Housing and Property Chamber
First-tier Tribunal for Scotland

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

STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017

Chamber Ref: FTS/HPC/PF/18/0146

Re: Flat 0/2, 11 Wilson Street, Renfrew, PA4 8NP

The Parties:-

Mr Stewart Murray, 49 Craighead Road, Bishopton, PA7 5DT ("the Homeowner")

Apex Property Factor, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH ("the Factor")

Tribunal Members

Ms Helen Forbes (Legal Member)

Mr Andrew McFarlane (Ordinary Member)

Decision

The Tribunal determined that the Factor has failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 1.C.e, 2.5, 3.3, 5.2 and 7.2 of the Property Factor Code of Conduct ("the Code"). The Tribunal determined that the Factor also failed to carry out the Property Factor's duties.

The decision is unanimous.

Background

1. By application received in the period from 18th January to 7 March 2018 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Factor had failed to comply with Sections 1.C.e, 1.D.I, 2.1, 2.2, 2.4, 2.5, 3.1, 3.3, 4.2, 4.7, 4.8, 4.9, 5.2, 5.3, 5.5, 5.7, 5.8, 6.1, 6.2, 6.3, 6.9 and 7.2 of the

Code. The Homeowner also alleged a failure to carry out the Property Factor's duties.

2. Details of the alleged failures were outlined in the Homeowner's application and associated documents including invoices, correspondence to and from the Factor, and the Factor's Written Statement of Services.

3. By Minute of Decision dated 19th March 2018, a Convenor of the Housing and Property Chamber referred the Application to a Tribunal.

4. On 10th April 2018, Notice of Referral and Hearing was sent to the Parties. A hearing was set down for 21st May 2018.

5. On 1st May 2018, the Factor lodged written representations.

6. On 1st May 2018, the Homeowner lodged a further production comprising a spreadsheet of invoices with comments from the Homeowner and responses from the Factor.

7. On 2nd May 2018, the Factor lodged productions comprising invoices, credit notes, correspondence between the parties, a spreadsheet of invoices with parties' comments, call logs, timesheets, debt recovery procedure and the Written Statement of Services.

Hearing

8. A hearing took place at 10.00 on 21st May 2018 at Glasgow Tribunals Centre, 20 York Street, Glasgow. The Homeowner was present. The Factor's Office Manager, Mr Neil Cowan, was present, together with Ms Saira Ali, Property Manager.

Preliminary Points

9. The Tribunal raised a preliminary point to clarify the dates of appointment of the Factor. Parties clarified that the Factor took up their appointment in 2012. The Factor's appointment ended on 22nd June 2016.

10. The Homeowner raised the following preliminary points:

    (i) Court action – the Homeowner said that the court action raised against him by the Factor for recovery of outstanding fees had been put on hold for parties to attend mediation.

    (ii) Written Statement of Services – the Homeowner said that there were three different Statements in circulation. He had lodged the only Statement he had received, dated 3rd May 2013. The Factor had lodged a different version of the Statement with the Tribunal, and yet another version with the Court. The apportionment of costs was different in each of the Statements. The actual apportionment of costs was between 9 properties within 11 Wilson Street, but this was shown as 6 in one

Statement, and 11 in another. This was indicative of the service provided by the Factor. The Homeowner said he had not received an updated Statement until it was produced for the Court.

In response to questions from the Tribunal, Mr Cowan said that the Statements were updated from time to time. They ought to be dated. The Factor would write to Homeowners when a new Statement was released, and it would also be provided by email. The Factor had provided a copy of the most up to date Statement to homeowners before their appointment ceased.

Evidence and Representations

The Tribunal then dealt with each of the Homeowner's complaints in turn.

Failure to comply with Section 1.C.e of the Code

11. The Code states that the Written Statement of Services should set out *the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee*

The Homeowner said that the Factor was not following their Written Statement as he had not received an invoice for a period of 18 to 20 months. It was said in the Written Statement that the fee was reviewed annually but this did not seem to be happening. The Factor had not informed the homeowners of an increase of 5% in the management fees. This was contrary to their Written Statement which stated that a month's notice would be given.

On behalf of the Factor, Mr Cowan said that invoices were normally issued monthly, however, there had been a period when the company had IT issues and one of the directors had a prolonged period of ill-health. This had impacted on the issuing of invoices. Homeowners had received eight invoices at one time, when the problems ceased. He felt that, as the increase took place on the 8th month, therefore the invoices for the first seven months acted as the notice period. The homeowners were given the opportunity of taking out a twelve month payment plan, rather than paying all the invoices at once.

Failure to comply with Section 1.D.I of the Code

12. The Code states that the Written Statement of Services should set out *your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your in-house complaints handling procedure*

The Homeowner said this was more to do with the Factor's actions in handling complaints rather than not having the complaint procedure within the Written Statement. The Homeowner agreed with the Legal Member that this was really a complaint under section 2.5 of the Code.

There was no further discussion on this point.

Failure to comply with Section 2.1 of the Code

13. Section 2.1 states: *You must not provide information which is misleading or false*

The Homeowner said this referred to two matters:

(i) Replacement of spindles on the common stair, and fence repairs and replacement of clothes poles in the common garden area – The Factor had carried out the work with no consultation with the homeowners, claiming that it was emergency work with health and safety implications, and that the Factor was authorised to do this without consultation in terms of the Tenements (Scotland) Act 2004. Although it was deemed emergency work, the Factor took six to eight weeks to carry it out. The Factor did not do anything to protect the homeowners or draw their attention to any health and safety issues in the common areas, such as putting up a notice or hazard tape. The Factor had a duty of care to the homeowners under health and safety legislation. The Homeowner said he did not believe it was a health and safety issue, particularly in relation to the spindles. There were two missing spindles at the bottom of the staircase, and they had been missing for many years. Even if a child fell through the gap, there was no real danger as there was no height from which to fall. The Homeowner believed that the Factor was simply trying to force through the work without seeking quotes and authorisation, misleading the homeowners by claiming it was a health and safety issue.

(ii) Accuracy of the insurance policy – The Factor had used inaccurate figures when arranging the block insurance for the property. The Factor had said that a formal valuation was required, but the Homeowner believed that most insurance companies can provide a reasonably accurate valuation. The Homeowner had left the block insurance and taken out his own home insurance, and the insurer had provided him with a valuation figure. The Factor's insistence that a formal valuation was required was false or misleading.

Mr Cowan responded as follows:

(i) When the repairs were identified as health and safety issues, the Factor still had to gather in enough funds to carry out the works, so the works were delayed until sufficient funds from management fees had come in. The usual procedure for carrying out larger repairs was to mandate the owners and ask for costs up front. This was different because it was a health and safety issue. In response to questions from the Ordinary Member as to whether there was a float for the development, Mr Cowan said there was a float, but some of the

homeowners had not contributed, and there was a level of debt within the development.

(ii) The previous factor for the development had gone into liquidation in 2012. The insurance was based on a historical valuation. The Factor had recognised that the property should be valued for insurance purposes; however, the homeowners within the development would not agree to pay for a professional valuation. The insurance was based on the historical figure plus inflationary updates. In response to questions from the Legal Member, Mr Cowan said the Factor had written to all owners in March 2014, in each development. Only one or two developments had agreed to have a valuation carried out. In response to the Homeowner's assertion that no valuation was required, Mr Cowan said that a block policy is classed as a commercial policy, and the insurer will not provide a valuation.

Failure to comply with Section 2.2 of the Code

14. Section 2.2 states: *You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action).*

The Homeowner said that the first communication he had received from the Factor was a threat of legal action. He had received no other communication from the Factor. At one stage, he and other homeowners had to contact the Factor to ask if they were part of the development, due to a lack of correspondence. The Factor had sent a couple of letters threatening to inform other homeowners and his mortgage provider of his outstanding debts, and this was unnecessarily aggressive. The Factor had not followed their debt procedures.

On behalf of the Factor, Mr Cowan said that the Factor had followed normal procedures, with phone calls and letters. He did not accept the Factor's behaviour was intimidating. It was a statement of fact that the Homeowner was not paying his debts to the Factor. It was very rare for the Factor to contact other homeowners to inform them of an individual's debts; however, the Factor reserves the right to reapportion outstanding debt among the other homeowners in a development and they would be obliged to inform the other homeowners how the debt came about. The Factor had a practice of informing the mortgage holder of a homeowner's debt, particularly if a Notice of Potential Liability ("NOPL") had been registered against a property. In response to questions from the Legal Member, Mr Cowan said that the Factor no longer contacted mortgage holders, as it became clear two or three years ago that the mortgage holders were not interested in having this information.

Failure to comply with Section 2.4 of the Code

15. Section 2.4 states: *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).

The Homeowner said this referred to the work that had been deemed necessary for health and safety reasons. The Factor had carried out all the work in-house without a tendering process. The work was completed before the homeowners were told. They were not given the opportunity to comment on the work. The Factor had carried out investigations into replacing the spindles with cast iron spindles, but this was deemed too expensive, and wooden spindles were used. There was no consultation with the homeowners, who may have wished to have cast iron spindles.

Mr Cowan stated that the Factor complies with the Code by having a procedure in place to consult with homeowners, before providing any such services. In response to questions from the Ordinary Member, Mr Cowan said there is no level of agreed authority in the Factor's Written Statement.

Failure to comply with Section 2.5 of the Code

16. Section 2.5 states: *You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)*

The Homeowner said that the Factor had ignored his correspondence, and continued to do so. He had to use read receipts for emails to the Factor, and this seemed to have prompted the Factor to reply to some correspondence. The Factor was not complying with the timescales contained in their Written Statement under 'Customer Service Standard'. He had made enquiries in relation to various issues, including repairs, litter-picking and removal of items. He had not received a satisfactory response to these issues. In response to questions from the Legal Member, the Homeowner accepted that responses had been given by the Factor to some of the points raised, but he was not always satisfied with the answers. He would expect his correspondence to be answered within a reasonable timescale, and this had not happened.

On behalf of the Factor, Mr Cowan said there had been a breakdown in communication. He had met with the Homeowner in February 2016 to try to resolve the situation. He also felt that no matter what response was given to the Homeowner in relation to the issues he had raised, there was no movement or progress in terms of the Homeowner accepting the response and paying the outstanding debts. In response to questions from the Legal Member, Mr Cowan said the Homeowner could well be correct in saying some of his correspondence hadn't been answered.

Failure to comply with Section 3.1 of the Code

17. Section 3.1 states: *If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, or a property changes ownership, you must make available to the homeowner all financial information that relates to their account. This information should be provided within three months of termination of the arrangement unless there is a good reason not to (for example, awaiting final bills relating to contracts which were in place for works and services).*

    The Homeowner said he had not received a final statement from the Factor, despite the arrangement being terminated in February 2016. The statement was due in May 2016. In response to questions from the Tribunal, parties agreed that the Homeowner's outstanding balance at present was £1410.74.

    On behalf of the Factor, Mr Cowan said there were two reasons for the delay in finalising the balances due:

    (i) There is an ongoing legal action in relation to the Homeowner's account, and a possibility of reapportionment of his debt to the other owners.

    (ii) There is an ongoing issue with Scottish Power whereby their bills have been issued to the Factor in the wrong name, and only estimated bills have been provided. The Factor has carried out meter readings once a year. There is an issue as to whether Scottish Power can carry out 'back-billing' for more than a twelve month period. This is going through Scottish Power's complaints procedure at the moment.

Failure to comply with Section 3.3 of the Code

18. Section 3.3 states: *You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.*

    The Homeowner said he had received no invoices for a period of 18 months. He referred to an invoice number 2650 dated 11/02/2013 and forming page 48 in the Factor's productions, where reference was made to a mandated roof repair with no further information provided. He had also asked for copies of electric bills and these had not been provided. Responding to questions from the Legal Member as to why he was not prepared to pay his share of common charges for electricity, the Homeowner said he was waiting for accurate bills, rather than estimates.

In response, Mr Cowan accepted that there was a period when no such invoices had been issued. However, monthly invoices provided a breakdown of the charges made, and the invoices had sufficient information. In response to the invoice number 2650 dated 11/02/2013 (production page 48) referred to by the Homeowner, there had been a mandate issued prior to the invoice which gave a detailed description of the work to be carried out. The Ordinary Member asked whether invoices gave sufficient information as to the apportionment of charges, as it did not seem clear on the face of the invoice how the homeowner would know what share of a charge they were paying. Mr Cowan said the homeowners are always aware at the outset that charges are apportioned. Mr Cowan said he could give no explanation as to why the Homeowner had not received the copy electricity bills upon request.

Failure to comply with Section 4.2 of the Code

19. Section 4.2 states: *If a case relating to a disputed debt is accepted for investigation by the homeowner housing panel and referred to a homeowner housing committee, you must not apply any interest or late payment charges in respect of the disputed items during the period that the committee is considering the case.*

The Homeowner said that late payment charges were removed from his account when the legal action was raised in Court. He was satisfied that they had been removed and that there were now no late payment charges on his account, after the application to the Tribunal had been made.

Mr Cowan agreed with the Homeowner.

There was no further discussion on this section.

Failure to comply with Section 4.7 of the Code

20. Section 4.7 states: *You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs.*

It was agreed between parties that this section was not relevant as the remaining homeowners had not been charged in this case.

There was no further discussion on this section.

Failure to comply with Section 4.8 of the Code

21. Section 4.8 states: *You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.*

The Homeowner said he had not seen the Factor's debt recovery procedure (page 99 of the Factor's productions) prior to the lodging of the productions.

In February 2016, the Factor had given him copies of letters that were allegedly sent out on 7th January and 29th March 2013, but he had not received them. The Factor had not made any phone calls to him regarding his outstanding debts. In 2016, Mr Cowan had agreed that all communication should be by email, as there seemed to be an issue with receiving mail from the Factor.

The Homeowner had received a debt letter from the Factor on 20th June 2013. He responded to this by emailing the Factor on 22nd June 2013, and while he was waiting for a response, he received a threatening debt letter.

He had hoped to take his case to the Tribunal, but he had put this on hold after the meeting with Mr Cowan in February 2016. It was nine weeks before he had a response to the matters discussed at the meeting. There was then a period of protracted correspondence. He had then been informed by the Factor by letter dated 12th September 2017 (production 56 for the Factor) that he hadn't followed the correct complaints procedure, and was only at stage 1 of the procedure. The letter implied that the Factor's complaints procedure had to be exhausted before he could go to the Tribunal. The Factor then delayed responding to his complaint and he felt this was deliberate, as the Factor wanted to raise the court action before the Homeowner could apply to the Tribunal.

Mr Cowan responded that the Factor had constantly laid down the options in relation to the Homeowner's debt, one of which was the possibility of court action. The Homeowner had only paid £50 since the meeting in February 2016. The court action was raised in August 2017, and the Factor was not made aware of the current application to the Tribunal until April 2018. The Factor's view was that legal action was the correct course of action and that fair warning was given.

Failure to comply with Section 4.9 of the Code

22. Section 4.9 states: *When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position.*

The Homeowner said that the threat to contact other homeowners seemed excessive. He felt the Factor's behaviour was more intimidating than misrepresentation. He referred to discovering that a NOPL had been registered on 28th July 2015, only when he received an invoice on 4th January 2016. There had been no prior warning. The Legal Member referred to page 1 of the Written Statement, under 'Debt Recovery Procedures' where it is stated that a NOPL might be put in place. The Homeowner said that there was no communication prior to registering the NOPL, and he would have expected a meeting or a phone call.

Responding to questions from the Legal Member as to why he has not paid management fees to the Factor, the Homeowner said that he did not believe the development had been managed and there was no communication from the Factor for a protracted period. Some owners thought that the Factor had gone into administration due to the lack of communication. The homeowners had requested that the Factor cease close cleaning and litter picking as there was no evidence that it was being carried out. After that time, the level of rubbish seen did not tally with the amounts of rubbish that the Factor had charged them for. The only activities carried out by the Factor thereafter were common insurance and common repairs. In 2015, the homeowners requested that the Factor cease acting as their factor, as there was no evidence that services were being carried out.

Mr Cowan said he disputed that close cleaning and litter picking were not being carried out by the Factor. A management fee was payable to manage the development, and the Factor was there to deal with issues that arose. There were not many issues arising at that development, but they dealt with them as necessary.

In relation to the question of the NOPL, Mr Cowan said it had been referred to in previous correspondence as part of the debt recovery procedure and it was always made clear that it was an option. In 2015, it was decided that a NOPL was more appropriate than court action. In response to questions from the Legal Member concerning the Factor's debt recovery procedure, which stated that a court action would come before a NOPL, Mr Cowan referred to the caveat at the end of the procedure, that stated '*each account is individually monitored and Apex reserve the right to modify this procedure where necessary.*' There are no fixed timescales for the debt procedures and, having warned a homeowner, the Factor can decide whether to implement the policy or not.

Failure to comply with Section 5.2 of the Code

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

The Homeowner said he was never provided with clear information showing the apportionment of the insurance premium, or the total premium charged. He was given information on the excess applicable, and he received a copy of the insurance certificate. He did not ask for full details of the insurance until after he exited the policy.

In response, Mr Cowan said that the insurance certificate summarises the important parts of the policy. The premium was divided equally between

homeowners. Responding to questions from the Ordinary Member as to why there were two invoices (3964 of 1/5/2013 and 4896 of 10/7/2013) for the same insurance period (Factor's productions at pages 45 and 54), parties clarified that 3964 was the annual invoice for insurance and 4896 was a credit note. Mr Cowan clarified that the credit note was raised because the Factor had a special deal for owners that had paid the previous year, with the previous factor, to get a discounted rate.

Failure to comply with Section 5.3 of the Code

24. Section 5.3 states: *You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance.*

The Homeowner said he asked the Factor for these details on 2nd February 2014 and they were not provided, although the email to the Factor was acknowledged. He felt unable to justify the insurance charges on his account because he had not been provided with adequate information.

Mr Cowan said that the Factor does not receive any commission from the insurance company; there was, therefore, no information to be disclosed. In response to questions from the Ordinary Member, he said no commission was received from the broker either. Mr Cowan could not comment on why the Homeowner had not received a response to his query.

Failure to comply with Section 5.5 of the Code

25. Section 5.5 states: *You must keep homeowners informed of the progress of their claim or provide them with sufficient information to allow them to pursue the matter themselves.*

The Homeowner said that this referred to a roof repair carried out in June 2015 by the Factor after the Homeowner had left the block policy. He was not informed about the repair until November 2015. He had changed insurance providers and did not have an opportunity to claim from his previous insurer. Responding to questions from the Legal Member, he said that he had not checked with the previous insurer whether they would accept a retrospective claim, and his share of the invoice for the repair was £134, with an excess of around £100.

Mr Cowan said the Homeowner was not insured under the block policy, therefore, the Factor did not have a duty to keep him informed of the progress of the claim. The claim was made during the period of IT problems, when no invoices were issued. If it had not been for the IT problems, all homeowners would have been informed of the repair and their share. He has seen others make a retrospective claim on their insurance.

Failure to comply with Section 5.7 of the Code

26. Section 5.7 states: *If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance.*

The Homeowner agreed that this section was not relevant, as he had not requested documentation relating to any tendering or selection process.

There was no further discussion on this point.

Failure to comply with Section 5.8 of the Code

27. Section 5.8 states: *You must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of buildings insurance, and adjust this frequency if instructed by the appropriate majority of homeowners in the group.*

The Homeowner said there had been no information provided by the Factor on property revaluation prior to February 2014. The Factor had given no information in relation to frequency of, or procedures for, revaluation. He then asked the Factor for information but none was provided. He would have expected a revaluation when the Factor became involved with the development, rather than continue to have insurance based on a historical figure.

Mr Cowan responded that revaluation does not suddenly become a high priority due to a change of factor. It was decided in 2014 to carry out an exercise to instruct professional revaluations. As mentioned previously, the homeowners did not agree to pay for this exercise. Given the situation, it was not possible for the Factor to recommend frequency of revaluation until the first revaluation was carried out.

Failure to comply with Section 6.1 of the Code

28. Section 6.1 states: *You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*

The Homeowner referred to the ongoing issue with Scottish Power and his repeated requests for copy bills. Without the bills, he couldn't be certain what he was paying for.

Mr Cowan responded that the issue with Scottish Power was expected to be resolved within the next month or so. The Factor could not pass on the bills as they were not correct.

Failure to comply with Section 6.2 of the Code

29. Section 6.2 states: *If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs5 , wherever possible.*

The Homeowner said that this referred to the repairs that had been classified as health and safety or emergency issues. He reiterated that he did not believe these repairs were emergencies.

Mr Cowan responded that emergency contact details are given to homeowners at the start, and this section had been complied with.

Failure to comply with Section 6.3 of the Code

30. Section 6.3 states: *On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff*

The Homeowner said this related to work carried out to the front and back doors, the spindles, clothes poles and back fence. He felt that using in-house staff to carry out these works meant there was no redress. The back door had been damaged beyond repair before the Factor was appointed. A new door was fitted and damaged by water saturation. The door was adjusted and rehung. If the Factor had used an external contractor, the Factor would have chased up the contractor. The Homeowner said he hadn't asked how or why the contractors were appointed.

Mr Cowan responded that the Factor had carried out work to the back door, which was necessary due to an overflowing pipe from another property. The back door had to be replaced after repair, and the Factor had not charged the homeowners for the replacement. He understood that a new door had been fitted rather than adjusting and rehanging the old door. The Ordinary Member pointed out that production 70 was a letter from the Factor to the Homeowner dated 26th April 2016 and it referred to a new door.

Failure to comply with Section 6.9 of the Code

31. Section 6.9 states: *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.*

The Homeowner agreed that the charge for the door had been credited to his account and he withdrew this complaint.

No further discussion took place on this section.

Failure to comply with Section 7.2 of the Code

32. Section 7.2 states: *When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.*

The Homeowner said that his complaints should have been escalated as complaints at a much earlier stage, as it was clear that they were complaints. More recently, he had written to the Factor on 31st July 2017 asking them to confirm that he had exhausted their internal complaints procedure. He received no response despite sending the email another three times before confirming to the Factor on 4th September 2017 that he would be proceeding with his application to the Tribunal. It was then he received the letter dated 12th September 2017 (page 56 of the Factor's productions) stating that he was only at stage 1 of the complaints procedure.

Mr Cowan responded that the last letter referred to had pointed out the procedure to the Homeowner. He accepted that, in hindsight, it might have been better to have dealt with the Homeowner's issues as complaints at an earlier stage. Responding to questions from the Legal Member as to whether the Factor would only treat an issue as a complaint if it was labelled as such by the homeowners, Mr Cowan said that it was more about the tone. He confirmed that he had always been involved with the Homeowner's issues, as had other members of staff. He accepted that the response to the letter of 31st July 2017 on 12th September 2017 (page 56 of the Factor's productions) had not been within the Factor's normal process in terms of response.

Failure to carry out the Property Factor's Duties

33. The Homeowner said he had probably covered most of this in his earlier submissions. The alleged failure related to the way in which the Factor dealt with the matters relating to health and safety issues. The legislation relating to health and safety is explicit and requires the Factor, once matters of this nature are identified, to take action to warn the homeowners of likely risk to their health and safety.

Mr Cowan responded that the Factor carried out their duties to the best of their ability, particularly given the limited funding available. He accepted that, in hindsight, applying tape or a notice might have been advisable.

Findings in Fact

34.

i. The Homeowner has been the registered owner of Flat 0/2, 11 Wilson Street, Renfrew, PA4 8NP since 28th July 2006.

ii. The Factor has been a registered property factor since 1st November 2012, with registration number PF000383.

iii. The Factor was appointed to manage the development at 11 Wilson Street, Renfrew in 2012.

iv. The Factor's appointment at 11 Wilson Street, Renfrew ended on 22nd June 2016.

v. During their appointment, the Factor provided services at 11 Wilson Street, Renfrew, including common repairs, litter picking, close cleaning, removal of refuse items and general management.

vi. During their appointment, the Factor experienced problems with IT issues over a period, which meant that invoices were not issued each month. Fourteen outstanding invoices were issued together. During that period there was an increase in the management fee. The Factor did not comply with its own Written Statement of Services, and failed to give owners not less than one month's written notice of the annual increase.

vii. The Factor failed to respond to enquiries and complaints from the Homeowner within prompt timescales, and within the timescales confirmed in the Written Statement of Services.

viii. The Factor's invoices on occasion failed to provide to the Homeowner a detailed financial breakdown of charges made and a description of the activities and works carried out.

ix. The Factor failed to provide to the Homeowner clear information in relation to block insurance showing the sum insured and the premium paid.

x. The Factor failed to progress the complaints of the Homeowner through their in-house complaints procedure timeously, failing to make a final decision and confirm it with senior management before notifying the Homeowner in writing.

xi. The Factor has failed to carry out its property factor duties by failing to warn homeowners of health and safety issues apparent at 11 Wilson Street, Renfrew.

xii. The Factor is unable to provide the Homeowner with a final statement of account pending the outcome of the debt action against the Homeowner and the dispute with Scottish Power.

xiii. The Homeowner has raised issues with the Factor in relation to matters of health and safety, common repairs, the removal of refuse and other matters, repeatedly requesting further details, even when the Factor has answered the Homeowner's queries to the best of their ability.

xiv. The Homeowner has failed to make payment for services rendered by the Factor and for his share of common electricity charges, with the exception of a payment of £200 on 23rd September 2013 and a payment of £50 on 26th February 2016.

xv. The Homeowner has an outstanding debt to the Factor estimated to be £1414.74.

xvi. The Homeowner has been provided with the Factor's Written Statement of Services dated 3rd May 2013. The Homeowner did not receive updated Written Statements of Services from the Factor.

Determination and Reasons for Decision

35. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

Failure to comply with Section 1.C.e of the Code

36. The Tribunal found that the Factor had breached this section of the Code. The Written Statement of Services provided to the Homeowner did not set out the management fee charged, including any fee structure or processes for reviewing and increasing or decreasing the fee. The Tribunal was not persuaded by Mr Cowan's assertion that issuing multiple invoices at one time meant that the homeowners had sufficient notice of an increase in the management fee.

Failure to comply with Section 2.1 of the Code

37. The Tribunal did not find that the Factor had breached this section of the Code. In relation to the repairs to the spindles, clothes poles and fence, the Tribunal was not entirely convinced that the Factor ought to have proceeded in terms of the Tenements (Scotland) Act 2004; however, the Tribunal did not consider that the Factor had the intention to provide misleading or false information to the Homeowner. In relation to the matter of insurance, the Tribunal found that the Factor had not provided misleading or false information. It was not the responsibility of the Factor to ascertain the correct value of the property, and the Factor had recommended the best course of action to the homeowners in recommending a valuation be carried out.

Failure to comply with Section 2.2 of the Code

38. The Tribunal did not find that the Factor had breached this section of the Code. The Factor did not communicate with the Homeowner in a way that was abusive, intimidating or threatening. The Tribunal accepted Mr Cowan's evidence that it may become necessary to disclose a homeowner's level of debt if there was to be apportionment of the debt among the other homeowners. The Tribunal accepted Mr Cowan's evidence that the Factor

believed that a homeowner's indebtedness may be a matter of some importance to the homeowner's mortgage holder.

Failure to comply with Section 2.4 of the Code

39. The Tribunal did not find that the Factor had breached this section. The Tribunal accepted Mr Cowan's evidence that the Factor has a procedure in place to consult with homeowners and seek their approval before providing work or services which will incur charges or fees in addition to core services.

Failure to comply with Section 2.5 of the Code

40. The Tribunal found that the Factor breached this section of the Code by failing to respond to enquiries and complaints within prompt timescales. By Mr Cowan's own admission, the Factor had not answered all of the Homeowner's correspondence. The Homeowner had requested copy Scottish Power bills and received no response. The Homeowner wrote to the Factor on 31st July 2017 regarding the complaints procedure and did not receive a response until 12th September 2017.

Failure to comply with Section 3.1 of the Code

41. The Tribunal did not find that the Factor had breached this section of the Code. The Tribunal accepted the evidence of Mr Cowan that a final statement could not be provided until matters in relation to the court action against the Homeowner, and the issue with Scottish Power have been finalised. The Tribunal observed that, according to Mr Cowan, the Scottish Power issue is likely to be sorted out in the near future.

Failure to comply with Section 3.3 of the Code

42. The Tribunal found that the Factor had failed to comply with this section of the Code. Taking into account the overriding objective of section 3 of the Code, and the need for clarity and transparency in all accounting procedures, the Tribunal found that, despite ordinarily providing an invoice on a monthly basis, the Factor had not provided a detailed financial breakdown of charges made and a description of the activities and works carried out. The invoices have a minimal level of detail and the level of apportionment between homeowners is not clear.

Failure to comply with Section 4.8 of the Code

43. The Tribunal did not find that the Factor had breached this section of the Code. Despite the communication lapses by the Factor, and the letters dated 7th January 2013 and 29th March 2013 that were not received by the Homeowner, the Tribunal noted that letters dated 20th June 2013, 3rd October 2013, 9th April 2014, 16th September 2015, 19th May 2017 and 31st May 2017 appeared to have been received by the Homeowner. In almost all of those letters, the Factor referred to the possibility of legal action being taken if payment was not made, thus giving notice of their intention. The Tribunal

found that the Factor took reasonable steps to resolve the matter, by issuing invoices and letters, and meeting with the Homeowner in February 2016 to discuss matters. The Tribunal observed that the Factor had responded fully to many of the Homeowner's enquiries, and it was difficult to see what more the Factor could have done to satisfy the Homeowner that the outstanding sums were due.

Failure to comply with Section 4.9 of the Code

44. The Tribunal did not find that the Factor had breached this section of the Code as the Factor did not act in an intimidating manner or threaten the Homeowner, nor did he misrepresent the correct legal position.

The Tribunal observed with some concern that there had been a significant gap between the Factor informing the Homeowner that a NOPL might be registered against his property (letter dated 3rd October 2013) and the NOPL being registered on 28th July 2015. A letter sent to the Homeowner on 9th April 2014 threatened legal action, but did not mention the possibility of a NOPL being registered against the property; however, this was not a breach of this particular section.

Failure to comply with Section 5.2 of the Code

45. The Tribunal found that the Factor had breached this section of the Code. The Factor did not provide the Homeowner with full details of the basis upon which the share of the insurance premium was calculated or the premium paid.

Failure to comply with Section 5.3 of the Code

46. The Tribunal did not find that the Factor had breached this section of the Code as the Factor was not receiving any such fee or benefit from the company providing insurance cover.

Failure to comply with Section 5.5 of the Code

47. The Tribunal did not find that the Factor had breached this section of the Code. The Homeowner was no longer insured under the block policy at the time that the claim was made, therefore, the Factor had no duty to keep the Homeowner informed.

The Tribunal observed that the Factor ought to have informed the Homeowner and any other homeowners that were not insured under the block policy of the repair to the roof, to enable them to claim against their own insurance, however, the failure to do so was not a breach of this particular section. The Tribunal also observed that the Homeowner did not attempt to make a retrospective claim on his previous insurance policy, when such a claim might have been successful.

Failure to comply with Section 5.8 of the Code

48. The Tribunal did not find that the Factor had breached this section of the Code. The Factor attempted to introduce a system of property revaluations and was unable to do so as the homeowners would not agree to pay for this.

Failure to comply with Section 6.1 of the Code

49. The Tribunal did not find that the Factor had breached this section of the Code. The Tribunal was not provided with any information in regard to a breach of this section, other than in written representations that referred to1) recent unsatisfactory roof repairs; and 2) charges for removal of rubbish/large items. It was not clear that these matters related to this particular section, and no further evidence was provided to the Tribunal to substantiate the Homeowner's claims in regard to these matters.

Failure to comply with Section 6.2 of the Code

50. The Tribunal did not find that the Factor had breached this section of the Code. The Factor has provided emergency details to the homeowners and has procedures in place. Again, the Tribunal observed that the matters complained of by the Homeowner in relation to the alleged health and safety work carried out by the Factor did not appear to relate to this section of the Code.

Failure to comply with Section 6.3 of the Code

51. The Tribunal did not find that the Factor had breached this section of the Code. The Homeowner did not request details of how and why the Factor appointed contractors.

Failure to comply with Section 7.2 of the Code

52. The Tribunal found that the Factor had failed to comply with this section of the Code. The Factor had clearly decided at an early stage that the Homeowner's complaints regarding several issues were not capable of being resolved, but the Factor failed to escalate and progress the complaints through the in-house complaints procedure.

Failure to carry out the Property Factor's Duties

53. The Tribunal found that the Factor had failed to carry out the Property Factor's duties in relation to the way in which the Factor dealt with the repairs that were deemed to be health and safety issues. The evidence on behalf of the Factor was that the Factor believed these matters to relate to health and safety, and could, thus, use the provisions of the Tenements (Scotland) Act 2004 to undertake the work without having to inform the homeowners or gain their consent in advance. In those circumstances, the Factor had a duty to the homeowners and occupiers to inform them of the existence of defects that had implications for their health and safety. The Tribunal was persuaded by

the evidence of the Homeowner, and the concession of Mr Cowan, that it would have been a simple matter to have posted notices and attached hazard tape to the areas affected.

Observations

54. The Tribunal noted that the Homeowner had refused to pay for services rendered by the Factor, for common electricity, and for management fees, over a long period. There was no compelling evidence before the Tribunal to indicate that the Factor had not carried out management services, or was charging homeowners inappropriately. The Tribunal also observed that the Homeowner seemed unwilling to accept the answers he was given by the Factor in relation to several issues. It was not clear to the Tribunal what more the Factor could have done to answer these issues, other than progress them as complaints. In the circumstances, the Tribunal was not minded to remove any of the charges or the Notice of Potential Liability.

Proposed Property Factor Enforcement Order (PFEO)

55. Having determined that the Factor has failed to comply with the Code, the Tribunal was required to decide whether to make a PFEO.

The Tribunal proposes to make a PFEO requiring the Factor, within 30 days of intimation of the PFEO to (1) Apologise in writing to the Homeowner for the breaches of the Code and the failure to carry out the property factor's duties; (2) Prepare a draft final statement of account. This should include a breakdown for each year of the Factor's appointment showing, on an itemised basis, a clear description of each total cost incurred and the share due by the Homeowner, amounts of credits relating to that period, and payments made during that period. In respect of electricity charges these should be calculated on the basis of the Factor's actual readings; and (3) Pay the Homeowner from their own funds the sum of £100, to reflect the strain and anxiety experienced by the Homeowner over the lack of compliance with the Code."

Right of Appeal

56. In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Helen Forbes

Legal Member and Chairperson
Date: 21st May 2018