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

Decision on homeowner's application: Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/17/0216

13 Burnpark, Catrine, Mauchline, KA5 6ER
("The Property")

The Parties: -

Mr Joseph Hall, 3 Otter Road, Swaffham, Norfolk, PE37 8JEG
("the Applicant")

Murphy Scoular, 3 Parkhouse Street, Ayr, KA7 2HH
("the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
David Hughes Hallet (Ordinary Member)

DECISION

The Respondent has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Sections 1.1a Bc, 4.1, 4.4, 7.1, and 7.2. of the Code of Conduct for Property Factors. It has also failed to carry out its property factors duties in terms of Section 17(5) of the Act in that it did not convene a meeting of proprietors in order that a vote could be taken in relation to a common repair.

The decision is unanimous

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 as "The Regulations"

The Respondent became a Registered Property Factor on 8 February 2013 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received on 6 June 2017 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondent had failed to comply with the Code of Conduct for Property Factors. The Applicant stated that the Respondent had failed to comply with sections 1.1a Ab, Bc and Bd, 2.1, 2.5, 4.1, 4.4, 6.1, 6.4, 7.1 and 7.2 of the Code. The Applicant also stated that the Respondent had failed to carry out its property factor duties in terms of section 17(5) of the Act.

2. On 17 July 2017, a Convenor on behalf of the President referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Russell House, King Street, Ayr on 6 October 2017.

3. On August 2017, the Respondent made a request for the hearing to be postponed as Mr Brian Murphy had other appointments arranged for that date. The Applicant opposed the request and advised that he had a considerable distance to travel and accommodation arranged. The Tribunal noted that the Respondent is a partnership of three individuals and therefore ought to be able to arrange for someone to attend. The request was therefore refused.

4. The Applicant lodged a bundle of documents with his application. In advance of the hearing he lodged further documents in support of his application. The Respondent also lodged a bundle of documents.

The Hearing

5. The hearing took place before the Tribunal on 6 October 2017. The Applicant, Mr Joseph Hall, attended. Mr Brian Murphy attended on behalf of the Respondent. It was explained by Mr Murphy that the Respondent is a small firm with only two active partners.

6. The Tribunal advised the parties that it appears from the documentation that the majority of the Applicant's complaints relate to a dispute over a common repair. The parties confirmed this to be the case. The facts giving rise to the dispute are, for the most part, not in dispute. The property is part of a development of houses, built by Hope Homes between 2002 and 2004. There are 58 properties. Within the development there is an area of common ground, located next to the Applicant's property. This is the only common property managed by the Respondent. The only work carried out on a regular basis is grass cutting. A gardener was appointed by the residents' association, before the Respondent became the factor for the property, and is understood to attend fortnightly, during the summer months, to cut the grass. In 2012 heavy rain caused the burn to flood and bank erosion at Mr Halls property. The Respondents were not the factors for the property at that time and were only appointed in early 2013. Some of the proprietors in the development believe the bank erosion to have been caused by a digger used

by Mr Hall when erecting a garage in 2004. These proprietors have therefore been unwilling to pay a share of the repair costs. Mr Hall denies the allegation that the digger caused the damage. An estimate was obtained from I. H. Borland for the repair to the banking of £12000. The work has been approved by SEPA. However, the work has not been instructed. The Respondent's position is that he cannot proceed to instruct the repair without the approval of a majority of owners and payment being received. Mr Hall disputes this and states that the Respondent, as factor, is empowered by the title deeds to instruct the work and is in fact obliged to do so. In terms of the title deeds each proprietor is a member of the resident's association. Various meetings of proprietors have taken place over the years regarding the issue. In 2014 Mr Hall instructed solicitors to initiate arbitration proceedings to resolve the matter. However, although the process was initiated, legal advice obtained by the Respondent on behalf of the owners concluded that the decision to refer the matter to arbitration was not legal because one owner could not unilaterally refer the matter to arbitration and the arbitration did not proceed. At an owner meeting on 28 April 2016, one of the proprietors who attended advised that he had some expertise in the area and thought that there was an alternative, cheaper option available than the work proposed by I.H. Borland. Some months later it was concluded that this alternative solution was not a viable option. On 28 April 2016 the Committee of the residents' association resigned, and no one was willing to replace them. Although still technically in existence, as required by the title deeds, there is no committee. In March 2017 the Respondent called a meeting of proprietors and put forward a proposal from Mr Hall that he would pay 50% of the repair cost up to a maximum of £6000. The remainder would be paid in equal shares by the other owners. A vote was not taken at the meeting itself, which was poorly attended. Furthermore, some of the attendees were from a different phase of the development and it transpired that they were not in fact liable to contribute. Following the meeting, Mr Murphy wrote to all proprietors in phase 1 (except Mr Hall) regarding the proposal. Of the 37, 15 rejected it, 4 accepted it and the others did not respond. The repair has not been carried out. It is Mr Halls position that the failure to instruct the work amounts to a failure to carry out its property factor duties. He also considers that there have been breaches of the code of conduct, some of which are also related to the dispute.

7. **Section 1 1a Aa and b of the Code – The written statement should set out "A. Authority to Act. Aa. A statement of the basis of any authority you have to act on behalf of all the homeowners in the group. B. where appropriate, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation".**
The Applicant referred to the statement of services provided by the Respondent to the proprietors in the development and included within his bundle of documents. The statement is a fairly brief one-page document. The Respondent confirmed that the document referred to is the current statement of services. The Applicant stated that the statement does not meet requirements of this section of the code. The statement says under a heading "Authority to Act" "Factors are appointed annually at the Annual General

Meeting of all proprietors. Repairs are not undertaken until consultation with the Chairperson of the owner's association or major work approved by proprietors" Mr Halls complaint is that this conflicts with the title deeds. Also, as the committee no longer exists, and it was agreed that full authority had passed to the factor, the statement of services should reflect that position. The Respondent disputes the complaint. Mr Murphy stated that the statement is adequate and complies with the code. He stated that the title deeds determine the issue of the factors authority and the statement is consistent with the title deeds. Furthermore, as the only property being factored is an area of common land, the statement of services does not require to be more detailed. The only routine work is the gardening, which was arranged before the Respondent became the factor by the committee.

8. **Section 1.1a Bc and Bd – The written statement should set out c.the core services that you will provide. This will include target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core services), d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified".** Mr Hall stated in his evidence that the statement of services does not detail the core services. In particular, it does not make reference to routine inspections. He explained that the Respondent was appointed following the resignation of the previous factor. He referred the Tribunal to an email from the Respondent dated 6 December 2012 which confirmed the appointment and outlines their terms. There is specific reference in the email to a management fee which includes periodic inspections. He pointed out that the inspections are not mentioned in the statement of services. In response, Mr Murphy again mentioned the limited role the factor has in this development. He advised that there are inspections, but aside from the grass cutting there is nothing else to instruct. It is his view that the statement of services does not require to be more detailed. More detailed provisions would only be needed if they were factoring a building. He added that the inspections are not part of their core services in this case. They do not therefore require to be referred to in the statement.

9. **Section 2.1 "You must not provide information which is misleading or false".** Mr Hall advised the Tribunal that he sent numerous emails over an 18 month period to the Respondent. Some of the responses contained information which was at misleading and false. He referred to an email he sent on 17 June 2016. It related to an owner's meeting which had taken place on 28 April 2016, when one of the owners in attendance stated that he had some expertise in the field of banking erosion and thought that there was an alternative way to repair it which would be less expensive. Mr Hall wrote on 17 June 2016 requesting a progress report on that proposal. He specifically asked whether the alternative proposal had been approved by SEPA and when the work would be instructed. He then referred to the response received by him on 20 June 2016 which stated that a proposal was under investigation but that the Respondent had no instructions to arrange repair work. The

response goes on to mention that the proprietors had specifically instructed the factor not to instruct work in relation to the banking. Mr Hall then referred the Tribunal to a letter from him to the Respondent dated 27 June 2016. In this letter he again asked when the investigations regarding the alternative repair would be complete and when there was to be a further meeting of proprietors regarding the matter. He also asked whether there had been a survey carried out of the banking, measurements taken or professional advice obtained. He stated that the response received, a brief email dated 28 June 2016, did not answer these questions. It simply advised that the respondent was trying to meet with the proprietor who had suggested the alternative repair and thereafter a meeting would be arranged. It goes on to mention that the Respondent had been instructed meantime not to proceed with any work. When questioned by the Tribunal about the aspects of these responses he considered to be misleading and/or false Mr Hall indicated that he did not believe that Mr Murphy had set out to mislead him or give him false information. However, it later transpired that the claim that there was an alternative cheaper repair option turned out not to be false and as a result no meeting took place to discuss it. The erroneous information came originally from the proprietor who had made the proposal, but it was relayed to Mr Hall by Mr Murphy. Furthermore, Mr Murphy did not then arrange the meeting which had been promised. Mr Murphy advised the tribunal that the proprietor who had suggested the alternative option worked for Wimpey Homes. Mr Murphy had struggled to get in touch with the proprietor or to get full information from him in order to have the proposal investigated. Ultimately, they discussed the proposal with landscape consultants who said it was not a workable solution. All of this took time. In the meantime, he advised that had not intended to mislead Mr Hall. Once it had been established that there was no alternative solution, there was a meeting called, at which time Mr Halls proposal that he would pay 50% of the Borland work was put forward. Mr Hall then advised the tribunal that he felt that he had been given the run-around. He accepted that perhaps Mr Murphy had also been misled was of the view that Mr Murphy had continued to pursue the alternative repair even when it became apparent that it would not suit, because SEPA had already rejected something similar. He stated that time was wasted pursuing the option that should have been more productively spent.

10. **Section 2.5 "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".** Mr Hall again referred to the letters he sent to the Respondent on 17 and 27 June 2016. In these letters he had asked questions which he did not feel had been responded to as quickly and as fully as possible. He made specific reference to the questions asked in the letter of 27 June 2016 about whether there had been a survey, measurements taken and professional advice obtained. He stated in his evidence that these questions had not been answered. He also referred to the written statement of services and said that there were no timescales identified in same for responses. In response, Mr Murphy advised the tribunal that he felt that there had been prompt and full

responses provided. The email of 27th June 2016 had been answered the following day. The letter of 17 June 2016 had been responded to by email dated 20 June 2016. With regard to the specific questions raised by Mr Hall he indicated that these had been answered. He had stated that he was under instructions from the owners not to instruct any work. This would include surveys and professional advice as these would involve costs. He accepted that the written statement indicates that emails are dealt with within 24 hours of receipt and enquiries and complaints acknowledged within 48 hours but that there is no timescale given for fully responding to complaints and enquiries. Mr Hall also indicated that the handling of his complaint by the respondent was also in breach of this section of the code. The parties evidence on this issue is in paragraph 14 of this decision.

11. **Section 4.1 "You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a 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". Section 4.4 "You must provide homeowners with a clear statement of how service delivery and charges will be affected if one or more homeowner does not fulfil their obligations"** Mr Hall advised the Tribunal that he has asked the Respondent for a copy of the debt recovery procedure but that this has not been provided. He referred to a letter dated 10 April 2017 in which this request was made. The letter also contains questions. In particular, he asked for clarification of a previous response from Mr Murphy which referred to debts over £50 being referred for debt collection. He was concerned that balances under this level were being passed on to other proprietors without any debt recovery action being attempted. He referred to the section on debt recovery in the written statement but said it is not comprehensive and does not deal with disputed debts. In response Mr Murphy indicated that the debt recovery procedure is contained in the title deeds and that he had explained this to Mr Hall. Reference was made to an email of 16 May 2017 in which this statement is made. He then advised the Tribunal that he had taken legal advice on the matter and had been advised that, if the title deeds make provision for debt recovery arrangements, he does not require a separate document detailing same. He also clarified that debts under £50 are not passed on to other owners. However, only those which exceed this amount are pursued, for economic reasons. In terms of disputed debts and the action to be taken if some homeowners do not pay, he stated that this is covered by the title deeds and referred to clause 14 in the deed of conditions which states "in the event of non-payment within one calendar month, the owners association shall be entitled to sue for recovery...or may instruct the factor to sue for recovery" and "Failing recovery...of such unpaid charges after all competent legal processes have been exhausted the remaining proprietors shall bear the same equally amongst them". He further advised that given the very limited role played by the factor in this development, he did not think that the issue of disputed debts would ever arise. The only contractor is a gardener. The major dispute about the repair to the banking could not be considered a disputed debt. No work had been carried out and no invoices issued so there is no debt to be disputed. Mr Hall conceded that the disputed repair had not yet reached

the stage where it could be considered a disputed debt. However, he maintained that the debt procedure should be fully detailed in a separate document. He also advised the tribunal that the Respondent had administered a fighting fund for legal costs and arbitration expenses, essentially to cover the cost of the dispute with him. As he is on one side and the other owners on the other he takes exception to this arrangement since the respondent should be representing the interests of all homeowners. However, although he disagrees with the setting up of the fighting fund, he is aware that some proprietors have not paid, despite being sent an invoice. He is of the view that this failure to pay renders these unpaid invoices disputed debts, for which a procedure is required. Mr Murphy confirmed that all owners, except Mr Hall, have been asked to pay to the fund set up for legal expenses. It has been used to pay for the legal advice they have obtained from a solicitor, Mr Stillie. It has not been used for arbitration because this has not taken place. No action has been taken against those who have not paid, but that option is available in terms of the procedures which are already in place.

12. **Section 6.1 "You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job specific progress reports are not required".** Mr Hall advised the Tribunal that he has not been kept advised of the progress of work, namely the banking repair, nor given estimated timescales for completion. He has made repeated requests for updates and these have not been provided. In response Mr Murphy advised the Tribunal that Mr Murphy has not been given timescales or updates because he currently does not have instructions to get the work done. There is therefore nothing to update him on.

13. **Section 6.4 "if the core services agreed with homeowners agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works".** Mr Hall advised the Tribunal that he has been told by Mr Murphy that there are inspections every three months. Periodic inspections are provided as part of the agreed services at the time of appointment. No programme of works has ever been issued. In response, Mr Murphy advised the tribunal that aside from the banking repair, which is not to be instructed, the only work carried out is by the gardener who was, in fact, appointed by the residents committee. Therefore, while they do inspect, the inspections have not at any time identified any work which would be incorporated within a programme of works.

14. **Section 7.1 "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. The procedure must include how you will handle complaints against contractors"**

Section 7.2 "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. The letter should also provide details of how the homeowner may apply to the homeowner housing panel".

The Tribunal was advised by Mr Hall that he had to ask the Respondent three times before he was provided with a copy of the complaints procedure. He referred to a letter dated 12 August which was sent to the respondent on 16 October 2016, a note of a phone call with Mr Murphy on 20 October 2016 and a further letter dated and sent on 11 November 2016, when these requests were made. He then referred to an email from Mr Murphy dated 15 November to which the procedure was attached. He referred the Tribunal to the document. It states that Brain Murphy has been appointed to deal with complaints and that complaints should be made in writing. It goes on to advise that Mr Murphy will contact the complainer within 7 days with "our understanding of the case" and inviting "further comments". Thereafter, within 21 days there will be a written outcome" Louise Murphy is responsible for carrying out a separate review if the complainer remains dissatisfied. Lastly, mediation can be discussed. Mr Hall then advised the Tribunal that following further correspondence he proceeded to intimate a complaint in terms of the procedure by letter dated 13 January 2017 and referred the tribunal to this letter. He received no response and sent a reminder on 26 January 2017. He then referred the Tribunal to a letter from Mr Murphy rejecting the complaint and providing an explanation for the rejection. Mr Hall sent a further letter with fuller details of his complaint on 13 February 2017. He also wrote to the other partner, Louise Murphy, to advise her that he had made a complaint and to point out that as he was her client in relation to financial services, she had a conflict of interest and could not become involved in the complaint. Mr Hall also pointed out that in terms of the complaints procedure, Mr Murphy was the person designated to deal with complaints and he had expected him to deal with it anyway. On 13 March 2017 he sent a further letter to Mr Murphy regarding his complaint and specifically stating that he was of the view that Mr Murphy was not following his complaints procedure. On 20 March 2017 Louise Murphy emailed Mr Hall to confirm that there was a conflict of interest and she could not deal with the complaint. She indicated that mediation was possibly the best course of action. Mr Hall sent a further letter to Mr Murphy on 10 April 2017 regarding the complaint. On 18 April 2017 an email response was received from Mr Murphy stating that the internal complaints procedure had been exhausted because Louise Murphy could not deal with his complaint. Mr Hall advised the Tribunal that he was unhappy with the way the complaint had been handled. The procedure had not been followed, particularly in relation to timescales and the processing of same. He felt that he should have been told at the outset that his complaint could not be dealt with because of the conflict of interest. He had not been offered mediation Lastly, he pointed out that the procedure itself does not comply with the code because it does not cover disputes with contractors.

When asked about the complaints procedure, and Mr Halls complaint, Mr Murphy advised the Tribunal that after his initial response, he felt that he could not deal any further with the complaint because it was about him. There are only 2 active partners and Louise Murphy had a conflict of interest. That

meant, to all intents and purposes, the procedure had been exhausted. He was of the view that the procedure was otherwise compliant with the code. The circumstances were unusual in relation to Mr Halls complaint. He pointed out that as the respondent is effectively a two person firm there was nothing they could do to ensure that the procedure could always be used. He also said that as there are no contractors, other than the gardener whose contract is with the owners association, there does not require to be a section on disputes with contractors.

15. **Failure to carry out property factor duties – failure to instruct the repair to the banking.**
Mr Hall advised the Tribunal that the allegation that the banking was damaged by a digger during construction of a garage at his property is unfounded and unsubstantiated. He is of the view that the repair which is needed is a common repair and in terms of the title deed falls to be paid for by all of the homeowners. Furthermore, it is the factors duty to instruct that repair, regardless of the views of the other owners. He referred the tribunal to the title deeds. The Tribunal noted that Mr Hall's land certificate contains a deed of conditions by Hope Homes. This deed contains various provisions relating to common property. In clause 9 it is stated that "each proprietor shall be bound along with the other proprietors having a right thereto and to the extent of one share each to uphold and maintain the common ground in good order and repair in all time coming and in the event of damage or destruction to repair or renew the common ground". In clause 13 it is stated that a factor will be appointed "who shall be responsible for instructing, supervising and administering any common repairs". In clause 14 it is stated that the existence of an owner's association is mandatory, and all proprietors are automatically members. The purpose of the owner's association is "to implement the terms of the deed of conditions and to preserve the amenity of the development". 5 owners can call a meeting of the association and "Any member may be represented by a proxy and ten members present in person or by proxy shall form a quorum in respect of any decision to be taken in relation to the development as a whole". Later it is stated that the committee of the owner's association "may be authorised to carry out all the functions of the owners association" "The owners association (or the committee if authorised)" have the power to order common repairs as well as appointing and dismissing factors. They are also empowered to "delegate to the Factor appointed" full right power and authority to take charge of all matters pertaining to the maintenance and preservation of common ground… as said rights, power and authority which could be exercised by majority vote of the proprietors of such a meeting". Later, it is stated that the factor who is appointed "shall, unless otherwise determined by a meeting of proprietors, be entitled from the commencement of the his appointment to exercise the whole rights and powers which may be competently exercised at or by a meeting of proprietors" Mr Hall then referred to the minute of the meeting of the owners association on 28 April 2016 when the committee resigned and no one was prepared to take their place. The minute states "authority then passed to the factor" His interpretation of this statement is that from that date, the factor had full authority to instruct and arrange common repairs without consultation with or the agreement of the proprietors in the development. The tribunal asked for

information about who prepared the minute. Mr Hall said he thought the outgoing chairman had prepared it. The tribunal asked whether there was any discussion at the meeting as to the implications of this statement. Mr Hall confirmed that there was not. The tribunal noted that the minute is not signed and there is no list of attendees. Mr Hall acknowledged this to be the case. Mr Hall was, however, adamant that since this meeting the respondent has had full authority to instruct work without consultation with or authority from the owners and has therefore failed to carry out his property factor duties. He further advised the tribunal that the banking continues to erode, and he is concerned that the buildings will be affected. He feels also that the dispute ought to have proceeded to arbitration. He again made reference to the fighting fund which was administered by the respondent and which he felt compromised their impartiality because it was set up to benefit the owners in their dispute with him. He considered this also to be a failure to carry out the property factor duties. When asked what he hoped to achieve by bringing the matter to the tribunal he indicated that the respondent should be ordered to fulfil its obligations and that he wanted some compensation to cover the costs he has incurred.

Mr Murphy advised the Tribunal that he did not agree with Mr Halls interpretation of what happened at the meeting on 28 April 2016. As the association was without a committee, all that was agreed was that the factor would take on the role of the committee for the time being. It did not increase or reduce his power in terms of common repairs. He continued to operate in terms of the title deeds. On being asked by the tribunal, he advised that all decisions relating to common repairs (prior to the meeting on 28 April 2016) had been made by a vote taken at a meeting of proprietors. This was accepted by Mr Hall. Mr Murphy also advised the tribunal that for a major repair, such as the banking, he would expect to have a 75% majority of owners in favour before he could proceed. He would also expect to be in possession of most, if not all, of the money as contractors would ask this before they started the work. Ultimately, he held a meeting on in March 2017 and put forward a proposal from Mr Hall that he would pay 50% of the cost, up to a maximum of £6000. He did not take a vote at the meeting because it was poorly attended and because some of the attendees were from phase 1. The proposal was rejected. He is therefore not able to instruct the work. In terms of the fighting fund he advises that this was set up so that legal advice and the arbitration could be paid for. The fee for the legal advice was paid. The remainder of the funds are still held. He further advised that the whole issue of the fighting fund is a minefield since owners in phase 1 also paid into it, although it later transpired that they were not responsible for the banking. Mr Murphy concluded by saying that he has no animosity toward Mr Hall and sympathises with him. However, his dispute is with the other owners, not the property factor.

16. The tribunal make the following findings in fact:

(i) The Applicant is the owner of the property but does not reside there.

(ii) The Respondent is the property factor for the development of houses in which the property is located. It was appointed in January 2013.

(iii) The development comprises 58 dwelling houses. There is a piece of common ground, located next to the property, factored by the Respondent.

(iv) In 2012 the banking on the common ground adjacent to the Applicant's property started to erode, following heavy rain. No repair to the banking has been carried out or instructed.

(v) The Respondent does not have a written debt recovery procedure.

(vi) The Respondent's written statement of services does not contain a list of core services.

(vii) The Respondent has a complaints procedure which does not cover complaints about contractors.

(vii) The development has a mandatory residents' association. This has been without a committee since April 2016, when the previous committee resigned.

Reasons for Decision

17. **Section 1.1a Aa.** The Tribunal considered the terms of the statement of services and noted that it is a very short document. However, it does appear to set out the basis upon which the Respondent considers that it has authority to act. It does not detail the level of any delegated authority, but this is a qualified requirement, only needed "if applicable". Mr Murphy advised the Tribunal that he does not have any delegated authority and, as the written statement states, repairs are only instructed after consultation has taken place. The Tribunal concluded that the Respondent has not breached this section of the code and that the section on authority to act in the written statement is sufficient to comply with the section 1.1aAa.

18. **Section 1.1a Bc and Bd.** The Respondent accepted that routine inspections are not referred to in the written statement. Mr Murphy stated in his evidence that they are not part of the core services, indeed he indicated that there are no core services. The tribunal accepted his evidence that the Respondent has a more limited role in relation to the development than it would have factoring a tenement building. Aside from the grass cutting, it appears that there is no other routine maintenance. However, the Code of Conduct applies to all registered property factors. The Respondent is not exempt from compliance with part of the code because its duties are more limited in this case than with other properties. The Respondent is required, in terms of this section, to set out the core services it will provide, and it does not do so. Property inspections are specifically mentioned in this section of the code. It is accepted by the Respondent that these are carried out routinely

and that they were agreed as part of the contract when they were first appointed. In the circumstances, the tribunal took the view that these inspections are part of the core services provided and should be in the written statement along with any other core services they provide. The tribunal concluded that the Respondent is in breach of this section 1.1aBc of the code. There was no evidence on the issue of services additional to core services. The Tribunal therefore concluded there is no breach of section 1.1aBd

19. **Section 2.1** The tribunal considered the evidence from Mr Hall in relation to the correspondence between himself and Mr Murphy. It accepted that some of the information he was given in the responses later transpired not to be accurate. However, the Tribunal noted that Mr Hall sent a great many letters and emails on the subject of the banking repair. These were for the most part answered promptly by Mr Murphy. Mr Murphy told Mr Hall what he was doing and what he hoped to achieve. There was no evidence that he had given Mr Hall any information that he knew to be false or misleading. The Tribunal took the view that for the Respondent to be in breach of this section he would have to have known or at least ought to have known that the information was not accurate. The Tribunal concluded that there is no breach of this section of the code.

20. **Section 2.5** The Tribunal is satisfied that Mr Murphy responded to all of Mr Hall's enquiries within reasonable timescales. It was clear from the evidence that there has been a great deal of correspondence from Mr Hall over a lengthy period of time. Some of the letters raise many issues and pose numerous questions. The copy correspondence provided by Mr Hall himself demonstrated that Mr Murphy did respond promptly to the letters. Evidently, the content of those responses did not meet with Mr Halls approval, but that is not the issue. The Tribunal did consider that the Respondent's responses in relation to the request for a copy of the complaints procedure and to the complaint itself were not quite so prompt but the delays were not excessive. Given the volume of correspondence issued to the Respondent, the tribunal concluded that some of his requests may have initially been overlooked. The failures were however rectified. The Tribunal concluded that the Respondent is not in breach of this section of the code.

21. **Section 4.1 and 4.4** The Tribunal noted that Mr Murphy accepts that there is not a separate written debt recovery procedure. Some limited information is detailed in the written statement of services. There is, in addition, some information in the title deeds. Even taken together, the Tribunal did not consider that a "clear written procedure" could be identified. The Respondent again made reference to the limited role it has in relation to the developments common property. However, the tribunal did not consider that this exempted the Respondent from the very specific requirements of this section of the code. It was clear from the evidence that non payment by some proprietors has been an issue, notably in relation to the so called fighting fund. The tribunal concluded that the Respondent is in breach of these sections of the code.

22. **Section 6.1** The Tribunal is satisfied that Mr Hall failed to establish a breach of this section of the code. The tribunal noted that there has been a great deal of correspondence between the parties. Mr Murphy did provide updates. He did not provide estimated completion timescales or progress reports in relation to the banking repair, because there was no work instructed. The tribunal concluded that there is no breach of this section of the code.

23. **Section 6.4.** The Tribunal rejected the Respondent's evidence that the periodic inspections carried out are not part of its core service. However, while it appears that the core services do include such inspections, the tribunal takes the view that a programme of works is only required when the inspections establish or confirm that work is required. The Tribunal accepted that there is no routine maintenance or repair work and that the inspections they carry out have not, so far, resulted in any planned work. The Respondent and the homeowners are clearly already aware of the banking problem and as it is not currently scheduled to be repaired, it would not form part of a programme. The tribunal therefore concluded that there is no breach of this section of the code.

24. **Section 7.1 and 7.2**. The Tribunal considered the terms of the complaints procedure. It concluded that it does not fully comply with the code. Specifically, there is no provision for disputes with contractors. While there may not be any contractors instructed by the Respondent at the present time, there may be in the future. A new gardener may be required, or other work may be instructed. There should therefore be provision for this in the procedure. Otherwise the tribunal was satisfied that there is a procedure in place which if followed, would usually be adequate. However, it was clearly not adhered to in relation to Mr Hall's complaint. Mr Murphy took the view that the procedure could not be followed because neither partner could deal impartially with the complaint. However, with a 2 partner firm, that must surely be a situation which arises from time to time. The tribunal therefore concluded that the procedure requires to be amended to provide for complaints against contractors and recommends that the procedure also be reviewed to provide for a third party to play a role in the procedure, if needed. The tribunal also took the view that the Respondent had technically not complied with section 7.2. Mr Hall was told that the Respondent was of the view that it had been exhausted and that he could proceed to make an application to the Tribunal, although not how he could do that.

25. **Failure to carry out property factor duties – failure to instruct the common repair to the banking.** The Tribunal considered the evidence of both parties and preferred Mr Murphy's interpretation of the Respondent's authority to act and to instruct repairs. The Title deeds are, it has to be said, somewhat contradictory and do appear at one point to indicate that the factor has the authority to carry out repairs as though instructed by a majority of owners at a properly convened meeting. However, when taken in context, it appears that what is envisaged is that decisions regarding the development are made by simple majority at owners' meetings. It appears that a decision might be taken to grant the factor full authority to instruct repairs, without consultation. However, it would be unusual for such delegated authority to

exist without financial limit and indeed, it is highly unlikely that a property factor would agree to unlimited authority. Both parties agree that prior to the meeting in April 2016, decisions were taken by majority vote. The reference in the minute of the meeting to authority passing to the factor appears, in the absence of any discussion and agreement as to its meaning, only to provide that the factor would carry out the functions of the committee for the time being. This would presumably include the calling of meetings. The Tribunal noted that given the dispute about the banking repair, it is highly unlikely that the owners would have been willing to give unlimited authority to the factor when this could result in the repair being instructed, against their wishes. However, the Tribunal is concerned about the issue of the disputed repair and the Respondents actions in relation to same. It does not appear that the vote taken following the meeting in March 2017 complies with the title deeds. The deeds indicate that decisions are to be taken by simple majority at a properly convened meeting. Having concluded that some of the attendees ought not to have been invited to the meeting, the Respondent ought to have called a further meeting of phase 2 owners. Assuming there was a quorum, a vote would then be taken. It seems unlikely, given the history, that such a meeting would have a different outcome. But, if the majority of those in attendance voted in favour of the repair, then that decision would be final and binding on the other owners. The Respondent could instruct the work and seek payment from all. It appears from the evidence that the original rejection of the banking repair pre-dates the Respondent's appointment. Furthermore, although there was evidence about other meetings regarding the repair, the specific proposal from Mr Hall and indeed the idea in principle of the repair itself do not appear to have been the subject of a meeting and vote since the respondent's appointment, or at least there was no evidence of that presented to the Tribunal. The tribunal therefore concluded that the Respondent has failed to carry out his property factor duties in this regard. He should arrange to convene a meeting in terms of the title deeds and put the matter to a vote, the outcome of which should be recorded. If it goes against the repair being carried out, as seems likely, then Mr Hall will no doubt have to consider his legal position. It is clear to the tribunal that in terms of the title deeds the repair is a common repair and that the owners, by failing to authorise and pay for the repair are likely to be in breach of their obligations. However, it is the view of the Tribunal that it is the owners, not the respondent, who would be at fault. The tribunal also noted that the Respondent has quite clearly devoted considerable time and effort in attempting to progress matters and to find a solution. The Tribunal also notes that his reasons for putting the proposal to all owners is understandable given the considerable history and the animosity which exists. The tribunal did not consider the Respondents actions in relation to the so-called fighting fund and the failed arbitration referral to amount to a failure to carry out property factor duties. The setting up of the fund was perhaps ill advised in the circumstances, although clearly motivated by a desire to resolve matters. The arbitration did not proceed because the legal advice obtained was that it could not. The tribunal however is of the view that the possibility of arbitration could presumably be re-visted and considered at a properly convened meeting. The Tribunal did not agree with Mr Hall's objection to the fighting fund. The legal advice would have to be paid for and contributions collected from the homeowners in the same way as any other

service instructed by the Respondent. The Tribunal did not consider the Respondent actions with regard to the fund and the arbitration to be in breach of his duties as property factor.

26. The Tribunal therefore concluded that the Respondent as breached sections 1.1aBc, 4.1, 4.4, 7.1 and 7.2. It has not breached 1.1aAa, 1.1aBd, 2.1, 2.5, 6.1 or 6.4. There has also been a failure to carry out its property factor duties, not by failing to instruct the banking repair, but by failing to call a meeting of owners to vote on same. The Tribunal considered the options available to it in terms of a property factor enforcement order. It does not appear to the Tribunal that compensation is appropriate. The breaches and failures which have been established do not appear to have directly resulted in any losses to the Applicant. The tribunal also took into account the significant efforts made by the Respondent in this matter. However, the tribunal concluded that the written statement of services and complaints procedure require to be amended and that a debt recovery procedure requires to be prepared.

Proposed Property Factor Enforcement Order

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

Appeals

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

Legal Member

Josephine Bonnar
27 October 2017