Housing and Property Chamber
First-tier Tribunal for Scotland

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal")
Property Factors (Scotland) Act 2011 ("the Act")

Statement of reasons for a decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/21/0602

Re.: Flat 60, Kyle Court, Smith Street, Ayr, KA7 3AW **("the property")**

The Parties: -
Mr James Chrichton, Flat 60, Kyle Court, Smith Street, Ayr, KA7 3AW **("the homeowner")**

First Port Property Services Scotland, Troon House, 3rd Floor, 199 St Vincent Street, Glasgow, G2 5QD **("the property factor")**

Tribunal Members: - Simone Sweeney (Legal Chair) Mary Lyden (Ordinary Member)

Decision of the Tribunal

The Tribunal unanimously determined that the application of the homeowner under reference, FTS/HPC/PF/20/0602 would be considered on its own. There is no evidence that the property factor has failed to comply with sections 2.5, 3.1, 7.1 and 7.2 of the Code of Conduct for Property Factors ("the Code") as required by section 14 (5) of the Act.

The Tribunal unanimously determined that there is no evidence that the property factor has failed to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.

Background

1. Reference is made to previous procedure and all of the Tribunal's directions and decisions in relation to this application, to date.

2. By application dated 15th March 2021, the homeowner applied to the Tribunal for a determination on whether the property factor had complied with sections, 1 c, f, g, h and 1 D l, 2.1, 2.2, 2.5, 3.1, 3.2, 4.1, 4.5, 4.6, 4.7, 5, 7.1 and 7.2 of the Code and with the Property Factor's duties in terms of section 17 (1) of the Act.

3. The Property Factor's duties under section 17 (1) of the Act were specified as failures to follow the debt recovery procedures, to transfer contingency and re-decoration funds, cancel insurance policy, adhere to statement of service and provide accurate information as provided within the property factor's statement of services.

4. Documentation in support of the application was produced by the homeowner (including copy communications, welcome pack, accounts) within an inventory of productions, dated 15th March 2021.

5. A Notice of Acceptance of the application was issued on 2nd June 2021 by a legal member of the Tribunal under Rule 9 of the regulations. The application was referred to a telephone hearing before the Tribunal on 6th August 2021 at 10am.

6. A note of response to the application together with an inventory of productions was received from the property factor under cover of email dated 23rd July 2021. Included in the documentation was copy deed of conditions, insurance documentation, copy communications between parties, complaints procedure, financial information and statement of services.

7. The application proceeded to a hearing at the telephone on 6th August 2021 at 10am. The homeowner was present with his supporter, Mr Watson. The property factor was represented by Ms Elaine Bald, Interim Regional Manager and Mr Steven Maxwell, Credit Control Manager. At commencement of the hearing, parties were asked if there were any questions or issues which they wished to raise. There was nothing raised by the homeowner. Ms Bald confirmed that the property factor had

no issues to raise. Accordingly the Tribunal proceeded to hear evidence and submissions from both parties.

Background to the complaint

8. The background to the complaint was that the property factor had been dismissed by the owners at the development following a secret ballot on 24th September 2019. The result of the vote had been intimated to the property factor on 25th September 2019 and acknowledged on 11th October 2019. The owners had appointed a competitor, Donald Ross Residential Factoring, to take over management of the development from 6th January 2021. This was all a matter of agreement between the parties.

9. By letter of 5th November 2019, the homeowner had written to the property factor requesting that an audit be carried out at no charge to owners. By letter dated, 5th December 2019, the property factor accepted the request to proceed with a full audit of charges up to 6th January 2020 but, as there was an audit taking place up to 31st August 2019, instructing an additional audit to cover the period up to 6th January 2021 would incur a fee of, at least £800. The homeowner withdrew the request for an audit by letter dated 14th December 2019. The same letter requested that the property factor provide, *"Certificate of 5 year Insurance Claims, which will be required by us."* An email was produced by the homeowner which showed that the property factor replied on 17th December 2019 attaching a copy of the claims history for the previous five year period. Again, this was all a matter of agreement between the parties.

10. The property factor's involvement ended on 6th January 2020. A letter was issued to the homeowner by the property factor on 20th January 2020 confirming that final accounts for the development would be issued prior to 6th April 2020 and referred to the fact that this is within the terms of section 3 of the Act.

11. The homeowner received copy accounts up to 6th January 2020 from the property factor by letter dated, 16th April 2020. Insofar as is relevant, the letter provided:-

> *"The development ran with a deficit to budget of £9,365.58. The main points to note are;*

- *The annual insurance was paid in full on 1st September so this shows as a deficit of £5,348.87 against the reduced budget to 6th January 2020 of £3,038.*
- *A total debtor figure of £2,725.77 has been deemed irrecoverable and will reduce the final balance to be passed to your new property factor. This is in accordance with your Title Deeds.*
- *All outstanding funds will now be transferred to your new factor."*

12. The content of the letter raised concerns for the homeowner which formed the basis of the application before the Tribunal.

Debt recovery

Evidence of the homeowner

13. It was submitted that the property factor had failed to comply with section 4.1 of the Code which provides:-

> **Section 4.1 of the Code**
>
> *"You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts."*

14. A copy of the property factor's statement of services was before the Tribunal. At page 4 of the document was a paragraph with the heading, *"Debt recovery and Credit Control procedures."* The document provided that a copy of the property factor's debt recovery procedure would be made available upon request. It provided a procedure which would be followed to recover outstanding service charges and a timescale within which this would be done. The homeowner admitted that the property factor has a written procedure for debt recovery. He admitted that it is clear. However, the homeowner argued that the procedure had not been, *"properly applied"* as required by section 4.1 of the Code.

15. The homeowner had been unaware of any debt recovery issues at the development prior to receipt of this letter. Following further enquiries, the property factor advised

that the debt of £2,725.77 had arisen from four owners who had failed to pay service charges in full for the period, 1st September 2019 to 29th February 2020. The homeowner argued that the property factor ought to have made owners aware of this situation when they were dismissed as factors in September 2019.

16. The fact that the homeowner had not been made aware of this information previously showed a failure on the part of the property factor to comply with section 4.6 of the Code, which provides:-

> **Section 4.6 of the Code**
>
> *"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."*

17. Further, the homeowner alleged that the property factor ought to have recovered the unpaid charges from these owners, that they had not done so and through that failure, had not complied with section 4.7 of the Code. Section 4.7 requires of the property factor:-

> **Section 4.7 of the Code**
>
> *"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."*

18. The homeowner submitted that this was not a debt which should be borne by the owners because it would never have existed had the property factor followed its own debt recovery procedure and recovered the monies. By failing to do so, the owners had a loss of £2,725.77. The homeowner submitted that the property factor was due to repay this sum to the owners.

19. Following questions from the Tribunal, the homeowner admitted that the sum of £2,725.77 had arisen because other owners had not paid charges for services. Further, that had they known of the existence of the debt in September 2019, the owners would have been *"happy"* with the debt. The issue was more the failure on the part of the property factor to communicate the existence of the debt. The homeowner

advised that he was unaware of any issues of debt recovery action taken against an owner during the three years he had lived at the property.

20. Mr Watson submitted that he has been a homeowner at the development for ten years. He is aware that there have been issues of debt in the past. Mr Watson supported the point made by the homeowner that the issue was the failure of the property factor to communicate the debt. Following intimation of their dismissal, Mr Watson advised that the property factor was in communication with the residents' committee at regular intervals but failed to mention that there was a collective debt to be shared by all owners. Had the owners known, Mr Watson insisted that the owners would have understood.

21. Finally, the homeowner submitted that the property factor had failed to comply with section 4.5 of the Code which provides:-

> **Section 4.5 of the Code**
>
> *"You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding."*

22. By way of explanation for this allegation, the homeowner submitted that he did not know if the property factor had systems for ensuring that payments were monitored. The fact that he had not been provided with any information to show same was his basis for alleging a failure by the property factor to comply with section 4.5 of the Code. The homeowner advised that the property factor had never communicated to him whether written reminders had been sent to those owners, in debt.

23. In response, Ms Bald denied any failure on the part of the property factor to comply with sections 4.1, 4.5, 4.6 or 4.7 of the Code.

24. In relation to section 4.1, Ms Bald referred to the statement of services which formed production number 6. Ms Bald submitted that the document is clear about the procedure which the property factor will follow when a debt is to be recovered and the timescales which will apply (an owner has 28 days to pay an account. Credit control procedures do not take effect until this 28 day period has expired. A

reminder letter is issued 15 days thereafter requesting payment in 14 days. 30 days post invoice, a letter is issued requesting payment in 7 days to prevent late payment charges. Thereafter a, *"litigation letter"* is issued. Should the debt not be settled at this time, matters are passed to solicitors to commence court proceedings).

25. Details of the debt recovery procedure is displayed on the property factor's website and is available should it be requested. Ms Bald was unaware of whether the homeowner had requested the document. Mr Maxwell explained that, on invoices issued to owners, there is information about how credit control procedures can be accessed on the website. This information would have been on the homeowner's invoices. Against this background, the property factor argued that the requirements of section 4.1 had been met.

26. Mr Maxwell provided an explanation of what had occurred in these circumstances. Reminder letters were issued to the relevant owners on 23rd October 2019 with second reminders issued on 10th December 2019. In between times, the property factor received intimation of their dismissal as factor. Focusing on the dismissal and the issues which flowed from that caused a delay in issue of the second reminder letter. As at 25th September 2019, a debt of £11, 645.17 existed, arising from twelve owners failing to pay charges. No intimation of this debt was made to owners at that time because credit control procedures had yet to be exhausted. Details of any debtors or creditors would appear on audited accounts but the homeowner had instructed the property factor not to proceed with audited accounts. The property factor insisted it had managed the debt. By April 2020, it had been reduced to £2,725.77 by the property factor following its own credit control procedures. But for the dismissal by the owners at the development, the property factor would likely have resolved the debt issue as it had managed to do in the past.

27. Mr Maxwell submitted that the credit control procedure which was applied by the property factor in these circumstances, notwithstanding dismissal of the property factor by the owners, showed compliance with section 4.5 of the Code.

28. The property factor denied any failure to comply with section 4.6 of the Code. Up to the date of termination on 6th January 2020, the property factor had pursed the debt. It was accepted that the property factor had a duty of care to owners to recover debt

and this was complied with. There was no requirement on the property factor to share this with the owners when the debt was being actively pursued. Prior to 6th January 2020, there remained a recoverable debt. Such debts would not be made known to owners until they became irrecoverable. These debts only became irrecoverable at the date of termination on 6th January 2020. Therefore the property factor identified no debt recovery *"problems"* be shared with owners as per section 4.6 of the Code.

29. Mr Maxwell explained further that, ordinarily, a meeting takes place twice a year with owners and the property factor. Any debts are shared with owners at that time. This did not go ahead because the property factor had been dismissed. Otherwise owners would learn the information from annual accounts.

30. Mr Maxwell insisted that the sum of £2,725.77 was not taken from the owners by the property factor as the homeowner was suggesting. Money had been expended on owners for various matters (insurance, development manager etc.) and charges up to the date of the property factor's termination on 6th January 2020. Balances were settled by the property factor.

31. As far as the property factor was concerned, a debt becomes irrecoverable when the credit control procedures fail to bring about a resolution and litigation is necessary or, as was the case here, the relationship between owners and the property factor comes to an end.

32. The property factor insisted that by following its credit control procedure and reducing the debt from over £11,000 to £2,725.77, it could be shown that reasonable steps had been taken to recover unpaid charges. Therefore the property factor was satisfied that it had complied with section 4.7 of the Code.

33. The property factor denied any duty to repay to the owners the sum of £2,725.77 on the basis that the property factor was not responsible for the loss.

Insurance

Evidence of the homeowner

34. Given the content of the letter of 16th April 2020 (see paragraph 11, above) the homeowner queried the costs for insurance cover. It was his understanding that insurance costs ought to have been for the period from September 2019 (the date of

renewal of the policy) and the date of termination of the property factor's involvement in the development on 6th January 2020. The letter of 16th April 2020 and accounts attached indicated that the owners had been charged for the full twelve month period, ie. September 2019 to September 2020 and the insurance policy remained live, having never been cancelled by the property factor at the point of their termination.

35. By letter dated, 30th April 2020, the property factor advised the reasoning for this,

> *"Prior to termination of our services the insurance broker wrote to Donald Ross Residential Factoring to enquire if they had made alternative arrangements to insure the building. No response was received. As such, it was prudent to allow the policy to continue until 31st August 2020 or until DRRF cancelled it on behalf of the homeowners."*

36. The homeowner submitted that it was the responsibility of the property factor to cancel the insurance policy at the date of their termination on 6th January 2020. It was alleged that the failure to do so was a failure to comply with section 5 of the Code which deals with the property factor's duties where insurance is concerned. The homeowner failed to specify which part of section 5 he was referring to. He submitted that the Code does not address this problem. He admitted that he was unable to find an appropriate part of section 5 of the Code which was relevant to this part of his complaint.

37. However the homeowner alleged that having not cancelled the annual insurance policy on 6th January 2020 was a, *"gross error."* The homeowner had been advised by the property factor that contact had been made with the new factor, Donald Ross Residential Factoring to enquire whether alternative arrangements had been made to insure the building. No response was received. Therefore the property factor had allowed the policy to continue. The homeowner had been advised to take the matter up with Donald Ross Residential Factoring. However the homeowner argued that it is not standard practice in such circumstances for the incoming factor to contact the outdoing factor.

38. The homeowner admitted that the owners knew that the insurance policy was renewed in September 2019, prior to the owners voting to dismiss the property factor. He admitted that no enquiries were made by him about the insurance policy being cancelled. Nor were there any enquiries made with Donald Ross Residential Factoring about them having cancelled the existing policy or creating a new policy. The homeowner admitted that the property factor acted upon instructions of owners and that no instruction had been given by the owners to cancel the insurance policy.

39. Mr Watson referred to the letter of 14th December 2019 headed, *"Kyle Court Termination of Services,"* sent to the property factor in which a request was made for, *"Provision of Certificate of 5 year Insurance Claims, which will be required by us."* Mr Watson invited the Tribunal to accept that the heading of the letter was clear and that the request for insurance information would only have been made on the basis that *"we"* (which the Tribunal understood to refer to the owners) intended to cancel the insurance policy. Following further enquiries from the Tribunal chair, Mr Watson confirmed that the letter did not make clear that the owners intended to cancel the insurance policy and that was why the request was being made for the insurance information.

40. It was explained that the property factor never told owners that they may need to cancel the insurance policy should they be changing factor and that the owners had simply assumed that Donald Ross Residential Factoring would automatically cover all insurance matters.

41. The Tribunal chair enquired why cancelling the insurance policy was the responsibility of the property factor when they were dismissed. The homeowner argued that the property factor was acting as agent for owners, had arranged insurance on behalf of owners and therefore it ought to have followed that the property factor cancelled the insurance policy on behalf of owners.

42. The homeowner explained that Donald Ross Residential Factoring created a new insurance policy on 6th January 2020 which they communicated to owners. Essentially this meant that there were two insurance policies in place. The homeowner advised that he assumed that the earlier policy must have been

cancelled and only realised that it was still in existence when he received the accounts in April 2020. He alleged that owners had suffered a loss. By failing to cancel the original policy, the property factor had cost the owners £5,348.87 being the difference between what was left the annual policy between 6th January and September 2020.

43. The evidence before the Tribunal was that Donald Ross Residential Factoring did not in fact take over property management services, as expected. Due to various issues the company ceased trading. A new property factor (Newton Property Management) was appointed in or around June 2020. The homeowner denied that Donald Ross Residential Factoring ought to have cancelled any existing policy or made efforts for this to have been done prior to arranging a new policy. Rather the homeowner responded, *"Why should they? First Port should have taken the initiative as they were leaving."*

44. The homeowner admitted that he could not identify any part of section 5 of the Code with which he alleged the property factor had not complied. He alleged that the property factor had failed to comply with the property factor's duties by failing to keep owners informed that they were not cancelling the insurance policy. Also, had the property factor made owners aware that the policy was still in place on 6th January 2020, this would have created a reminder to owners to cancel the policy.

Response of the property factor

45. The property factor denied any failure to comply with the Code and highlighted the admissions by the homeowner that he could not identify any part of section 5 of the Code with which the property factor had failed to comply.

46. Ms Bald denied any responsibility rested with the property factor for cancelling the existing insurance policy on 6th January 2020. Efforts had been made by the property factor to communicate with the incoming factor but no response was forthcoming. Donald Ross Residential Factoring ought to have made greater effort to engage with the property factor. Ms Bald submitted that Donald Ross Residential Factoring failed to undertake due diligence as the in-coming factor.

47. Ms Bald argued that there was no evidence that Donald Ross Residential Factoring had set up an alternative insurance policy and that the owners were doubly insured.

48. The property factor admitted that the insurance policy created in September 2019 was never cancelled by them and that it was in the interests of the owners that the insurance policy continued given that Donald Ross Residential Factoring ceased trading and that there was no evidence of the owners being doubly insured.

49. With regards to the loss alleged by the homeowner, this was denied by the property factor. Donald Ross Residential Factoring did not provide property management services until the end of the insurance policy in September 2020. Rather, Newton Property Management stepped in before the annual insurance policy had expired.

Contingency Funds

Evidence of the homeowner

50. The next issue arising from the letter of 16th April 2020 (see paragraph 11, above) related to remaining monies owing to the owners.

51. It was a matter of agreement that, as at 6th January 2020, there was a balance of, £22,310.20 within the contingency fund and that this money belonged to the owners.

52. However there appeared to be a dispute about to whom the money should be paid. The homeowner submitted that the sum should be paid to the new factor, Donald Ross Residential Factoring. He submitted that the property factor had originally agreed to do this when they stated in their letter of 16th April 2010 that, *"all outstanding funds will now be transferred to your new factor."*

53. However the homeowner submitted that the property factor had returned monies to individual owners notwithstanding the undertaking in its letter of 16th April 2020 to return the sums to the new factor.

54. Moreover the sums were not paid to owners until around 23rd June 2020. The homeowner argued that 16th April 2020 was the final date by which sums should be returned (being the date on which account were issued).

55. The homeowner submitted that it is standard practice for all monies to be passed to the incoming factor. The homeowner alleged that the property factor's actions showed a failure to comply with section 3.2 of the Code which provides:-

> **Section 3.2 of the Code**
>
> *"Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor."*

56. Also the property factor had failed to comply with section 3.1 of the Code which provides:-

> **Section 3.1 of the Code**
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> *"If a homeowner decides to terminate their arrangement with you after following the procedures laid down in the title deeds or in legislation, of 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 bills relating to contracts which were in place for works or services)."*

57. The basis for alleging a failure to comply with section 3.1 of the Code was the fact that the financial accounts did not reach the homeowner until 16th April 2020. The property factor's, Mr Maxwell, had assured the homeowner that he would receive the accounts within three months of the date of termination. The date of termination of the arrangement was 6th January 2020. The homeowner submitted that he ought to have received the accounts by 6th April 2020 being three months thereafter. The fact that he had not received them until 16th April 2020 meant that the accounts were late and the property factor had not complied with the requirements of section 3.1 of the Code.

Response of the property factor

58. Ms Bald refused to respond to queries from the Tribunal or engage in comment to the allegations against the property factor in respect of sections 3.1 or 3.2 of the Code.

The Tribunal found Ms Bald's conduct to be consistently challenging throughout the course of the hearing and obstructive in progress of the application.

59. An inventory of productions lodged on behalf of the property factor included an email from the property factor's Mr Bodden dated, 15th May 2020. The email, insofar as is relevant provided,

> *"Regarding the homeowners funds, the situation has changed considerably since our letter of 16th April 2020. On 11th May 2020 at 21.03 you emailed First Port to notify us that you were changing factor. It is therefore not appropriate to proceed with our commitment from 16th April to transfer a significant sum of money to Donald Ross. It would be equally irresponsible to transfer these funds to a company for which we can find no Property Factor registration number."*

Section 1 of the Code

Evidence of the homeowner

60. The homeowner alleged that the property factor had failed to comply with section 1 C h of the Code. Section 1 C h of the Code relates to the statement of services which must set out: -

> **Section 1 C h of the Code**
>
> *"any arrangements relating to payments towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service)."*

61. The homeowner invited the Tribunal to accept that the contingency fund and the floating fund referred to at section 1 C h of the Code, to be the same thing. He alleged that 1 % of the sale of any property is made to the contingency fund. He was not convinced that the sums within the contingency fund had been passed over by the property factor effectively.

62. A copy of the statement of services was before the Tribunal. Under the heading, *"Float,"* it provides:-

> *"Where applicable, a non-interest bearing float, contributed to by each owner, may be required in order to finance the day to day cost of maintenance and management of a property. Any float required will be calculated having regard to individual*

circumstances and will be reviewed from time to time. Ay floats will be included in your first account received from us and is refundable on the sale of your property or at termination of the management contract under deduction of any final charges due. Any floats will be held in an account separate from FirstPort Limited funds."

Response of the property factor

63. Mr Maxwell submitted that the contingency fund was distinct from a float fund.

Section 2 of the Code

Evidence of the homeowner

64. The homeowner alleged three parts of section 2 of the Code had been breached by the property factor, sections 2.1, 2.2 and 2.5 of the Code.

65. Section 2.1 of the Code places the following duty on the property factor:

Section 2.1 of the Code

"You must not provide information which is false or misleading."

66. With regard to a failure to comply with section 2.1, the homeowner referred to information on the notes to the accounts he received on 16th April 2020. The note provided that the insurance policy could not be cancelled on 6th January 2020, *"due to claims being made, therefore the further (sic) 6 months were charged."* However in a letter from the property factor dated, 6th July 2020, this was confirmed to have been a mistake. The letter (insofar as is relevant) read,

"You are correct that the account notes stated that there had been claims made against the policy. This was not the case. Please accept my sincere apologies for the confusion."

The homeowner alleged that this example demonstrated that the property factor had provided him with information which was false.

67. The homeowner alleged that the property factor had failed to comply with section 2.2 of the Code from the poor manner adopted by the property factor's Mr Bodden in his communications with the homeowner.

68. Section 2.2 of the Code provides:-

Section 2.2 of the Code

"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)."

69. The homeowner had engaged in a number of email communications following receipt of the accounts on 16th April 2020. Amongst other things, the homeowner expressed his view on the various issues which form the basis of this application. The property factor's Mr Bodden issued a response to the homeowner by email of 15th May 2020 addressing each of the homeowner's issues. The email attached a copy of the property factor's complaints procedure. The homeowner repeated his position by email of 18th May 2020. A response was issued from the property factor's customer service centre on 19th May 2020 and not from Mr Bodden, personally. The email provided,

"…Mr Bodden has reviewed the content and refers you to his response of 15th May 2020."

The homeowner considered this to be a failure on the part of the property factor to address his concerns and intimated same by email of 19th May 2020. Mr Bodden replied on 21st May 2020 in the following terms,

"…First Port have not refused to address the concerns you have raised. We have acknowledged and reviewed your concerns, and communicated a clear response to each point raised. We accept that you are not satisfied with the responses issued, but we do not consider this to constitute a refusal to address your concerns."

The homeowner persisted with the issue which was in dispute between the parties. Mr Bodden issued a final email dated 26th May 2020. Insofar as is relevant the email provided,

"We will not respond any further on this matter, but again invite you to raise a formal complaint if you believe we are acting inappropriately…the matter may be escalated to the First-tier Tribunal…but only once our internal procedure has been exhausted."

70. The homeowner believed this showed that he had been treated badly by Mr Bodden. He felt that Mr Bodden was refusing to engage with him. To issue the email of 19th May 2020 from another source and to advise the homeowner to make a formal complaint if he remained unhappy was, *"abusive"* as far as the homeowner was concerned.

71. Section 2.5 of the Code provides:-

> **Section 2.5 of the Code**
>
> *"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)."*

72. Under the heading, *"Correspondence and email"* the property factor sets out its delivery standards within the statement of services. The document provides,

> *"We will endeavour to issue a formal written response within 5 working days of receipt of any formal correspondence from you (excluding public and statutory holidays). If we are unable to fully respond within this timescale you will receive an acknowledgement of your communication and an indication of when you can expect a full reply."*

73. To illustrate his allegation that the property factor had failed to comply with section 2.5 of the Code, the homeowner directed the Tribunal to letters from the homeowner's solicitor to the property factor. A letter dated 29th October 2020 was sent to the property factor at its registered address. The letter requested a response within fourteen days. There being no reply, the solicitor wrote again on 19th November 2020 enclosing a copy of the letter of 29th October 2020. No response was received from the property factor. A third letter was sent from the solicitor dated 9th December 2020 requesting a reply within seven days. A letter from the property factor's Mr Bodden to the solicitor was within the papers before the Tribunal. It was dated 21st December 2020. Reference was made to the solicitor's letter of 29th October

2020. No apology or explanation was provided for no response having been issued, sooner.

Response of the property factor

74. By way of response, Ms Bald referred the Tribunal to numbers 1 to 4 on page 5 of the property factor's written response. This section provided a response to allegations around property factor's duties and was silent on the allegations of a failure to comply with sections 2.1, 2.2 and 2.5 of the Code. Ms Bald was invited to add to the written response but declined to do so.

75. Insofar as is relevant, the written response provides that the property factor has undertaken a review of the correspondence provided by the homeowner. It is submitted that there is no evidence that the property factor threatened to break off ongoing correspondence, that Mr Bodden's responses to the homeowner were clear and professional and provided the homeowner with sign posting to the next stage in the complaints procedure, including the First-tier Tribunal.

Complaints resolution

Evidence of the homeowner

76. It was also alleged that the property factor had not complied with sections 7.1 or 7.2 of the Code which provide:-

> **Section 7.1 of the Code**
>
> *"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."*
>
> **Section 7.2 of the Code**
>
> *"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."*

77. The homeowner admitted that the property factor has 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. However, the homeowner alleged that the property factor had failed to follow its procedure.

78. The homeowner submitted that the property factor has a three stage complaints procedure. A copy of the procedure was before the Tribunal. The complaint is investigated and a stage one response is issued. This was followed by the homeowner. A stage one response to his formal complaint was issued on 6th July 2020 by the property factor's Mr Bodden. Being unhappy with the response, the homeowner raised a stage two complaint. In terms of the property factor's complaints procedure, this should be reviewed by senior management. The property factor's complaints procedure provides,

> *"Most Stage 2 complaints will be reviewed by the Senior Management team or (if appropriate) by the First Port Retirement Complaints panel…"*

79. The stage two response letter was also issued by Mr Bodden. The homeowner submitted that another manager ought to have reviewed matters, independently.

80. Finally the homeowner referred the Tribunal to the stage two complaint response from Mr Bodden. At the conclusion of that letter dated, 11th August 2020, the property factor advised that should the homeowner wish to escalate their complaint for independent review, they should contact the Tribunal. The address provided was, *"4th Floor, 1 Atlantic Quay, 45 Robertson Street, Glasgow, G2 8JB*." The correct address for the Tribunal at that time was, 20 York Street, Glasgow, G2 8GT.

Response of the property factor

81. Mr Maxwell responded by advising that Mr Bodden's position at the time of the complaint was regional manager. He was the property factor's most senior manager at that time. The property factor's complaints procedure provides that a complaint will be reviewed by senior personnel but does not specify that each stage will be reviewed by different personnel.

82. Mr Maxwell did not dispute that the homeowner had been provided with incorrect contact details for the Tribunal and apologised for the error.

Findings in Fact

The Tribunal finds the following facts to be established:-

83. That the homeowner is the owner of the property at 33 Kyle Court, Smith Street, Ayr, KA7 3AW.

84. That the property is within a block of flats which share common parts and common areas in and around the block.

85. That the block of flats in which the property is situated is within a wider development of similar blocks of flats.

86. That the property factor provided services to manage the common parts and common areas of the development, including the block of flats in which the property is situated until 6th January 2021.

87. That a statement of services provides details of the property management services provided by the property factor at the development.

88. That the deed of conditions and the statement of services provide the Property Factor's duties upon which the property factor has a duty to comply.

89. That the Property Factor's duties have been in place since October 2012.

90. That the property factor was dismissed following a secret ballot by owners on 24th September 2019.

91. That the result of the vote had been intimated to the property factor on 25th September 2019 and acknowledged on 11th October 2019.

92. That, as at 25th September 2019, a debt of £11,645.17, existed.

93. That, as at 6th January 2020, the property factor no longer provided property management services to the development.

94. That, as at 6th January 2020, a debt of £2,725.77 existed.

95. That the debt of £2,725.77 arose from the failure of four owners to pay relevant charges.

96. That the property factor has a clear written procedure for debt recovery which outlines a series of steps which will be followed.

97. That the property factor has in place systems to ensure regular monitoring of payments by owners.

98. That, having, followed these systems, the property factor was able to identify that twelve owners had failed to make payment.

99. That the property factor followed its debt recovery procedure and reduced the debt from £11,645.17 on 25th September 2019 to £2,725.77 on 6th January 2020.

100. That, by reducing the debt, the property factor demonstrated that it had taken reasonable steps to recover unpaid charges from owners who had not paid their share of costs.

101. That the debt did not become irrecoverable until 6th January 2020.

102. That there was no obligation on the property factor to share with owners debts which were not irrecoverable.

103. That the homeowner requested from the property factor details of insurance claims for the five period preceding 14th December 2019 and that this was provided by the property factor.

104. That an annual insurance policy was arranged by the property factor in September 2019 on behalf of owners.

105. That the insurance policy was not cancelled on 6th January 2020 and continued thereafter.

106. That the property factor contacted Donald Ross Residential Factoring prior to termination of its services.

107. That Donald Ross Residential Factoring failed to reply to the property factor's communications.

108. That the sum of £22,310.20 was owed to the owners as at 6th January 2020.

109. That, by letter of 16th April 2020, the property factor undertook to return outstanding funds to the new factor.

110. That, by email of 11th May 2020, the homeowner advised the property factor that another factor had been appointed by the owners.

111. That the sum of £22,310.20 was returned to owners in or around June 2020.

112. That, having terminated its delivery of services to the development on 6th January 2020, the property factor was required to make available to the homeowner all financial information relating to his account within three months of termination.

113. That the property factor provided the homeowner with financial information relating to his account on 16th April 2020.

114. That the statement of services provides arrangements relating to payments towards a floating fund.

115. That the notes to the accounts stated that claims had been made against the insurance policy which was not the case.

116. That this error was identified and admitted by the property factor and an apology provided by letter of 6th July 2020.

117. That letters were sent to the property factor on behalf of the homeowner on 29th October, 19th November and 9th December 2020.

118. That the property factor replied to the letter of 29th October 2020 on 21st December 2020.

119. That within the statement of services the property factor endeavours to respond to formal correspondence within five working days.

120. That the homeowner entered into email communication with the property factor's Mr Bodden following receipt of the accounts on 16th April 2020.

121. That Mr Bodden presented the property factor's position in his email of 15th May 2020 and invited the homeowner to make a formal complaint should he choose to do so.

122. That the property factor's emails of 19th, 21st and 26th May 2020 repeated the position set out in the email of 15th May 2020.

123. That the property factor has a three stage complaints process.

124. That the procedure provides that a stage two complaint will be reviewed by the senior management team.

125. That stage one and stage two complaints letters were issued by the property factor's Mr Bodden.

126. That the stage two letter from the property factor provided incorrect contact details for the Tribunal.

Reasons for decision

127. It was admitted by the homeowner that there was a clear debt recovery procedure in place but that it had not been properly applied. By this, he meant that he had not been made aware of a debt of £2,725.77, existing. The procedure sets out how the property factor will go about recovering monies due from owners and within which timescales. The procedure is within the statement of services and available on the property factor's website. Section 4.1 of the Code does not place a requirement on a property factor to make owners aware of a debt. The homeowner failed to show any evidence that there was a failure on the part of the property factor to comply with section 4.1 of the Code.

128. The evidence before the Tribunal was that the property factor was well aware that twelve owners had failed to pay factoring dues and that reminders were issued to them. There was no evidence presented by the homeowner to the contrary. Accordingly, the Tribunal is satisfied that the property factor has complied with section 4.5 of the Code.

129. The Tribunal accepts that the credit control procedure in place required to be exhausted before a debt became irrecoverable. At this point it became a *"problem"* in terms of section 4.6 of the Code as there could be implications for other owners from any litigation arising. Prior to that, it would not seem reasonable for owners to be made aware of any debts. It may be that an owner in debt has entered into a payment plan with a property factor. Until such times as that plan comes to an end, a debt still exists but it is recoverable. For data protection reasons, alone, it would not seem fair for that debt to become public knowledge. The reduced debt of £2,725.77 became irrecoverable on 6th January 2020 as a result of the property factor's dismissal. Until that date, the Tribunal accepts the evidence of the property factor that successful efforts were being made to reduce and eliminate the debt and

therefore there was no requirement to inform owners of debt recovery problems. Accordingly, the Tribunal is satisfied that the property factor has complied with section 4.6 of the Code.

130. The property factor reduced the debt at the development from £11,645.17 to £2,725.77 between September 2019 and January 2020. This is not disputed by the homeowner. The Tribunal is satisfied that the property factor has complied with section 4.7 of the Code.

131. By his own admission, the homeowner failed to identify any part of section 5 of the Code with which the property factor had failed to comply. In the absence of any such specification, the Tribunal finds no failure on the part of the property factor to comply with section 5 of the Code.

132. There is no evidence before the Tribunal that Donald Ross Residential Factoring created a new insurance policy on behalf of owners. In any event, there was no obligation on the property factor to end the existing policy. The homeowner admits that the property factor acts on the instruction of owners. Mr Watson's evidence was that the owners wished to end the policy but there is no evidence that this instruction was communicated to the property factor. Any obligation to end the policy rested with the owners. It was not for the property factor to end the policy without instruction.

133. The homeowner alleges that the property factor failed its property factor's duties by failing to provide information to owners. It was not for the property factor to provide reminders to owners of the insurance policy so that they might cancel it. The issue for the homeowner was a lack of communication by the property factor. The homeowner was able to take such actions as necessary to dismiss the property factor. Following that, it was open and prudent for the homeowner (in his role as chairman of the owners committee at the development) to arrange a meeting with the property factor to discuss all relevant matters arising from the property factor's dismissal and any impact on the development and the owners. That meeting could have taken place at any time between September 2019 and 6th January 2020. The homeowner chose not to meet or communicate with the property factor about all

such matters. Had such a meeting taken place, many issues (including insurance) could have been discussed and misunderstandings could have been avoided. The Tribunal identifies no evidence of any failure on the part of the property factor to comply with the property factor duties.

134. It is a matter of agreement that the property factor provided an undertaking to return the remaining sums to the new factor, Donald Ross Residential Factoring by letter of 16th April 2020. It is a matter of agreement that Donald Ross Residential Factoring never took up property management services at the development and that by email of 11th May 2020, the homeowner advised the property factor that a third factor (Newton Property Management) had been appointed by the owners. Moreover it is a matter of agreement that the sum of £22,310.20 was returned to owners, individually in or around June 2020. Section 3.2 of the Code requires funds due to be returned. The homeowner failed to show any evidence within the deed of conditions which specified that these funds should be returned to anyone other than the owners. In fact it is fortuitous that the funds were not passed to Donald Ross Residential Factoring given their failure to continue trading. The evidence before the Tribunal was that the owners received all sums due from the contingency fund. The Tribunal is not satisfied that there is any evidence that the property factor has failed to comply with section 3.2 of the Code.

135. It is a matter of agreement that the date of termination of the property factor's services was 6th January 2020. Parties were in agreement with the terms of section 3.1 of the Code that all financial information should be provided within three months of termination unless there is a good reason not to. It was a matter of agreement that the accounts were issued on 16th April 2020. This was out with the three month period. Should there have been a good reason for the accounts not being issued sooner, the property factor's Ms Bald failed to explain or even respond to same. The Tribunal found Ms Bald to have conducted herself in a manner which was unnecessary and unhelpful. This behaviour continued throughout the hearing. It is unclear why Ms Bald approached matters in this way when the property factor was positively encouraged to engage in the hearing. In the absence of any good reason why the financial information was not provided within the three month period, the

Tribunal determines that the property factor has failed to comply with section 3.1 of the Code.

136. The statement of services provides arrangements relating to payments towards a floating fund. There is no evidence of any failure on the part of the property factor to comply with section 1 C h. of the Code.

137. It is a matter of agreement that the notes to the accounts stated, wrongly, that claims had been made against the insurance policy which was not the case. The Tribunal accepts that this was a mistake by the property factor, that the mistake was identified and admitted by the property factor and an apology provided by letter of 6th July 2020. There is no evidence of any deliberate attempt by the property factor to mislead the homeowner. The Tribunal is satisfied that the property factor has complied with section 2.1 of the Code.

138. Communications by email revealed that parties held very different opinions on matters and that was unlikely to change. The homeowner was advised how he could escalate matters to a complaint on 15th May 2020. The email of 19th May 2020 was not abusive or intimidating or threatening in its content or tone. The Oxford English dictionary definition of, *"abusive"* is behaviour which is, *"extremely offensive or insulting."* The definition of, "intimidating" is, *"having a frightening, overawing or threatening effect."* The definition of, *"threaten"* is to cause someone to be vulnerable or at risk; endanger While the Tribunal accepts that the email of 19th May 2020 may not have provided the homeowner with the response he would have liked, the Tribunal does not find that, assessed objectively, it meets the test for being abusive, intimidating or distressing. Accordingly, the Tribunal is not satisfied that there is any evidence of a failure by the property factor to comply with section 2.2 of the Code.

139. There was no dispute between the parties that letters were sent to the property factor on behalf of the homeowner on 29th October, 19th November and 9th December 2020, that the property factor failed to reply until 21st December 2020 without any explanation. Within the statement of services the property factor endeavours to respond to formal correspondence within five working days. The

property factor fell short of compliance with its own delivery standards. The property factor has failed to comply with section 2.5 of the Code.

140. The homeowner admitted that the property factor has a clear written complaints procedure of three stages. Stage one addresses the initial complaint and the homeowner received a stage one complaint letter from the property factor's Mr Bodden dated, 6th July 2020 following investigation. Stage two of the process requires review by, *"the senior management team."* A stage two letter was issued to the homeowner on 11th August 2020. This letter was also from Mr Bodden. There was no evidence before the Tribunal that the stage two complaint was reviewed by a senior management team or anyone other than Mr Bodden. In the absence of same, the Tribunal is not satisfied that the property factor has followed its own complaints procedure. Accordingly, the Tribunal determines that the property factor has failed to comply with section 7.1 of the Code.

141. In relation to section 7.2 of the Code, information was provided on the stage two letter of 11th August 2020 of the First tier Tribunal but the information was out of date. The Tribunal moved from the address provided by the property factor some years ago. The fact that incorrect information was provided to the homeowner is not disputed by the property factor. The Tribunal is satisfied that the property factor has failed to comply with section 7.2 of the Code.

142. Nothing new was submitted to support the allegation that the property factor had failed to comply with the property factor's duties. In the absence of any evidence to support this allegation, the Tribunal is not satisfied that the homeowner has shown that the property factor has failed to comply with the property factor's duties as required by section 17 (1) (a) of the Act.

Decision

143. In all of the circumstances narrated, the Tribunal finds that the property factor has failed in its duty to comply with sections 2.5, 3.1, 7.1 and 7.2 of the Code.

144. The Tribunal determined to issue a PFEO.

145.Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.

146. The Tribunal proposes to make the order in the following terms:

Within 28 days from the date of issue of this order, for the property factor to:-

- *provide to the homeowner payment of £400 in recognition of:- the property factor's failure to reply timeously to communications sent on behalf of the homeowner on 29th October, 19th November and 9th December 2020; the failure to make available to the homeowner all financial information within three months of 6th January 2020; the failure to follow the property factor's own complaints procedure; the failure to provide accurate information of how the homeowner may apply to the Tribunal and; in recognition of the time, preparation and inconvenience the homeowner has expended in having to bring this application.*
- *To provide evidence of same to the Tribunal's administration.*

Appeals

147. 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 within 30 days of the date the decision was sent to them.

148. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

…… ……. Legal Chair, at Glasgow on 24th September 2021