definition of this in the Deed of Conditions.

23. For the Factor Mr Hutton said that there was a distinction to be made between providing an accounting and whether work being done was acceptable to owners. The Factor provided quarterly accounts that detailed all charges. The Factor was not misappropriating clients' funds and from an accounting point of view the Factor was not in breach of this section of the Code.

Sections 5.2, 5.3 and 5.7 of the Code

24. The Homeowner confirmed to the Tribunal that his complaints in connection with these sections of the Code had now been resolved and he was no longer insisting on them.

Section 6.3 of the Code

25. The Homeowner confirmed to the Tribunal that this complaint was also resolved and was no longer insisted upon.

Section 6.4 of the Code

26. The Homeowner submitted that it was necessary for the Factor to prepare a programme of work. He referred the Tribunal to his letter of 31 March to Ms Hawcroft and emails of 14 February, 19 and 23 March and 19 June all of which addressed the issue with the Factor. He explained that whilst the Factor had indeed produced a programme of work it was largely irrelevant if it was not being followed by the contractor.

27. In response Mr Hutton acknowledged as he had earlier that the Factor should have communicated more clearly with the owners with regards to the work that was carried out in the shelter belt. He went on to say that when Andrew Young of ASY had spoken at the AGM he had only been talking about the shelter belt and not the other areas.

28. The Homeowner further submitted that the area in question was referred to in the Deed of Conditions not as a shelter belt but as communal woodland and the maintenance of the communal woodland was not up to standard. In response to a query from Mr Hutton as to the standard of maintenance expected, the Homeowner said that he did not expect it to be Kew Gardens but he did not expect protective tubes to be lying around or large bramble bushes and other plants to be present. He expected it to be largely weed free but the contractor did not do anything. He went on to say that he thought owners had already been charged for carrying out this work so any additional charges would be abhorrent. He did accept that there could be additional charges for reducing the height of the trees once they reached a certain height as this was not included in the maintenance schedule. The Homeowner referred the Tribunal to Section 3 of the Factor's Communal Landscape

Maintenance Specification 2013 which was headed "SPECIFICATION OF THE MAINTENANCE OF MIXED NATIVE SHRUBS AND WOODLAND AREAS."

Section 6.9 of the Code

29. The Homeowner submitted that as the contractor had failed to provide an adequate service, he should be given a refund or compensation to reflect the increased charges in 2013 and the further 5% increase in 2018. He went on to say that he had pursued the Factor for many years about the inadequate gardening services being provided and there was a duty on the Factor to pursue the contractor.

30. For the Factor Mr Hutton acknowledged the Homeowner's expectations and again referred the Tribunal to Mr Paterson's letter of 26 July 2012 beyond which he had nothing to add.

Section 7.2 of the Code

31. The Homeowner said that following his formal letter of complaint to Ms Hawcroft and her reply he had understood that he had to write a further letter of complaint to Ms Wilson and thereafter there had been several instances where in her response to the Stage 2 complaint he had not been told the complaints procedure was exhausted and he could apply to the First-tier Tribunal. He said this had delayed his application to the Tribunal.

32. In response Ms Wilson said that as part of the Stage 2 complaint process she had gone back to the Homeowner on several occasions asking for more information therefore the process had not ended. The Homeowner confirmed this had been the case.

Property Factor's Duties

33. In support of his contention that the Factor had failed to carry out its property factor's duties the Homeowner referred the Tribunal to a number of sections of the Factor's Written Statement of Services ("WSS"). In Section 1.1 of the WSS regarding the Factor's authority to act he submitted that as the maintenance of the common areas had been inadequate and the contractor should have been pursued the Factor had failed. With regards to Section 1.2 of the WSS the Factor had to act under the terms of the Deed of Conditions. The Factor had taken it upon itself to act as Chair and take the minutes at the aborted AGM in February and at the AGM in March 2019 when the Deed of Conditions requires the owners present to elect a chairperson and someone to take the minutes. The owners had therefore been subjected to unnecessary additional costs. The Homeowner also said that the voting procedure adopted by the Factor was not provided for in the Deed of Conditions.

34. Mr Hutton referred the Tribunal to his earlier submissions and confirmed that Ms Hawcroft had offered to chair the meeting. There had been no objection to this at the meeting in March.

35. With regards to Section 1.4 of the WSS the Homeowner submitted that whilst the owners were being obliged to indemnify the Factor he did not believe that the Factor from its actions was putting the owners first before its own interests and cited the gardening contract as an example as well as the proposal to appoint a tree surgeon where the Homeowner suggested the Factor was riding roughshod over the rules and leaving him and other owners angry.

36. In response Mr Hutton referred the Tribunal to a redacted letter of support that the Factor had received following the March AGM. The Homeowner acknowledged that the behaviour of some owners at the meetings in February and March had been unacceptable.

37. With regards to Section 2.1 of the WSS the Homeowner submitted that from the issues he had raised earlier it could be seen that the Factor had failed exercise the requisite degree of skill and diligence required. Mr Hutton referred the Tribunal to his earlier submissions in this regard.

38. With regards to Section 3.1 of the WSS the Homeowner commented that it did not include any reference to common woodland.

39. With regards to 4.1 of the WSS the Homeowner made reference to his complaints regarding a GDPR breach with documents being stored on the Factor's portal inappropriately. For the Factor Mr Hutton confirmed that once it had been established that a document had been uploaded to the portal inappropriately it had been removed immediately and an apology provided. With regards to the further breach that the minutes of the AGM should show either the property represented or the name of the owner but not both, whilst on this occasion the Factor had accepted the decision of the ICO it did not agree with its findings and it may challenge them on a future occasion.

40. With regards to Section 5.1 of the WSS the Homeowner said he still did not accept that the Factor had fulfilled its obligations to provide a full accounting. Mr Hutton again referred to his previous submissions in this regard.

41. With regards to Section 7.1 of the WSS the Homeowner said he had seen no evidence of the Factor actively working with the owners in relation to the common areas and the discussions with the Factor had been more confrontational than they needed to be. For the Factor Mr Hutton said he did not think there was any thing confrontational and did not think that was the tenet from everyone in the development.

42. With regards to Section 11.5 of the WSS the Homeowner said he took issue with the Factor seeking advance payment for the tree surgeon when the procedure being undertaken was incorrect. Ms Wilson said that the Factor cannot instruct a contractor to carry out additional works until firstly the owners vote to go ahead and then the Factor gets the money. Mr Hutton confirmed that the voting slip sent out by the Factor made it quite clear.

43. With regards to Section 18.4 of the WSS the Homeowner said this was out with the terms of his complaint and therefore not relevant.

44. With regards to Section 19.2 of the WSS the Homeowner referred the Tribunal to his earlier submissions regarding the handling of his complaints.

45. With regards to Section 23 of the WSS the Homeowner submitted that the Factor had failed to provide a professional and competent service. For the Factor Mr Hutton disputed that this was the case.

46. In conclusion the Homeowner stated that the primary issue was that had there been clarity and transparency with regards to the gardening contract that would have allayed his concerns. Because that had not been forthcoming that had led to the current position. He did not believe that the work done by the Garden contractor was in line with the work for which he had been charged. There had been a lack of management of the sub-contractor by the Factor. The Homeowner also submitted that the WSS should have been published before 2014 and that the inclusion of a termination charge should have had approval from owners. He went on to say that the voting process instigated by the Factor was also invalid. He felt that some of the Factors failings were systemic and recurring. It did not have a robust complaint handling procedure. It arrived at a position regardless and needed considerable improvement. For the Factor Mr Hutton referred the Tribunal to his earlier submissions and noted that he was aware that the Homeowner was looking at employing other Factors

The Tribunal make the following findings in fact:

47. The Homeowner is the owner of the property

48. The Property is within the Forest Park, Peebles Development (hereinafter "the Development").

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

50. The Factor's Communal Landscape Maintenance Specification dated 2013 ("the 2013 specification") issued to owners has not subsequently been modified.

51. Section 3 of the 2013 specification includes maintenance of the common woodland area at the development including the removal of litter and rubbish.

52. The gardening contract for the development was undertaken by A.S.Y. Garden Services between 2013 and the current time.

53. The Gardening Specification of Work to be done by A.S.Y. Garden Services was contained in a letter to the Factor dated 1 February 2013 and included removing litter from all areas of the common grounds.

54. The contract price for A.S.Y. Gardening Services from 30 April 2013 until 31 March 2018 was £6500.00 per annum and increased thereafter to £6825.00 per annum.

55. The gardening contractor did not carry out litter picking in the common woodland area.

56. Weed control in the common woodland area was restricted to around the whips until they were established and for a width of one metre behind the fence line of proprietors' houses.

57. Ms Gemma Hawcroft intimated in a minute of a meeting of 12 February 2019 that the Development's gardening services contract would be going out for re-tender.

58. No decision was taken at the AGM on 228 March 2019 to proceed with a re-tendering of the gardening services contract.

59. The Factor provided the Homeowner with all necessary vouching in response to a request for a detailed accounting from the Homeowner.

60. The balloting of owners by the Factor in respect of instructing an arboculturilist report is compliant with the terms of the Deed of Conditions burdening the development.

61. The Factor is entitled to charge an administration fee for work done on the sale of a property in the development.

62. The Factor responded to the Homeowners formal complaints within its timescales provided in its Written Statement of Services.

63. The Homeowner did not strictly follow the Factor's complaints procedures.

64. The Factor failed to comply with its timescales for dealing with enquiries from the Homeowner on some occasions between March 2019 and August 2019.

65. The core service provided by the Factor included a planned programme of cyclical maintenance and the Factor did prepare a programme of works namely the 2013 specification.

66. The Factor did not formally end the Homeowner's Stage 2 complaint until April 2019 as it had requested further information from the Homeowner.

67. The Factor assumed the role of chair and minute taker of the meeting of 12 February and 28 March 2019 in breach of the terms of the Deed of Conditions burdening the development.

68. The Factor breached data protection regulations in respect of owners' personal information put on its portal but removed it immediately on the breach being identified and confirmed by the ICO.

Reasons for Decision

Section 2.1 of the Code

69. The Tribunal was satisfied from the evidence provided by the Homeowner and to some extent acknowledged by the Factor that there had certainly been a lack of clarity as to what had been expected of the gardening contractor throughout the period of his contract from 2013 to the present day. The 2013 specification is however quite clear in its terms as Section 3 includes both shrubbed areas and woodland areas. It was established that what the Factor referred to as the "shelter belt" was indeed the common woodland areas. It follows therefore that an owner reading Section 3 would assume that initially at least the woodland area would be kept weed free for 600mm around each plant and that any litter and rubbish would be removed regularly. There was nothing to suggest in the A.S.Y. Garden Tender Letter of 1 February 2013 that the removal of litter was excluded from the common woodland area as it states "remove litter from all areas of the common grounds". Mr Paterson's letter of 26 July 2012 does not really assist as although it refers to ensuring a weed free strip of around 1 metre from the fences of individual gardens it also refers to maintaining the area as the existing shelter belt and of course pre-dates the tender letter of 1 February 2013 and the 2013 Specification. The Tribunal was therefore satisfied that the Factor had provided the Homeowner with false or misleading information in this regard.

70. The Tribunal did not agree with the Homeowner that by producing a minute of the 12 February meeting that it was the Factor's intention to carry out a re-tendering exercise of the gardening services contract. Although the contract did not go out to tender following the AGM on 28 March the Tribunal was not satisfied that Ms Hawcroft had not intended following the February meeting to undertake such an exercise.

71. The Tribunal was satisfied from the documents provided by the Factor and the evidence of Mr Hutton that the Factor had at the AGM on 28 March 2019 provided the Homeowner with a detailed account including vouching as requested and the information provided was not misleading or false.

72. It did appear to the Tribunal that it would be unusual for a Factor to be prohibited from carrying out a postal ballot of owners and for it to be necessary for all decisions to be taken by owners at an owners meeting. There did however appear to be some force behind the Homeowners argument although significantly Clause 19 of the Deed of Conditions makes no reference to voting at meetings simply to voting. The Tribunal concluded that there would be nothing to prevent a postal ballot if at a meeting of owners, it was decided to instruct the Factor to obtain quotes and thereafter send out voting slips for owners to return on the understanding that a majority of all owners in favour would prevail. However, that did not appear to have been what actually happened at the meeting on 28 March although that might have been an impression that some might have taken from what was discussed. The Tribunal therefore thought that the Factor could have been in

some difficulty with its proposed course of action were it not for the terms of Clause 20.6 of the Deed of Conditions. The Tribunal heard no evidence to suggest that the Factor's wide-ranging rights and powers conferred on it by this clause have been restricted at any time. It therefore appeared to the Tribunal that given that the clause entitles the Factor to do anything that the proprietors could do themselves at a meeting they were entitled to conduct the postal ballot.

73. In conclusion the Tribunal was satisfied that the Factor was in breach of this section of the Code but only insofar as it relates to the Tribunal's findings in paragraph 69 above.

Section 2.4 of the Code

74. The Factor is a commercial organisation. It is free to determine the charges it will make to owners for its services. It has an obligation to advise owners of these charges. Although the Deed of Conditions may state that it is for the proprietors to determine the Factor's remuneration the commercial reality is that the Factor will offer its services at a price for its core service together with any additional charges and if a majority of owners are in favour, they will appoint the Factor. Thereafter the Factor's Written Statement of Services will apply and that will provide for increase and variations. It will of course always be open for owners if dissatisfied with a Factor to dismiss it in accordance with the provisions in the title deeds and/or the Written Statement of Services. The Tribunal was not satisfied that the Homeowner had demonstrated a breach of this section of the Code.

Section 2.5 of the Code

75. The Tribunal was satisfied that the Factor had dealt with the Homeowner's formal complaints in a timely manner and the conclusion of the Stage 2 complaint had been delayed because the Factor had requested further information from the Homeowner. It did appear that some enquiries from the Homeowner had not been responded to within the timescales set out in the Factor's Written Statement of Services. However, the Tribunal did note that the Homeowner had sent a great deal of correspondence to the Factor over a relatively short period of time. In some emails there appeared to be a duplication of enquiries and it also appeared that at least to some extent the Factor had provided a response. There were however some emails that introduced fresh enquiries that were not immediately replied to and therefore to that extent there was a breach of this section of the Code.

Section 3 and 3.3 of the Code

76. The Tribunal was satisfied that the Factor provided the Homeowner with a financial breakdown of charges made and a description of the activities and works done including supplying supporting documentation and vouching when requested. The problem here was that it was not clear from the documents that were available exactly what work was being done by A.S.Y. Garden Services on a regular basis in the woodland areas. However, although the

monthly invoices issued by that company lacked any detail the original tender letter that formed the contract and had been provided to the Homeowner did supply the necessary clarification. The real problem was not the failure to provide the documentation but the failure of the contractor to comply with the contract. There was therefore not a breach of this section of the Code.

Section 6.4 of the Code

77. It was not disputed that the Factor had prepared a programme of works namely the Communal Landscape Maintenance Specification 2013. The Homeowner's issue was in reality that the Factor had failed to adhere to ensure that the contractor followed the terms of the specification. However, that would not amount to a breach of this section of the Code.

Section 6.9 of the Code

78. If the contractor was obliged in terms of his contract to remove litter from all areas of the common grounds and has failed to do so then the Factor ought to have pursued the contractor to ensure that this work was done. From the evidence it appeared that the contractor did nor believe that he was expected to carry out litter picking in the woodland areas yet both the 2013 specification and the contractors own tender specify that litter will be removed from these areas. The Tribunal was therefore satisfied that the Factor ought to have ensured that the contractor was fulfilling his obligations in this regard and if necessary have pursued the contractor to have this work carried out. The Tribunal was therefore satisfied that the Factor was in breach of this section of the Code.

Section 7.2 of the Code

79. The Tribunal noted that the Homeowner had initiated a formal complaint by letter dated 12 March 2019 followed up by a further letter dated 14 March 2019. That Stage 1 complaint was answered by Ms Hawcroft on 19 March well within the Factor's timescales set out in its complaint procedures. Ms Hawcroft advised the Homeowner that if he was not satisfied with the response, she would escalate the complaint to her line manager Ms Wilson and if she could not resolve matters the Homeowner could have recourse to the Housing and Property Chamber. Rather than confirming to Ms Hawcroft that he was not satisfied with her response the Homeowner sent an email to Ms Wilson on 26 March 2019 and also letters of complaint to Mr Hutton on 25 and 26 March 2019. Ms Wilson provided a response in an email of 8 April 2019 again well within the Factors timescales and in that letter, Ms Wilson requested further details and clarification of the Homeowner's complaint. It therefore appeared that at that stage the Stage 2 complaint procedure had not been exhausted and therefore it would not have been appropriate for the Factor to have advised the Homeowner of his right to make an application to the Tribunal. Subsequently the Factor did confirm that the complaints procedure was at an end but by that time the Homeowner had advised the Factor that he had made an application to the Tribunal. Taking everything into

account the Tribunal was not satisfied that the Factor was in breach of this section of the Code.

Property Factor's Duties

80. The Tribunal noted that the same complaints relating to the various alleged breaches of the Code formed a substantial part of the Homeowner's arguments in respect of the alleged failure of the Factor to carry out its property factor's duties and the arguments in response by the Factor were in the main along the same lines as it had submitted in respect of its defence of the alleged breaches of the Code. There were however some instances that were distinguishable from the earlier submissions. The Tribunal agreed with the Homeowner's submission that it was for the owners at the AGM to elect a chairman and minute taker. The Factor ought not to have appointed itself but should have directed the owners to the relevant clause in the Deed of Conditions. It would then have been open to the owners present to have chosen either the Factor or one of their own members to carry out these functions. Although the Homeowner was clearly aggrieved at the actions and perceived failures of the Factor, the Tribunal felt it did not have enough evidence before it to support the conclusions the Homeowner suggested with regards to the Factor's management of the development in general. There may well have been other owners who had similar concerns to the Homeowner but equally some owners appeared content with the Factor's performance. The Tribunal noted that there had been a data breach on the part of the Factor that had initially been denied by it but had ultimately been accepted and remedied. This was however a failure on the part of the Factor to properly carry out its duties in this regard. As indicated above the Tribunal was satisfied that the Factor did have the necessary authority to institute a postal ballot of owners and the Tribunal was also satisfied that if a majority of the owners voted to proceed to instruct the Factor to proceed with the employment of an arboculturilist to prepare a five year plan the Factor would be entirely within its rights to request payment in advance from the owners. The Tribunal therefore did not accept the Homeowners submissions in this regard. Whilst not accepting all of the Homeowners submissions with regards to the alleged failures of the Factor to carry out its property factor's duties the Tribunal was satisfied that the Factor had failed to carry out its property factor's duties.

Conclusion

81. Although the Tribunal was satisfied that there had been breaches of the Code and a failure of the Factor to perform its property factor's duties the Tribunal did not consider that it was in a position to accede to all the Homeowner's suggestions in his application as to the remedies he was seeking. Although the gardening contractor had failed to fully perform the contractual terms as set out in the specification of 1 February 2013 the Tribunal was unable to quantify the actual cost to the Homeowner for work charged for but not done. There was however an expectation on the part of the Homeowner that he had paid for work to be done and the Tribunal was satisfied that in the circumstances the Homeowner was entitled to recompense. The Tribunal was

also satisfied that the Homeowner had been put to a substantial amount of trouble and inconvenience in raising these issues with the Factor before bringing the application to the Tribunal. It did seem to the Tribunal that there needed to be greater clarity in the Factor's Communal Landscape Maintenance specification and that this document required to be amended to reflect the current arrangements with the garden contractor. The Tribunal noted that the Homeowner was seeking a written apology from the Factor and it considered that this would not be unreasonable. The Tribunal was also of the view that as the Factor had unilaterally decided to appoint itself as chair and minute taker at the meeting of 12 February 2019 and the AGM of 28 March 2019 it should refund any charges made to owners for those appointments.

Proposed Property Factor Enforcement Order

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

Appeals

A homeowner or property factor aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member and Chair

30 December 2019 Date