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 (Procedure) Regulations 2017 ("The Rules")

Chamber Ref: HOHP/PF/18/0035

48A Westblackhall Street, Greenock, PA15 1UY ("the Property")

The Parties:-Mr. Craig Roberts residing at 15D, Robertson Street, Greenock, PA16 8NL ("the homeowner") and

Morison Walker Property Management Limited, having a place of business at 23, Patrick Street, Greenock, PA16 8NB ("the factor")

Tribunal Member

Karen Moore (Legal Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that (i) the factor had failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Section 1 of the Property Factor Code of Conduct ("the Code"), (ii) had not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Sections 2, 4 and 7 of the Code of Conduct and (iii) had not failed to comply with the property factor duties in terms of Section 17(5) of the Act.

Having so determined, the tribunal considered whether or not to make a Property Factor Enforcement Order in terms of Section 19 of the Act and determined not to make an Order.

Background

1. By application comprising documents received by the First-tier Tribunal for Scotland (Housing and Property Chamber) between 5 January 2018 and 16 February 2018 ("the Application") the homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the factor had failed to comply with Section 1 at 1.1a C f, Section 2 at 2.1, 2.2 and 2.5, Section 4 at 4.3 and 4.9 and Section 7 at 7.1 and 7.2 of the Property Factor Code of Conduct ("the Code") and had failed to comply with the property factor duties in terms of Section 17(5) of the Act.

2. The Application comprised the following documents-
   i. Application form dated 8 December 2017;
   ii. Copy correspondence between the homeowner and the factor;
   iii. Copy Land Certificate REN26108 for the Property;
   iv. Copy Sheriff Court summons raised by the factor against the homeowner and correspondence relating to same;
   v. Photographs of the common areas relative to the Property and
   vi. The factor's Written Statement of Services.

3. The factor lodged submissions and productions comprising: -
   i. Letter dated 29 March 2018 and
   ii. Copy correspondence between the homeowner and the factor additional to that submitted by the homeowner and
   iii. Copy accounts invoiced by the factor to the homeowner

Hearing

4. A Hearing took place at 10.00 on 25 April 2018 at the Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT. The homeowner was present. The factor was represented by Mrs. Gallagher and Mr. McPhail, two of its Directors.

5. Although the parties had been notified that the tribunal would comprise of two members, at the Hearing only one member, myself, the legal member was present. Having regard to Rule 33 of the Rules and having sought the views of the parties who were happy to proceed, I determined to proceed with the Hearing on my own.

6. I first established with the parties that the points at issue between them were the way in which the factor apportioned common charges, the way in which the factor followed its debt recovery procedures and the tone and content of the factor's letters to the homeowner. I then heard evidence from the parties in respect of these matters.

Apportionment of Common Charges (Section 1 of the Code at 1.1a C f)

7. The homeowner addressed me on the content of the application and explained that the application arose as result of a sheriff court debt action raised against him by the factor. He explained that he had entered a defence and counter claim challenging the basis on which the factor had apportioned the common charges between the proprietors in the tenement block of which the Property forms part. The case in question had been sisted to allow the homeowner to make an application to the tribunal, as the forum with jurisdiction in respect of the factor's duties, to ascertain if the factor had acted properly in this respect. Therefore, the homeowner's complaint in respect of Section 1.1a Cf of the Code which states that the factor's Written Statement of Services should set out *"what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated"* is based on the way in which the factor sets out how it charges for common works and services.

8. The homeowner explained that his challenge to the factor's method of apportioning the common charges founded on two criteria: firstly, that reference to apportionment of common charges in the title deeds to the property stated that these were to be apportioned equally to the number of dwellings in the block and, as a co-proprietor had converted a single flat into two flats, the factor should have adjusted the apportionment of common charges accordingly. Secondly, that, as far as he understood, the title deeds for other properties in the block were inconsistent and so the Tenements (Scotland) Act 2004 should apply and the common charges should be apportioned in ratio to square footage. In support of this, the homeowner advised that it was his recollection that Mrs. Gallagher, at a meeting with him, had stated that the titles for the tenement were "unworkable".

9. Mrs. Gallagher stated that she recalled the meeting and explained that she had meant that the title deeds for the various properties were inconsistent with each other and so unworkable on that basis. She explained that the factor had apportioned the shares on a common-sense approach of equalising based on usage of common parts and had done so since it had been appointed as factor for the Property and the tenement of which it formed part ("the block") in or around 1980.

10. Mrs. Gallagher and Mr. McPhail explained that the block comprises fifteen separate units of ten flats and five shops. The shops and a main door flat are on the ground floor, with three flats on each of the first, second and third floors. There is one common entrance and two internal closes and stairways, one close and stairway serving the east side of the block and one close and stairway serving the west side of the block. On the east side of the block there are six flats and three shops. The six flats share equally the costs of the internal close and stairway serving that side of the block and those six flats and two of the shops share equally the costs of the roof, gutters and downpipes serving that side of the block. On the west side of the block there are four flats, one of which is the Property and one of which is the sub-divided flat, and two shops. The four flats share equally the costs of the internal close and stairway serving that side of the block and those four flats and two of the shops share equally the costs of the roof, gutters and downpipes serving that side of the block. All fifteen properties in the block share equally the cost of the common drains, water supply pipes and gas and electricity.

11. Mrs. Gallagher and Mr. McPhail explained that although the factor had been made aware that Mr Bateman, owner of the flat immediately above the Property had sub-divided his flat into two smaller flats, as far as the factor knew, the title to Mr Bateman's flat had not been altered. Mrs. Gallagher and Mr. McPhail explained again that as the title deeds for the various properties in the block were inconsistent with each other, the factor had apportioned the shares based on usage for almost forty years. Mr Bateman's flat continued to be treated as one unit. They explained that the proprietors in the block had been asked if they wished to prepare a Deed of Conditions to regularise matters but declined to do so.

12. The homeowner adhered to his position that as the title deeds to the Property, being Land Certificate REN26108 stated that common charges are to be apportioned equally to the number of dwellings in the block, the factor should have adjusted the apportionment of common charges as a result of Mr Bateman converting his single flat

into two flats. The homeowner referred me to Land Certificate REN26108 which at Section D6 states that common parts shares are to be "*...in proportion to the number of shops, saloons and dwellinghouses using the same...*". The homeowner also adhered to his position that, if the titles of the properties are inconsistent and if the conversion of a single flat into two flats causes further inconsistency, the factor ought to apply the terms of Section 4 and Schedule 1, Rule 4 of the Tenements (Scotland) Act 2004 and should apportion the common charges in ratio to square footage.

Communication and Consultation (Section 2 of the Code at 2.1, 2.2 and 2.5)

13. With regard to Section 2, 2.1 of the Code, which states *"You must not provide information which is misleading or false*", the homeowner explained that he considered the factor had been false and misleading in its dealings with him as the factor was or ought to have been aware that Mr Bateman had converted his single flat into two flats and so ought to have adjusted the apportionment of common charges. The homeowner gave further examples of the factor's false and misleading behaviour by reference to the factor undertaking to install a secure door to the common entrance and undertaking to upgrade the close interior and then failing to carry out these works. The homeowner also referred me to the phrase *"The Sheriff found in our favour"* on page 2 of the factor's submission letter of 29 March 2018 as a further example of misleading behaviour.

14. In response, Mrs. Gallagher and Mr. McPhail explained that the factor's undertaking to carry out works to the door to the common entrance and close interior was conditional on agreement the other proprietors in the block, and that until recently, there had been neither agreement nor payment from the other proprietors in the block. Mrs Gallagher explained that the phrase used was accurate as the Sheriff had determined that the homeowner had been due payment to the factor and that the court action had been settled on a mutual basis.

15. With regard to Section 2, 2.2 of the Code, which 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 explained that he considered the factor to be in breach of this part of the Code because the factor continues to issue payment demands and threaten court action whilst there is an ongoing dispute.

16. In response to this complaint, Mrs. Gallagher explained that the debt recovery action being taken relates to unpaid accounts which have accrued since and so postdate the disputed accounts.

17. With regard to Section 2, 2.5 of the Code, which 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."*, The homeowner explained that this part of his complaint relates to the factor failing to respond to correspondence from him dated 1 June 2017 until 9 August 2017, a period of 44 days, and failing to respond to correspondence from him dated 13 November 2017 until 29 November 2017, a period of

13 days, both of which periods exceed the 10 working day target timescale set out in the factor's Written Statement of Services.

18. In response to this complaint, Mrs Gallagher agreed that the Written Statement of Services timescale had not been met and explained that she had apologised to the homeowner for the more lengthy delay.

Debt Recovery Procedures (Section 4 of the Code at 4.3 and 4.9)

19. With regard to Section 4, 4.3 of the Code, which states, *"Any charges that you impose relating to late payment must not be unreasonable or excessive."* The homeowner advised that, in his view, the factor's charge of £10.00 plus VAT for a late payment reminder letter is excessive as it represents one-third of the quarterly management fee and the factor's work involved in producing the letter is minimal as the factor's accounts system is automated.

20. In response to this complaint, Mrs. Gallagher and Mr. McPhail explained that the charge is based on the cost of producing the letter and that the accounts system is not fully automated and that there is a significant element of manual checking. Mrs. Gallagher and Mr. McPhail submitted that, in their opinion, the charge is commensurate with or less than similar charges levied by other factoring organisations. With reference to the charge of £25.00 plus VAT for court proceedings, Mr. McPhail explained that this charge is based on the cost of checking the Land Register and drafting and submitting the court summons, all of which are manual tasks.

21. With regard to Section 4, 4.9 of the Code, which 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 advised that this complaint is the same complaint raised in respect of Section 2, 2.2 of the Code. Accordingly, it is addressed by me at paragraphs 15 and 16 above.

22. In the Application, the homeowner cites a letter dated 9 August 2017 from the factor to him indicating that repairs other than those required as a matter of health and safety will be withdrawn as an example of the factor intimidating him to concede his position in respect of apportionment of the common charges. In response to this complaint, Mrs. Gallagher explained that the general level of debt for the block was such that the factor could no longer sustain the financial burden of instructing repairs.

Complaints Resolution (Section 7 of the Code at 7.1 and 7.2)

23. With regard to Section 7, 7.1 of the Code, which states, "*You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."* and Section 7, 7.2 of the Code, which 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 advised that this complaint arises from both paragraphs of the Code taken together as the factor failed to progress his complaint in line with the Code and its own Written Statement of Services. The homeowner submitted that as his complaint, being the dispute in respect of the apportionment of the common charges, was escalated to Mrs. Gallagher as a director and so senior management of the factors, at the first opportunity, the complaint did not progress through the factor's organisation and so checks and balances in respect of an independent review of the complaint were not applied.

24. In response to this complaint, Mrs. Gallagher and Mr. McPhail explained that the factor is a relatively small organisation of eleven employees some of whom are part-time and junior in respect of authority and that the structure of the organisation is such that complaints are dealt with at director level.

Property Factor Duties

25. With regard to property factor duties, the homeowner advised me that, in his view, the factor had breached this duty as it had withdrawn services in respect of property management. The homeowner referred me again to the letter dated 9 August 2017 referred to by me at paragraph 22 and to a similar letter to the other proprietors of the block stating that the factor *"will no longer be carrying out any repairs unless they are required as a matter of Health and Safety, until this issue has been resolved",* the issue in question being non-payment of factoring accounts and common charges. The homeowner's position is that having accepted the role of factor, the factor is duty bound to manage the Property and the block.

26. In response to this complaint, Mrs. Gallagher and Mr. McPhail explained again that the general level of debt for the block was such that the factor itself could no longer sustain the financial burden of instructing routine repairs and so proposed to undertake only those affecting public safety. Mrs. Gallagher advised that the arrears situation had now been remedied and so routine repairs were being carried out.

Findings of the tribunal

27. I took account of the Application with supporting documents, the productions lodged by the factor and the submissions made by the homeowner and on behalf of the factor at the Hearing.

28. I found that all parties gave evidence in a straightforward and truthful manner and I had no difficulty in believing their accounts of the events. I found that the issues between them are a genuine dichotomy of views in respect of the interpretation of the titles to the Property and the block and the role of the factor in carrying out its duties and complying with the Code.

Finding: Apportionment of Common Charges (Section 1 of the Code at 1.1a C f)

29. Although the core area of disagreement between the parties is the method of apportionment of the common charges, the Application before me is an application complaining of a breach of Section 1.1a Cf of the Code. Section 1.1a Cf of the Code does not deal with the way in which the factor apportions the common charges but deals with the content of the factor's Written Statement of Services. It states that the Written Statement of Services should set out *"what proportion, expressed as a percentage or fraction, of the management fees and charges for common works and services each owner within the group is responsible for. If management fees are charged at a flat rate rather than a proportion, this should be stated".* The factor's Written Statement of Services, comprising eight pages and forming part of the Application, is specific to the block, being headed *"Property:40/52, West Blackhall Street, Greenock (4066)".* Although that Written Statement of Services follows the criteria as recommended by the Code, it does not set out the proportion, expressed as a percentage or fraction, of the charges for common works and services for which each owner within the group, in this case the block, is responsible. The Written Statement of Services is silent on this point. For this reason, I find that the factor is in breach of this part of the Code.

30. I return to the matter of the way in which the common charges are apportioned by the factor when addressing the property factor duties.

Finding: Communication and Consultation (Section 2 of the Code at 2.1, 2.2 and 2.5)

31. With regard to Section 2, 2.1 of the Code, which states *"You must not provide information which is misleading or false*", with regard to the example put forward by the homeowner in respect of the factor's knowledge of the conversion of the single flat, I do not agree that the factor sought to mislead or give false information in this respect. The title deeds had not been amended and so, in my view, there was no re-apportionment of common charges to be made. With regard to the factor's undertaking to install a secure door to the common entrance and undertaking to upgrade the close interior, I accepted the factor's position that any undertaking would be conditional on the agreement of the other proprietors in the block. My view of the factor's use of the phrase *"The Sheriff found in our favour"* on page 2 of the factor's submission letter of 29 March 2018 is that it is an understandable use of layman's language when referring to a settled court action in which a debtor had made payment and that it was not an attempt to mislead or to be false. In any event, the statement post-dated the date of the Application.

32. With regard to Section 2, 2.2 of the Code, which 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)",* I accepted the factor's position that the debt recovery action currently being taken by it relates to unpaid accounts which have accrued since the court action was sisted .

33. With regard to Section 2, 2.5 of the Code, which 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."*, I accepted the factor's position that there had been an apology for one lengthy delay and take the view that the other delay is insignificant.

Finding: Debt Recovery Procedures (Section 4 of the Code at 4.3 and 4.9)

34. With regard to Section 4, 4.3 of the Code, which states, *"Any charges that you impose relating to late payment must not be unreasonable or excessive."* Taking into account all that was said by both parties, I am of the view that the charges levied by the factor are not excessive but are a fair estimate of its additional costs in pursuing debts. I find no relevant correlation between the management fee and the additional costs in pursuing debts. The latter can be directly costed based on the additional work created by these tasks and, given that the current national minimum wage is £7.83 per hour excluding national insurance and pension costs and the cost of a second class stamp is 58 pence, £10.00 plus VAT for a late payment reminder letter is entirely reasonable.

35. With regard to Section 4, 4.9 of the Code, which 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."* As narrated at paragraph 32, I accepted the factor's position that the debt recovery action being taken relates to unpaid accounts which have accrued since court action was raised.

36. With regard to the homeowner's statement in the Application, that the factor's letter of 9 August 2017 is intimidating, I accepted the factor's position that this was a statement of commercial fact intended to do no more than make the proprietors of the block aware that the factor could not fund the cost of repairs properly due by them and was not a form of threat or intimidation levelled at the homeowner alone.

37. Accordingly, I find that there has been no failure to comply with the Section 14 duty in terms of the Act in respect of compliance with Section 4 of the Code.

Finding: Complaints Resolution (Section 7 of the Code at 7.1 and 7.2)

38. With regard to Section 7, 7.1 of the Code, which states, "*You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."* and Section 7, 7.2 of the Code, which 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.",* I

found that the essence of the homeowner's complaint is that the factor ought to have a more complex complaints process than the size of its organisation merits and can see no logic in this complaint. In my view, the purpose of Section 7 at 7.1 and 7.2 is to ensure that complaint handling is dealt with at a senior level within factoring organisations and that is exactly what occurs in this factor's organisation.

39. Accordingly, I find that there has been no failure to comply with the Section 14 duty in terms of the Act in respect of compliance with Section 7 of the Code.

Finding: Property Factor Duties

40. The homeowner's position in respect of property factor duties is that the factor had breached this duty as it had, by letter dated 9 August 2017, withdrawn certain services in respect of property management, the homeowner's view being that the factor's duty is absolute. The factor's Written Statement of Services at *"Core Services Provided"* states that the factor *"will instruct or carry out repairs as and when instructed by the Homeowner"* and states that if the factor *"identifies work the factor would write to you ...to advise of the work needing done"* and *"We would only not instruct work if we have objections from the majority of homeowner"*. The factor's Written Statement of Services goes on to state *"If (the factor) considers the work ...to be ..a matter of Health and Safety, we may instruct ...without ,... notifying"* .Therefore, I consider it to be clear from this wording that the factor acts as an agent of the proprietors in the block and that it is the proprietors, not the factor, who have the final say on repairs and so my view is that the homeowner is incorrect in stating that the factor's duty is absolute. I am of the view that the factor's letter dated 9 August 2017 sets out the factor's commercial decision as to the extent of its role as an agent who has not been reimbursed by its principals. I am also of the view that this approach does not compromise its Written Statement of Services.

41. I am mindful that the core area of disagreement between the parties is the method of apportionment of the common charges. Although, the homeowner did not complain about this matter in terms of a failure by the factor to comply with the property factor duties in terms of Section 17(5) of the Act, I consider that, as the factor is fully aware of this disagreement and as the factor's Written Statement of Services at "Other Duties" includes "*apportioning of cost due by each Homeowner",* I am entitled to deal with this matter as a complaint of a failure to comply with a property factor duty.

42. The homeowner's position is that the factor does not follow the title to the Property, being Land Certificate REN26108, and does not follow the titles for the properties in the block when apportioning common charges. I only have the Land Certificate REN26108 before and so cannot comment on the titles for the remainder of the block, however, I do not doubt Mrs. Gallagher when she says that the titles are inconsistent. In any event, as Section 17 of the Act states *" (1)A homeowner may apply to the First-tier Tribunal for determination of whether a property factor has failed (a)to carry out the property factor's duties.....(5)In this Act, "property factor's duties" means, in relation to a homeowner (a)duties in relation to the management of the common parts of land owned by the homeowner",* I am restricted to dealing with the property factor duties as they relate to

this homeowner and so have no requirement to consider the titles for the other properties in the block.

43. Land Certificate REN26108 at Section D Burdens Section contains two burden writs which make reference to common property. Firstly, Disposition by the Trustees of Neil Campbell and another to Margaret Scott or Blair recorded GRS(Renfrew) 8 July 1936 burdens the individual properties in the block and an adjacent block now known as 54-62 West Blackhall Street, Greenock with payment of "*an equal share of the expense of maintaining and keeping in repair ....all common fittings and common parts"* and dispones *"these jointly ...in proportion to the number of shops, saloons, and dwellinghouses using same".* Secondly, Disposition by Robert Blair to Alexander and Annie Gillespie recorded GRS(Renfrew) 19 April 1976 burdens two flats, one of which appears to the Property, with of *"a one-third share of the roof, hatchways, rhones and rain conductors and staircase"*" and "*an equal share of the expense of maintaining and keeping in repair the common ground in proportion to the number of shops, saloons, and dwellinghouses using same and a similar share of the common close".*

44. By the factor's account, the factor apportions the common charges for the Property as one -quarter of the costs of the internal close and stairway serving the west side of the block, one-sixth of the costs of the roof, gutters and downpipes serving that side of the block and one- fifteenth of the cost of the common drains, water supply pipes and gas and electricity. The factor does not mention the common ground. Taking the first burden writ, Disposition by the Trustees of Neil Campbell and another to Margaret Scott or Blair recorded GRS(Renfrew) 8 July 1936, which apportions common charges equally amongst those who use the common parts and leaving aside the property which is common to the block and the adjacent tenement, it is my view that the factors approach is correct. The factor apportions costs equally according to usage.

45. However, I acknowledge that the terms of the second burden deed, Disposition by Robert Blair to Alexander and Annie Gillespie recorded GRS(Renfrew) 19 April 1976 appear to contradict the 1936 deed by apportioning a one-third share of the roof, gutters, downpipes and close to the Property. The homeowner submitted that, if the terms of the title deeds are not clear, the terms of Section 4 of the Tenements (Scotland) Act 2004 ("the TSA 2004") should apply. Section 4 of the TSA 2004 applies the Tenement Management Scheme as set out in Schedule 1 of the TSA 2004 ("the Tenement Management Scheme") to all tenements unless certain conditions also set out Section 4 apply. It is my view that, from my reading of Land Certificate REN26108 and from Mrs. Gallagher's submissions in respect of inconsistency of the title deeds, that Section 4 of the TSA 2004 might well apply to some extent, but, as I explain in paragraph 47, that is a matter for the proprietors of the block.

46. The homeowner further submits that as one of the flats in the block has been sub-divided, Schedule 1, Rule 4 of the Tenements (Scotland) Act 2004 should also apply. However, I am of the view, however, that Rule 4 of the Tenement Management Scheme does not apply. Section 4(6) of the TSA 2004 states that Rule 4 of the Tenement Management Scheme applies unless a tenement burden provides that the liability for costs is to be met by one or more of the owners. In this case, there are two tenement

burdens which provide that the liability for costs is to be met by one or more of the owners. Accordingly, Rule 4 of the Tenement Management Scheme does not apply.

47. The homeowner's complaint is not only that the TSA 2004 applies but that the factor should apply it as part of its property factor duties. I do not agree. Mrs. Gallagher submitted that the proprietors in the block were invited by the factor to regulate the title conditions in respect of common parts and charges by adoption of the Tenement Management Scheme or by making a Deed of Conditions, but they declined to do so. Presumably, the proprietors in the block are content to rest on the factor's approach of apportioning costs equally based on usage. The factor's position is that the factor carries out its role by custom and practice based on this approach. As regards lawfulness, my view is that this is an acceptable agency contractual relationship recognised by the Act and the Code. In any event, as outlined at paragraph 42, my jurisdiction is restricted to the factor's actions in respect of this Application and that with reference to the Act. I cannot order the factor or the other proprietors in the block to adopt the Tenement Management Scheme or to make a Deed of Conditions. Accordingly, it is not for me to require that the factor should apply the TSA 2004 of its own accord.

48. The remaining point in the homeowner's Application and the apportionment of common charges is the sub-division by Mr Bateman of his single flat into two flats. I accept the submission by Mrs. Gallagher that although structural work was undertaken, the title deeds were not amended. Accordingly, I am of the view that, with regard to apportioning common charges, the factor is entitled to rely on the deeds and the current practice as they stand and disregard further apportionment. I note, however, that the factor has come to an informal arrangement with Mr. Bateman whereby Mr. Bateman has agreed to pay a greater share of common charges if requested. In my view, this is the action of a diligent factor.

49. Section 17(4) of the Act states, *"References in this Act to a failure to carry out a property factor's duties include references to a failure to carry them out to a reasonable standard.* Therefore, the issue for me in respect of this part of the Application is to determine if the factor failed to carry out the property factor duties, including failure to carry them out to a reasonable standard. For the reasons set out in paragraphs 40 – 48 inclusive, I find that the factor has not failed to carry out its property factor duties.

Decision of the tribunal

50. Accordingly, for the reasons and findings set out in full in the foregoing paragraphs, the tribunal determined that the factor has failed in its Section 14 duty in respect of compliance with Section 1.1a Cf the Code and has not failed to carry out its property factor duties in in terms of Section 17 of the Act.

51. Having determined that the factor has failed to carry out its duty in terms of Section 14 of the Act, I then considered whether to make a property factor enforcement order in terms of Section 19 of the Act. I had regard to the full facts of the Application and all of the matters before me. I had regard to the fact that the homeowner was fully aware of the basis on which the factor apportioned common charges and had been for some time. I

am of the view that the deficiency in the factor's Written Statement of Services does not prejudice the homeowner. I took the view that the factor could readily and easily remedy this breach by issuing an amended Written Statement of Services with reference to the way in which common charges are apportioned. I had regard to the effect of a property factor enforcement order on the factor and on its reputation and considered that the effect of a property factor enforcement order outweighed the extent of the breach, particularly as the breach could be remedied as suggested by me. Accordingly, I determined not to make a property factor enforcement order.

Appeal

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

Karen Moore

Chairperson

8 May 2018