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")

Chamber Ref: FTS/HPC/PF/18/1978

Property: 28, Kelvin Court, Glasgow, G12 0AD ("the Property")

The Parties:-

Mr Charles Duncan, residing at 28, Kelvin Court, Glasgow, G12 0AD ("the Homeowner") represented by Mr Iain Bradley, solicitor-advocate, Glasgow ("the Homeowner's Agent")

Ross and Liddell Limited, having a place of business at 60, St. Enoch Square, Glasgow, G1 4AW ("the Factor") represented by Mr. Michael Ritchie of Messrs Hardy MacPhail, solicitors, 5th Floor, Atlantic Chambers, 45, Hope Street, Glasgow, G2 6AE, ("the Factor's Agent")

hereinafter together referred to as "the Parties"

Tribunal Members

Karen Moore (Chairperson)

Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that the Factor (i) had not failed to comply with Section 14 of the Act in respect of compliance with Section 2.4 of the Property Factor Code of Conduct ("the Code") and (ii) had not failed to comply with the property factor duties in terms of Section 17(5) of the Act.

Background

1. By an application comprising application form with supporting correspondence and documentation received in the period from 6 August 2018 to 25 October 2018 ("the Application") , the Homeowner applied to the tribunal in terms of Section 17(1) of the Act (firstly) for a determination that the Factor had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with Section 2 (Communication and Consultation) at 2.4 and (secondly) for a determination that the Factor had failed to comply with the property factor's duties in terms of Section 17(5) of the Act.

Hearing.

2. A Hearing took place on 15 February 2019 at 10.00am at Glasgow Tribunal Centre, 20 York Street, Glasgow G2 8GT. The Homeowner was present and represented by the Homeowner's Agent. The Factor was present and represented by the Factor's Agent. Mr. Brian Fulton, one of the Factor's Directors, and Mr. Gerry Gilroy, a consultant surveyor with the Factor attended on behalf of the Factor. Both Parties lodged productions with the tribunal and copied these to each other in advance of the Hearing.

3. The Parties, in evidence and in response to questions posed by the tribunal, confirmed and explained to the tribunal that the background to the Application is that:-

i. there are 101 properties in the development known as Kelvin Court ("the Development");
ii. the Development was built circa the late 1930s;
iii. the Development is served by a common district heating system which was installed at the time of the original construction;
iv. the Factors were property managers of the Development from mid-2015 until their resignation on 31 May 2018;
v. there is a constituted Development owners' association, the Kelvin Court Proprietors Association ("the KCPA") of which there is a committee and there are sub-committees;
vi. notwithstanding the terms of the Deed of Conditions by Davidson Properties (Cricklewood) Limited recorded in the General Register of Sasines on 30 March and 14 December 1972 which governs obligations in respect of the common property within the Development and the management thereof, the KCPA, its committee and its sub-committees were the interface between the Factors and the proprietors of the Development ("the Development owners") in respect of the Factor's role in managing the Development common property;
vii. the KCPA provides instructions to the Factor;
viii. the KCPA committee and its sub-committees meet monthly, with the sub-committees reporting to the committee, and decisions not delegated to the committee or sub-committee being referred to Annual General Meetings or Extraordinary General Meetings of the Development owners;
ix. the Factor has no specific delegated authority and no financial threshold for extraordinary works, being works outwith the scope of the Written Statement of Services;
x. Mr. Gilroy was the named contact within the Factor's organisation for extraordinary works and
xi. Mr. Bradley, in addition to acting as the Homeowner's Agent, is also an owner in the Development.

4. The tribunal had regard to the Homeowner's complaint that the Factor was in breach of the Code at Section 2 (Communication and Consultation) and paragraph 2.4 which states: *"You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).*

5. The Homeowner's Agent suggested to the tribunal that the Homeowner's complaint in respect of compliance with the Code could also sit under Section 3 of the Code, Financial Obligations, at paragraph 3.3 : "*You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed*

financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.", and, at paragraph 3.4 which states: *"You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property)."* The Homeowner advised the tribunal that it was the Chamber administrative staff who suggested to him that Section 2 (Communication and Consultation) and paragraph 2.4 of the Code was the relevant section for his complaint.

6. The Factor's Agent submitted that the Homeowner's complaint in respect of Section 3 of the Code had not been properly intimated to the Factor and that the Homeowner's complaint in respect of failure to comply with the property factor's duties in terms of Section 17(5) of the Act arose from the same matter. The tribunal took the view that it was open to the tribunal to determine if sufficient notice had been given in respect of Section 3 of the Code and if the Factor's actions fell also within the scope of Section 17(5) of the Act.

7. The Homeowner and the Homeowner's Agent explained that the basis of the Homeowner's complaint is that the Factor had, without warning and prior consultation with the KCPA or the Homeowner himself, made payment of accounts relating to work for abortive fees for a heating project which did not proceed, the accounts being an account of £18,445.00 to W.S. Millar, a heating design engineer, and an account of £3,800.00 to the Factor for its services in respect of the heating project. From the copy invoice lodged by the Homeowner as part of the Application, the tribunal noted the Homeowner's share of each account to be £153.46 and £31.62 respectively.

8. The Homeowner and the Homeowner's Agent explained that, prior to the Factor being appointed to manage the Development, the KCPA had, on behalf of the Development owners, instigated investigations into renewing or replacing the district heating system ("the Heating Project") and, of its own accord, had instructed a firm of surveyors, Messrs. Wallace and Brown, in this regard. Messrs. Wallace and Brown, in turn, had instructed design engineers, Clancy Consulting Limited ("Clancy Consulting") to carry out feasibility study works. In the interim, the Factor was appointed as property manager of the Development and Mr Gilroy, in particular, was designated as the member of the Factor's staff with the professional expertise to assist and advise the Development owners in respect of the Heating Project.

9. Mr. Gilroy explained to the tribunal that he was employed by the Factor as part of its organisation in its role as Factor to the Development and was not acting on his own behalf as an independent consultant. The additional cost charged in respect of his services was charged by the Factor and not by him personally. Mr Gilroy explained that he was instructed by the KCPA and, on a day-to-day basis, by its Fabric Sub-committee to whom he reported.

10. The Parties explained to the tribunal that Mr. Gilroy replaced Messrs. Wallace and Brown as instructing surveyor to Clancy Consulting, who continued to be instructed to prepare a feasibility study in respect of the options open to the Development owners for the Heating Project and who, in particular, in December 2106, were instructed to prepare a detailed feasibility study and report on options.

11. The Parties agreed that there were structural and practical difficulties concerned with the Heating Project such as: the Development is "B" Listed; there is asbestos in the

buildings of the Development; the whole heating system is in common ownership and, although it should be used as a single unit, some owners by-pass parts of the system within their own properties; the high cost of the Heating Project and the Heating Project meaning significant structural changes to the roof and /or stairwells in the buildings of the Development.

12. The Parties explained to the tribunal that the timeframe set for the Heating Project was tight with the tender process to begin in the early months of 2018 and the works to be carried out in the summer of 2018 and completed before winter 2018. The Parties advised the tribunal that the works timetable was to take account of obtaining the necessary statutory consents and energy supplier connections.

13. Mr. Gilroy's position is that Clancy Consulting reported to him in March and April 2017 on four options for the Heating Project, of which two were recommend by Clancy Consulting and endorsed by the Factor. Mr. Gilroy explained to the tribunal that he engaged the services of Mr. W.S. Millar, mechanical and electrical engineer, to assist him assess some of the technical aspects of Clancy Consulting's reports. Mr Gilroy explained to the tribunal that he reported Clancy Consulting's findings and the recommendations by letter and at meetings to the KCPA in April 2017, and, the KCPA committee, at its meeting on 9 April 2017, approved expenditure of £40,000.00 to take forward proposals for the Heating Project to the next stage of detailed design works. It was intended that the detailed proposals be put before the Annual General Meeting of the Development owners on 4 May 2017. However, no reports from Clancy Consulting were forthcoming for that meeting.

14. An Extraordinary General Meeting ("EGM") of the Development owners was held on 5 July 2017 and attended by members of Clancy Consulting Consultants and Mr Gilroy, and at which meeting the reports prepared by Clancy Consulting as at that date were discussed and the recommendation to proceed with the preferred option of Clancy Consulting and the Factor (Option 2) was agreed by the EGM.

15. The Parties explained to the tribunal that following this EGM, they had become concerned that Clancy Consulting were failing to meet the required timescales and that concerns were being raised in respect of Clancy Consulting's understanding of the technical issues surrounding the Heating Project. Mr. Gilroy's position is that he remained in contact with Clancy Consulting pressing for progress and reported back to the KCPA Fabric Sub-committee. Mr Gilroy explained to the tribunal that following on from this, he had spoken with Mr Millar in respect of the possibility of Mr. Millar taking over from Clancy Consulting and had asked Mr Millar to quote a fee in this regard. Mr. Millar's quote of £18, 750.00 dated 8 August 2018 for "RIBA Stages 4, 5 & 6" for the Heating Project at the Development forms part of the Application and is lodged as a production by the Factor together with Mr Gilroy's accompanying email referring to his discussions with the KCPA representatives.

16. Mr. Gilroy's position is that at a meeting of the KCPA committee on 18 October 2017, the minutes of which are lodged as a production by the Factor, the Factor was instructed to appoint Mr Millar to take over the Heating Project scheme design and carried out works and services under that appointment. The Homeowner advised the tribunal that he was unaware of this instruction to appoint Mr. Millar, and that, in any event, it appeared to him that the appointment had been made by Mr. Gilroy in August 2017 when Mr. Gilroy asked Mr Millar to quote for work and so the appointment had been made ahead of the meeting of 18 October 2017 and without the authority of the Development owners.

17. The parties explained to the tribunal that a further EGM of the Development owners was held on 22 January 2018 specifically to discuss progress of the Heating Project, the outcome of which meeting was that a motion that "all work ceases on the present heating project while other alternatives are considered" was carried.

18. Mr. Gilroy explained to the tribunal that, at the EGM on 22 January 2018, he continued to support the Heating Project proposals and so considered the outcome to be a vote of "no confidence" in his professional services. Accordingly, he resigned from acting. Mr. Gilroy advised the tribunal that, in his opinion, the decision of the EGM was to terminate the works and the appointment of Mr. Millar and himself in his role as advisor. He proceeded to do this by finalising the accounts due to Mr. Millar and the Factor in respect of his own services and making payment of these accounts from the fund of £40,000.00 which had been lodged by the Development owners with the Factor to account of the design works and services.

19. The Homeowner advised the tribunal that, in his opinion, Mr Gilroy had not been authorised to make these payments and that he considered that Mr Gilroy, having attended the EGM on 22 January 2018, ought to have been aware of the high level of dissatisfaction that the Development owners had in respect of the work and services provided by Mr. Millar and Mr. Gilroy and so ought not to have made payment of the sums due without the express authority of the Development owners. The Homeowner advised the tribunal that by making payment, Mr Gilroy and the Factor had removed the Development owners right to withhold payment for poor or lack of service and had left them with no recourse in that regard. The Homeowner's Agent suggested that by making an almost immediate payment of the accounts, Mr Gilroy had ensured that there was no opportunity for the Development owners to instruct the Factor to withhold payment.

20. Mr Gilroy advised the tribunal that he had not acted untoward nor with unusual haste and that as soon as work of this sort is completed or the contract terminated, it is usual practice to render an account straight away. As the funds for these accounts were held by the Factor, the accounts were rendered and paid and appeared as entries in the next rendered Common Charges invoice to the Development owners, including the Homeowner, dated 16 March 2018 for the period 29 November 2017 to 28 February 2018, a copy of which invoice was lodged by the Homeowner as part of the Application

21. The Homeowner's position is that the Factor's action in respect of dealing with the Heating Project and making payment of the accounts to Mr. Millar and to itself breached the Code and the property factor's duties in terms of Section 17(5) of the Act.

22. The Homeowner and the Homeowner's Agent explained to the tribunal that the second strand of the Homeowner's complaint in respect of the Factor failing to comply with the property factor's duties in terms of Section 17(5) of the Act related to two separate breaches of the General Data Protection Regulation and the Data Protection Act 2018 by distributing the Homeowner's personal email address, being his personal information, to other Development owners and by issuing to the Chairperson of the KCPA and to at least one other Development owner an email to which was attached a spreadsheet containing details of the way in which other Development owners might pay their shares of the Heating Project costs, which information was personal to those Development owners. Homeowner's Agent explained to the tribunal that the on each of these occasions the Factor had self-referred to the Information Commissioner's Office ("the ICO") but on both occasions had understated the extent and effect of the breach.

23. Mr Fulton of the Factor and the Factor's Agent agreed that the data breaches had occurred and had been self-referred but disputed that there had been under reporting. The Factor's Agent submitted that the matter had been dealt with by the ICO and so was not a matter for the tribunal. Mr Fulton further advised that the Factor had apologised to the Homeowner in respect of the breach which concerned him. of the Factor

Findings of the tribunal

24. The tribunal took into account the Application, the productions lodged by the Homeowner and the Factor and the submissions made by and on behalf of the Homeowner and on behalf of the Factor at the Hearing. The tribunal found that all parties did their best to give evidence in a straightforward and truthful manner and had no difficulty in believing their accounts of the events, even though the opinions of the Parties differed.

25. The Homeowner is the heritable proprietor of the Property which forms part of the Development. The Factor took over the appointment of factor and property manager in 2015. The Factor's duties under the Act arose from that date until it resigned in May 2018.

26. The tribunal accepted the background as outlined in paragraph 3 hereof. The Tribunal accepted that Mr. Gilroy acted as the Factor's named contact for the Heating Project and as part of the Factor's organisation and not on his own account.

27. With regard to the authority to act and instruct the Factor, the tribunal found that the KCPA committee and sub-committees, by their usual custom and practice in their dealings with common property, had authority to instruct the Factor on behalf of the Development owners. The tribunal found that it fell to the sub-committees to report matters to the KCPA committee which in turn reported back to the Development owners in that regard.

28. With regard to the authority to act and instruct the Factor in respect of the Heating Project, in particular, the tribunal found that the KCPA committee and the Fabric and the Finance sub-committees, by their usual custom and practice, had authority to instruct the Factor on behalf of the Development owners, and so, found that the KCPA committee and sub-committees had authority to instruct Mr. Gilroy to appoint and dismiss contractors and engineers. The tribunal, therefore, found that it follows from that, that Mr Gilroy had authority to appoint Mr. Millar following the dismissal of the Clancy Consulting Consultants in October 2017.

29. The tribunal found that Mr. Gilroy was entitled to act on those instructions and, having regard to the productions lodged by the Parties, the tribunal found that Mr. Gilroy appeared to do so diligently and reported to those instructing him directly in great written detail. As Mr. Gilroy was aware of the way in which the KCPA committee and sub-committees disseminated information to the Development owners, the tribunal found that Mr. Gilroy was entitled to rely on the KCPA to inform the Development owners of the progress of the Heating Project.

30. The tribunal accepted that the Homeowner, from his own personal knowledge, may not have been fully aware of the instruction by the various committees of the KCPA to Mr. Gilroy but is of the view that this did not alter the competence of those instructions. The tribunal also accepted that the Homeowner, from his own personal knowledge, may not have been fully aware of the information provide by Mr Gilroy to

the KCPA, but is of the view that this did not alter that fact that Mr. Gilroy reported regularly and in detail to the KCPA and kept the KPCA aware of costs.

31. With regard to Mr Gilroy's decision to treat the outcome of the EGM of 22 January 2018 as bringing matters to an end in respect of the involvement of Mr. Millar and his own role on behalf of the Factor, the tribunal found that it was reasonable for Mr. Gilroy to reach this view. The motion carried was that "all work ceases on the present heating project while alternatives are considered". It is clear to the tribunal that the intention was that the work on which Mr. Millar and Mr. Gilroy as the Factor's employee had been instructed was to end at that time. The work might recommence, Mr. Millar and Mr. Gilroy might be re-instructed or other technical advisors might be instructed at a later stage but, at that point, Mr. Millar and Mr, Gilroy were discharged of their duties.

32. The tribunal had regard to the evidence of both parties at the Hearing and the productions lodged by the Factor, in particular, in respect of costs and found that it was clear or ought to have been clear to the Development owners, including the Homeowner, that Mr. Millar had provided a quote for his services and that he had carried out these services. The tribunal had regard to the minutes of the EGM of 22 January 2018 and note that, although these are full in respect of debate at that meeting, there is no mention of any of the Development owners, including the Homeowner, stating that neither Mr. Millar nor the Factor should be paid in respect of the services carried out by them. The tribunal accepted Mr. Gilroy's evidence that the Heating Project works and appointments having "ceased", he was entitled to finalise the accounts due to Mr. Millar and the Factor in respect of his own services and make payment of these accounts from the fund of £40,000.00 which had been lodged by the Development owners with the Factor for this purpose.

33. With regard to the two data protection breaches, the tribunal found that these had occurred and had been reported to the ICO by the Factor and, thereafter, dealt with by the ICI, as that office saw fit.

Decision and reasons in respect of the Homeowners' complaint in respect of Section 2 at paragraph 2.4 of the Code

34. The Code at Section 2, paragraph 2.4 which states: *"You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).* Having found that Mr. Gilroy and so the Factor had such a procedure in place for the Development and followed this in respect of the Heating Project, the tribunal determine the Factor was not in breach of this part of the Code.

35. The tribunal considered the Homeowner's Agent's suggestion that the Homeowner's complaint could be extended to Section 3 of the Code at paragraph 3.3 which states that: "*You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.", a*nd, paragraph 3.4 which states: *"You must have procedures for*

dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).", the tribunal determined that on the evidence and information before it, the Factor was not in breach of these parts of the Code.

Decision and reasons in respect of the Homeowners' complaint in respect of property factor duties.

36. The Homeowner's complaint in this regard related, firstly, to the way in which Factor dealt with the Heating Project and made payment of the accounts due to Mr. Millar and itself. Having found that Mr. Gilroy acted within his authority and in accordance with usual practice, the tribunal determined that the Factor did not fail in this duty.

37. The Homeowner's second complaint in this regard related to the two data protection breaches, only one of which affected the Homeowner directly. The tribunal agreed with the Factor's Agent that these matters had been resolved in another forum which has direct jurisdiction for breaches of this statutory nature. Dissatisfaction with the outcome thereof is not a matter for this tribunal and can be raised with that other forum.

38. The tribunal then gave consideration to the fact that, nonetheless, is the data protection breach which affected the Homeowner a failure in respect of the property factor's duties in terms of Section 17(5) of the Act and so is it a matter with which this tribunal can deal? In answering that question, the tribunal had regard to Section 17(5) of the Act which states: *"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",* and took the view that handling personal data of the Homeowner is not a duty relating "to the management of the common parts of land" but is a duty in relation to holding personal information and so is not a matter for this tribunal. Accordingly, the tribunal determined that the Factor did not fail in this duty.

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 4 March 2019.