Decision: Property Factors (Scotland) Act 2011, section 19(1) and the First Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, Rule 31

Chamber Ref: PF/16/0079

The Property:

11 Bogbeth Road, Kemnay, Aberdeenshire AB51 5RJ

The Parties:-

Mr Andrew Snowie, residing at 11 Bogbeth Road, aforesaid.
("the homeowner")

and

The Property Management Company (Aberdeen) Limited, Little Square, Oldmeldrum, Aberdeenshire AB51 0AY ("the factors")

The tribunal (formerly the Homeowner Housing Committee):

David M Preston, Chairman; and Angus Anderson, Surveyor Member

Decision:

The tribunal, having made such enquiries as it sees fit for the purpose of determining whether the factor had complied with the Code of Conduct for Property Factors ("the Code") as required by section 14 of the Act, determined unanimously that the factor has failed to comply with sections: 2 (2.1, 2.2, 2.4 and 2.5); and 6 (6.3, 6.6 , 6.9) of the Code; and with their duties: to respond to reports of property defects; or to hold or arrange meetings with homeowners or groups / committees of homeowners, in accordance with their Scope of Services.

Background:

1. By application dated 12 May 2016 the homeowner applied to HOHP for a determination as to whether the factors had failed to comply with the Code and to carry out the Property Factor's duties.

2. In particular the homeowner complained that the factors had failed to comply with sections: 2.1; 2.2; 2.4; 2.5; 3.3; 5.2 – 5.7; 6.1; 6.3; 6.4; 6.6; 6.8; 6.9; and 7.2 of the Code. Details of the alleged failures were outlined in the homeowner's letters to the Homeowner Housing Panel dated 28 March 2016 (item 1 of the homeowner's documents) and to the factors dated 19 June 2016 (item 6 of the

homeowner's documents). In his letter dated 31 July 2016 to the factors (item 12n of the homeowner's documents), the homeowner outlined the duties in which he believed the factors had failed. These failures comprised:

a. Failure to respond to queries regarding repairs and accounts issues. He said that he had complained about the car park light for years and this had not been rectified. He had asked for details of why the management fee for the apartments was higher than for the houses and details of how this was calculated. He asked for details of the "additional" services carried out by the factors for the apartments that led to the additional charge. He had asked for information since March 2015 regarding the insurance claim arising from a fire in number 10; he had not been provided with information regarding the progress of the claim; and had been given conflicting information from the insurance company, the brokers and the factors.

b. Failure to consult with owners regarding significant expenditure. The homeowner referred to the planting of trees in October 2015 in respect of which Ms Troup had said the owners would be consulted and which they were not.

c. Failure to respond to the homeowner's query within five working days. He referred to a query regarding an invoice in connection with the attempted light repair on 15 July 2016 which had not been acknowledged or answered.

d. Failure to arrange and hold two meetings per annum with owners as provided in the factors' Scope of Services.

3. By Minute of Decision dated 5 September 2016 a Convener of HOHP referred application to a Homeowner Housing Committee. In terms of the Tribunal (Scotland) Act 2014 the functions of the Homeowner Housing Committee were transferred to the tribunal. The Minute of Decision specified that the application comprised documents received in the period 1 June to 4 September 2016.

Hearing:

4. A hearing took place in The Credo Centre, John Street, Aberdeen AB25 1BT on 17 January 2017. Present at the hearing were: the homeowner, accompanied by Ms McDonald, who attended in the capacity of a supporter, but gave no evidence; Mr Richard Burnett, Operations Director and Mr Martin Rochfort, Managing Director, both representing the factors.

5. Evidence was heard from: the homeowner; Mr Burnett; and Mr Rochfort in amplification and clarification of the written submissions and documents.

6. In support of his application, the homeowner had lodged copy correspondence and emails between him and the factor and other documents as enumerated in the Inventory of Productions lodged by him.

7. By letter dated 17 October 2016 the factors submitted written representations in answer to the homeowner's complaints together with copy correspondence and documents in support of their position.

Preliminary Matters:

8. Neither party raised any preliminary matters to be considered.

9. At the outset the convener apologised for the adjournment of the hearing from the original scheduled date in December which had arisen through unavoidable circumstances.

10. The convener outlined the procedure which it was proposed to follow at the hearing. He indicated that as the homeowner's complaints related to a number of specific issues, evidence would be heard from the homeowner on each issue, followed by evidence from the factors' in response.

11. During the hearing Mr Snowie referred to: his email dated 27 September 2016 (item 12b); a Statement of Account dated 23 September 2016 (item 12c); and an email dated 16 October 2016 with further photographs (item 12f). He also referred to an issue which had arisen in relation to repairs to a fence which had formed part of an insurance claim. The tribunal determined that these matters fell out-with the scope of the application as defined in the Minute of Decision dated 5 September 2016 and, except where the information in these emails related directly to the matters covered by the terms of the application, were not considered by the tribunal

Evidence and Representations:

Change of Management Company:

12. Mr Snowie said that towards the end of 2015 he was of the view that a number of owners were dissatisfied with the service being provided by the factors and that there would be support for a change of factors. He had approached James Gibb, Residential Factors who prepared a Property Management Proposal (item 8a of the homeowner's documents) and a vote was arranged to confirm the level of support to be conducted by Scottish Factor Brokers who had in turn circulated the owners in the development.

13. Mr Snowie said that he was unhappy about the terms of a letter from the factors to all homeowners dated 8 December 2015 (item 8b of the homeowner's documents) which he regarded as very judgemental and said that it contained assertions which he had asked the factors to substantiate but they had failed to do so. In his view the letter could and should have been more professional and he found the use of the words "underhand" and "misleading actions by others" to be offensive and intimidating. He said that it was well known that he had been involved in the process. He said that he had provided James Gibb with the information about the arrangements with PMC, upon which he understood they had based their proposal and therefore could not understand why the factors suggested that James Gibb had been provided with false information.

14. Mr Snowie said that he had been subjected to an adverse reaction on social media from other owners including one who accused him of getting a finders' fee from James Gibb.

15. Mr Snowie said that James Gibb had advised him that 96% of the responses to Scottish Factor Brokers' letter had been in favour of change, although he was unable to say how many responses they had received. He explained that he had simply asked James Gibb if they were interested and gave them the information and a copy of the title and left them to get on with it.

16. Mr Snowie maintained that it had been he who had asked James Gibb to take the matter no further as a result of the distress and pressure he had experienced following the factors' letter,

17. In response the factors referred to section G of their documents and pointed out that they had not identified Mr Snowie as being involved and it had been the letter from Scottish Factor Brokers which had done so. Mr Rochfort said that he had contacted the Managing Director of James Gibb and when he had explained the position to them they had withdrawn from the process.

18. Mr Burnett said that PMC were concerned at the process being used to bring about the change by inviting owners to go on to an insecure website to cast a vote. He said that there was no provision in the titles for an online vote of this sort and that owners had not been made aware that the vote would not be protected and it was not sufficiently clear that a vote in favour would be a vote for change.

19. The factors stood by their letter of 8 December which was an explanation of the attempt to move factor and a request for any owner who wished to discuss it further to contact them. Apart from Mr Snowie, nobody had contacted them to raise any issue and they therefore saw no reason to take the matter further.

Car Park Light

20. Mr Snowie referred to the correspondence at section 9 of his Inventory of Productions. He said that when he had moved into the property there had been two lights in the car park, both of which had been operated by time switches. It had subsequently been decided to change one of the lights to operate by a photocell but he said that it had never worked properly and he had raised this with the factors on numerous occasions at that time and since but it had only been within the week prior to the hearing that it appeared to have been fixed.

21. Mr Snowie regarded the faulty light as a danger to health and safety. In particular the location of his front door means that if the light is not working properly, he is unable to see properly when entering the house. He advised that somebody had recently fallen in the car park, having tripped on a kerb as a direct result of the faulty light.

22. Mr Snowie said that he had complained about the faulty light since it had been changed to a photocell and was of the view that had the factors taken proper

notice of his complaint they would have been able to pursue the contractor or the supplier under warranty for the fault.

23. In response, Mr Burnett referred to section C of the factors' documents and advised that there had been an on-going problem with the light which had now been repaired but it was not clear whether there was still a problem. He said that various contractors and electricians had reported that the light was working. He said that the factors did not know whether the light might have been tampered with which had caused it not to work. He said that when it had been reported as faulty, he and others from his office had attended and it had been found to be working correctly. A new unit had now been installed although it was not clear yet if the problem had been fully resolved. Further contractors had re-traced and tested everything. He explained that there had been an initial problem with the light which had been replaced along with the photocell.

Insurance Policy Issues:

- *Boiler Fire and Insurance Claim*

24. Mr Snowie referred to the documents contained at Section 10 of his Inventory of Productions. He said that this matter was of the greatest concern to him in the application. He explained that in March 2015 there had been a fire in number 10, which was in a separate apartment block. The owners of the apartments had been told that the cause of the fire had been a fault in the central heating boiler and they had been asked to have their own boilers checked out by Aberdeen Boiler Services which he had done. As a result a certain wire had to be clipped back from resting against a hot pipe. He was aware that some other owners had their boilers checked but that others had not, which concerned him.

25. Mr Snowie complained that the factors had told the homeowners that the developers, Barratt, and the boiler manufacturers, Vokera would be involved in tracing the cause of the fire but no further information had been provided and he had also been told that Barratt and Vokera had not been approached.

26. Mr Snowie could not understand why Barratt should not have been required to have the repair carried out in line with their "5 year warranty" conditions, a copy of which he had produced at item 10f of his documents. He complained that he had asked about this on a number of occasions but not obtained any satisfactory response and Barratt had told him that the only reason they would not cover it would be due to lack of maintenance.

27. Mr Snowie advised that in view of the lack of information from the factors he had gone direct to the insurance company and had been provided with conflicting information with regard to the progress of the claim.

28. Mr Snowie was of the view that as the claim had been made on the common insurance policy he had an interest since any increase in premium as a result of the fire or any excess due under the policy would affect him.

29. Mr Snowie was concerned at the length of time which it had taken for the claim to be settled and the work carried out. He considered that the factors had been dilatory and had delayed the work being completed.

30. In response the factors referred to section E of their documents. Mr Burnett maintained that they had been constrained in the information which they were able to make available to Mr Snowie as the insurance claim related to another property and was specific to that property. It did not involve a common part of the development or of the apartment blocks or any part of Mr Snowie's block.

31. Mr Burnett said that Barratt, had told them that the fault in the boiler was not their problem and consequently the matter had been pursued through an insurance claim.

32. Mr Burnett said that there would be no excess payable under this claim as it had been in respect of a fire but that the precautionary checking of other boilers was not an insurable event and would not be covered. There was no way of knowing whether there would be any effect on the premium as it had not been calculated. In any event, he advised that had any excess applied to the claim, this would have been dispersed amongst all the proprietors in the same way as the global premium is divided.

33. Mr Rochfort explained that the factors maintain a block insurance policy for which a global premium is assessed and it is then rated and applied to different developments and then to individual properties within developments. The insurers calculate the rating based on a number of factors such as value, location and claims history, with which the factors have no involvement. He explained that the factors are paid an administration fee which is included in the block buildings insurance charge as detailed in the annual budgets, copies of which are at section D of the factors' documents.

34. Mr Burnett explained that the claim had not as yet been concluded because it had been a very involved matter, although it was close to being finally resolved. There had been various contractors involved and the fact that Loss Adjusters had been involved had caused some delays. He said that it would be a matter entirely for the insurers if they wanted to recover their costs from the Barratt warranty or elsewhere but it would be unlikely that that would happen before the whole claim had been settled.

35. Mr Burnett explained that the factors do not as a matter of course become involved in claims relating to individual properties ie "private parts" as opposed to "common parts". Where there is a large claim and Loss Adjusters are appointed by the insurers it is generally the case that the Loss Adjusters will correspond through the factors who will remain involved in the claim in that situation. Mr Burnett said that the factors receive no payment for work done in such a situation.

36. In answer to questions from the tribunal regarding the Statement of Account for the period 1 June to 31 August 2016 produced by the homeowner at item 12c, the factors explained that their accountancy software required that the

apportioned items in respect of the insurance claim had to be included within every homeowner's statement, even although they related to the private parts of another property. He said that the outlays and receipts from the insurance company cancelled each other out. The factors accepted that they had responded to the homeowner's email of 27 September 2016 (at item 12b in the homeowner's documents) in which he asked for details of these items. They provided information in their email of 28 September 2016 (at page 8 of item 12f of the homeowner's documents), notwithstanding that the items related to the insurance claim for the fire at number 10. The factors gave no explanation for this inconsistency in providing details of the third party insurance claim.

- *Equipment Cover*

37. Mr Snowie complained that he had sought an explanation of the inclusion of "equipment breakdown cover" in the block policy and referred to the emails and correspondence at items 10i of his productions. He said he was not aware of any equipment to a value of £1 million. He said that he had raised this matter with the factors and also with GS insurance brokers and had not received satisfactory response.

38. In response the factors referred to their response at section JK and the letter from GS insurance at section M of their documents.

Grounds Maintenance & Conflict of Interest

39. Mr Snowie referred to the correspondence and emails submitted by him at item 11a - e of his documents. He said that there had been general dissatisfaction with the services provided by Proserv Ltd. He referred to an email dated 23 May 2013 from Wendy Kidd to the factors at item 9b of his documents and said that this demonstrated that he was not the only person to have complained about Proserv. He maintained that a considerable expense, of over £500, had been incurred to replace five trees and in respect of which he said Ms Troup had undertaken to consult with owners before the expense was incurred. He acknowledged that the individual expense to him had only amounted to approximately £5 but was of the view that the total cost had been excessive and the trees have been planted at the wrong time of year by Proserv.

40. Mr Snowie's complaints about the grounds maintenance were outlined in his letter of 28 March 2016 (item 1 of his documents). In this letter he also asked for details of the tendering process which had been conducted resulting in the appointment of Proserv to which he had not received any response. He understood that other owners had also requested this but this had not been produced.

41. Mr Snowie said that in his opinion there appeared to be a conflict of interest between the factors and Proserv because Mr Rochfort was a director of both companies. He regarded the declaration in the key factor booklet that the factor "...is affiliated to Proserv through common ownership by a controlling entity.." as not being sufficient to satisfy the requirements of the Code. .

42. In response the factors referred to sections F and L of their documents. Mr Burnett explained that the annual budgets were based on the expenditure from the previous year and the budget was linked directly to the direct debit to be set for the coming year. He said that he considered the expenditure on the trees to be of a minor nature which would not require consultation with owners. In response to a question from the tribunal the factors explained that they would only consult with owners in respect of proposed major works which were not included in the standard management fee and for which a project management fee based upon a percentage of the expenditure amount would be payable as detailed in their Scope of Services. He said that they did not set an expenditure limit below which they would have delegated authority to act without consultation because this could cause accusations from some owners that they would simply spend up to the limit.

43. Mr Rochfort said that he was unaware of any recent tendering process having been carried out and was not aware of the details of any such process which might have been carried out. He explained that in other developments for which they were responsible, if an effective owners' committee required, they would put the ground maintenance work out to tender and would provide details of the process on request.

44. The factors said that they had written to all owners at the start of 2016 with an invitation for owners to come back to them on any issue which caused them concern. Apart from Mr Snowie there was no response and they had taken this as satisfaction with the situation. He said that had a significant number of owners come back to them they would have responded and arranged a meeting, using the concerns raised as the basis of an agenda. They therefore concluded that there was general satisfaction with the standards which had been applied. He was of the view that any standards issues regarding the service provided by Proserv had been satisfactorily addressed.

45. So far as the apparent conflict of interest was concerned, the factors referred to the booklet entitled "the key factor" (at section f of the factors' documents) which had been provided to all homeowners of properties for which they were responsible. In particular, the disclosure within the "Terms & Conditions of Business" section under "Affiliations and Accreditations" which stated "the Property Management Company is affiliated to Proserv (Scotland) Ltd through common ownership by a controlling entity." The factors submitted that such a disclosure satisfied the terms of section 6.8 of the Code.

Inadequacy of Responses

46. Mr Snowie complained that he had not received full and proper responses to many of his concerns and in particular referred to his email of 13 January 2016 addressed to Ms Troup to which he had received initial responses on 15 January 2016 appended to his original email. On 17 January 2016 he had responded to her with further comments but he had not received a satisfactory response or explanation about his further comments until Ms Troup's further email of 17 February 2016, as a result of which he had submitted a formal complaint to Mr Rochfort as Managing Director on 19 June 2016.

47. Mr Snowie acknowledged that he had been offered opportunities to meet with the factors but he had declined these offers as he did not want to be 'ambushed' by them and in any event he wanted to have their responses in writing. Mr Snowie's email of 28 March 2016 outlined his efforts to obtain responses from the factors.

48. Mr Snowie referred to the fact that he had sought reasons for why the management fee for the apartments was higher than for the houses and had asked for details of the "additional services" carried out for the apartments that led to the additional charge, none of which had been supplied.

49. Mr Snowie complained that the first meeting of owners following his purchase of the property in December 2009 did not take place until 28 August 2013 which had been on the back of several complaints from owners on the development. He pointed out that the Scope of Services issued by the factors (item 3 of his documents) stated that a PMC Property Manager would meet twice per annum with owner / resident committee representative / groups. No such meetings had been arranged.

50. The factors referred to section H of their documents and maintained that they were not clear as to his on-going concerns and had asked Mr Snowie for his responses in bullet point form to which they would respond. They also maintained that they had offered to meet with Mr Snowie on a number of occasions but he had not responded to such requests. They maintained that had such a meeting taken place they were confident that his concerns would have been addressed.

51. Mr Rochfort referred to his letter dated 19 August 2016 (at section H-I of their documents) to the homeowner at paragraph 2 where he explained the reason for the higher charge and additional services such as Buildings Insurance, Car Park Power and Roof Maintenance services, if required. He had pointed out that this had also been explained by Ms Troup in various emails to Mr Snowie. In answer to the tribunal the factors explained that the charge for roof maintenance was reconciled if it was not used and the balances were refunded to homeowners regularly if required or retained against an individual's contribution to any future roof repair.

52. In response to the concern about frequency of meetings, the factors advised that they had written to the homeowners and asked them to revert to them on any issues which they had with regard to the development or its management. They said that no response had been forthcoming and that accordingly they did not see that it would be worthwhile arranging a meeting if there was nothing to discuss. They said that they would have used the issues raised by homeowners as an agenda. They had lodged notes from a meeting held on 19 May 2015 and agreed that these were the only two meetings which had ever been held in respect of the Parklands development.

Findings in Fact:

53. The applicant has been the owner of the duplex apartment number 11 Bogbeth Road, Kemnay, Aberdeenshire in terms of Land Certificate under title number ABN103643 since 26 November 2009.

54. The factors were appointed as property managers of the development at Parklands, Kemnay by Barratt Homes on 6 June 2008 in terms of their tender Proposal document dated February 2008 (item A of the factors' documents).

55. The development at Parklands, Kemnay comprises 105 properties of which 12 are duplex apartments at Bogbeth Road. The factors are responsible for the common property within the development in addition to which, in the case of the duplex apartments, includes the roof of the apartment blocks and the common walls et cetera and also includes car parking and lighting serving the apartments.

56. The factors have been under a duty to comply with the Property Factors (Scotland) Act 2011 and the Code of Conduct for Property Factors since November 2012.

Determination and Reasons for Decision:

Change of Management Company:

57. The tribunal took account of the documentation provided by the parties and to their oral submissions. The tribunal found that the terms of the letter of 8 December 2015 in referring to "underhand and misleading actions by others" were inappropriate and intimidating. The fact that Mr Snowie became the subject of adverse comment on social media and accusations of financial gain from the change of management arose directly as a result of the terms of letter.

58. The factors maintained that the reference to underhand and misleading actions had been on the part of James Gibb and Scottish Factor Brokers. The tribunal did not accept this as the words were clearly attributed to the attempt to move the management responsibility from the factors which, by implication referred to the instigator of the change.

59. Mr Snowie had approached James Gibb, as he was perfectly entitled to do, and had also apparently contacted Scottish Factor Brokers to conduct a vote about the possibility of a change of factor. He provided them with such information as he had in respect of the current arrangements and was entitled to leave matters with them. Scottish Factor Brokers canvassed the views of the homeowners on the development by conducting a vote which could either be submitted online or by post. The factors took issue with the proposed change and with the process being followed. The tribunal saw no problem about a poll being conducted to assess the level of support for change. Mr Snowie is neither a property professional nor a solicitor and should not be expected to be familiar with the process of changing factor. Any failure on his part to follow the correct procedure is not something which the factors should exploit in this way.

60. Mr Snowie, in his email of 13 January 2016 sought justification from the factors of the assertions contained in the letter of 8 December 2016 but received a wholly inadequate response from Ms Troup that "This matter is now closed and their proposal withdrawn so does not warrant further discussion." He then went back to them again in his email of 17 January 2016 to which Ms Troup responded "with regard to the quotations provided by James Gibb, we can confirm there are 4 budgets in place at the development, not 2 and so the costs which were quoted did not include all required elements". The tribunal could not understand this response which was not adequately explained by the factors in answer to questions put to them. Such a response to an enquiry from a homeowner was entirely inappropriate, particularly when the homeowner had repeated his request, in his email of 17 January 2016 and did nothing to provide justification for the assertions contained in the letter of 8 December 2015.

61. On a comparison of the factors' budgets at section G of their documents and the James Gibb proposal (item 8a of the homeowner's documents), the tribunal could not see any "serious flaws" as asserted by them and Mr Snowie was entitled to expect a more detailed explanation. The tribunal therefore concluded that the factors were in breach of section 2.1 as they did not provide either Mr Snowie or the tribunal with sufficient justification for their assertions.

62. The factor maintained that the proper procedure for a change of management would be by majority vote at a quorate meeting of owners. However notwithstanding the terms of the factors' Scope of Services, only two meetings of owners had ever been held in respect of the development. The factors were of the view that unless a significant number of owners raised issues to be dealt with at a meeting, none would be held In such circumstances it is difficult to envisage how an owner such as Mr Snowie who might seek to effect a change in Property Management would be able to do so without canvassing the level of support for such a proposition. Had there been sufficient response to the vote then a meeting could easily have been arranged to follow the procedure provided in the Deed of Conditions. However the factors' actions pre-empted such a possibility.

63. The tribunal accordingly found that the factors were in breach of section 2 of the Code, in particular section 2.1 and 2.2.

Car Park Lighting:

64. The tribunal found that the homeowner had reported the fault with the car park light over many years and although the factors had responded to his reports they had not taken sufficient steps to rectify the problem as quickly as they could have. The tribunal recognised that this was an intermittent fault which was clear from the correspondence and that accordingly the chances of visits by Mr Burnett or other staff from the factors resulting in an identification of the problem were slim to say the least. The tribunal was concerned at the implications contained in the suggestion which had been raised by Mr Burnett in his written response and at the hearing that the factors were not aware of whether the light might have been tampered with. Mr Snowie had provided numerous photographs showing the light off during hours of darkness and on during daylight hours. The factors also said in their email of 23 March 2016 that they were reluctant to instruct

repairs with reports from only one individual. The tribunal rejected that position since one of the lights in the car park serving the duplex blocks was only likely to affect a limited number of homeowners. Mr Snowie had explained that the fault in this particular light had a significant effect on his property.

65. Mr Snowie maintains that if the factors had responded to his reports at an earlier stage they could have sought to have a replacement light at no cost under warranty.

66. The tribunal found that the factors were in breach of section 6.9 of the Code in that they had not responded to the reported faults from Mr Snowie at a time when they might have been able to pursue either the installers or the manufacturers under a warranty. In addition the tribunal found that the factors had failed in their duty to respond appropriately to reports of the defective light in accordance with their Scope of Services

Insurance Policy Issues:

- *Boiler Fire and Insurance Claim*

67. The tribunal accepted the factors' position that the fire and consequent insurance claim were matters in respect of which Mr Snowie had no direct interest. The property in which the fire had occurred did not form part of the same building as the homeowner's property. The factor quite properly issued a general warning to other owners in the apartments about the situation which had arisen and recommended that they should have their boilers checked. Beyond that the matter was entirely between the proprietor of number 10 and the insurance company. The question of whether the situation would be covered by any warranty from either the boiler manufacturer or the developer was entirely between the proprietor of number 10 and/or his insurers and ultimately, in the circumstances described to the tribunal would be for the insurance company to determine and act.

68. Similarly the length of time taken to resolve matters was of no concern to Mr Snowie and was a matter in which he had no interest. His indirect involvement through the shared premium and the possibility of a share of the excess on the policy (which was not specified to the tribunal) were sufficiently remote or insignificant as not to result in him gaining any real interest at all.

69. The tribunal was not clear as to why a full explanation of the inclusion of the "insurance claim" items within the Statement of Account was not provided along with the account of 23 September 2016 (item 12c of the homeowner's documents) and also why the factors had responded in their email of 28 September 2016 with details to the homeowner's enquiry as opposed to simply explaining the difficulty with the accounting procedures. It did not conclude, however that the factors were in breach of the Code in this respect. In any event it fell out-with the scope of the application.

70. The tribunal found that the factors were not in breach of section 5 of the code in regard to this issue.

- *Equipment Cover*

71. The tribunal noted the correspondence and the representations made in respect of this matter and found that the policy was a block policy which contained standard clauses and cover which included cover for equipment breakdown which would cover any lift or fire hydrant riser equipment which might be in a development of flats.

72. The tribunal acknowledged that the factors had not specifically dealt with the query raised by Mr Snowie about this matter in the email of 13 – 17 January 2016 but did not consider that such failure amounted to a breach of section 6 of the Code, while recognising that had the factors responded to his further requests of 17 January 2016 this matter might have been clarified sooner.

73. The tribunal found that the factors were not in breach of section 5 of the Code but found that in this regard they were in breach of section 2.5 in that the communication was insufficient to clarify the matter and was unlikely to lead to fewer misunderstandings and disputes.

Grounds Maintenance & Conflict of Interest

74. The tribunal found on the information before it that the grounds maintenance issues which had arisen over a period of almost seven years were comparatively minor and did not in themselves demonstrate any failure on the part of the factors to comply with; the Code; their duties; or their Scope of Services.

75. In relation to the replacement of trees, the tribunal determined that the cost incurred could not be regarded as excessive and, based on the tribunal's experience of other developments, would probably have fallen below any level of delegated authority which might have been provided. The tribunal noted the 'Delegated Authority' provisions of the factors' Scope of Service (item 3 of the homeowner's documents). It accepted that although they had complied with the requirements of section 6 of the Code, they did not specify a level of expenditure below which the factors may proceed with repairs or maintenance without reference to the homeowners in advance. Section 2.4 of the Code requires the factors to have a procedure in place to consult with homeowners and seek approval before providing work or services which will incur additional charges except where there is such an agreed level of delegated authority. There is no clearly defined agreed level and the tribunal did not find that the factors' calculations of the budget as described by Mr Burnett provided sufficient information to homeowners to satisfy section 2.4.

76. As a separate matter, Mr Snowie said that Ms Troup had, in an email of 23 May 2013, undertaken to consult with owners before money was spent. That undertaking was qualified by reference to 'extraordinary' expense and, as determined by the tribunal, an expenditure of around £500 shared by over 100 properties cannot be regarded as 'extraordinary'. Mr Snowie was looking for clarity of the circumstances under which a consultation with owners would take place. The tribunal accepts that there is no such clarity and recommends that the

factors should consult with owners and seek to agree such a limit. There was no evidence of any other expenditure which was regarded by Mr Snowie as 'extraordinary' apart from his assertions about the trees.

77. So far as the alleged conflict of interest is concerned, the tribunal found on balance that the factors had complied with the letter of the Code by disclosing that there was a relationship between them and Proserv. Section 6.8 of the Code requires the factors to disclose in writing, any financial or other interests with any contractors appointed. The statement, which could be said to be 'hidden away' on the third last page of a 44 page booklet and which might be regarded as minimalist is nonetheless made. The tribunal was, however, mindful of the introduction to the Code which is intended to set out 'minimum standards' of practice. In order to dispel accusations or suspicions on the part of homeowners, the tribunal would expect that the factors would pay more attention to the openness and transparency of their dealings with Proserv and be more assiduous than might otherwise be the case in ensuring that full details of tendering processes and the basis of appointment of contractors, which should be carried out on a frequent basis, are made available to homeowners.

78. Mr Snowie complained that the factors were in breach of section 6.3 and 6.6 of the Code by failing to provide him the basis on which Proserv were appointed and by failing to produce documentation relating to any tendering process for the ground maintenance contract despite his requests. The factors did not provide any such information or documentation prior to the hearing and failed to provide it to the tribunal at the hearing. The tribunal therefore finds that the factors failed to comply with sections 6.3 and 6.6 of the Code.

79. The tribunal did not find, on balance, that the factors were in breach of sections 6.8 or 6.9 of the Code but did consider that there was room for increased openness and transparency about the awarding of contracts.

Inadequacy of Responses:

80. The tribunal noted the chain of emails and correspondence relating to this issue as comprising the emails between Mr Snowie and Ms Troup of 13-17 January 2016. Ms Troup responded to Mr Snowie's comments of 17 January 2016 in her email of 17 February 2016. Mr Snowie was not satisfied and accordingly wrote to Mr Rochfort on 19 June 2016 with a "formal complaint". In accordance with the Complaint Handling section of the Key Factor booklet, by writing to the Managing Director, this became a Stage 2 complaint, although no response was given until 19 August 2016. This letter refers to an email from Mr Snowie of 31 July 2016 but the tribunal was not supplied with a copy of that email. In any event, Mr Snowie's letter of 19 June 2016 clearly set out his on-going concerns where he requested:

    a. information regarding the tendering process for the grounds maintenance contract
    b. a copy of the declaration of interest between Proserv and the factors
    c. a demonstration of how and why the contractors were appointed.
    d. an illustration of how the management fee for the apartments was calculated in comparison to the management fee for the houses

e. further information regarding his complaints about the car park light had not been properly attended to
f. justification for the assertions contained in the letter of 8 December 2015 regarding the James Gibb proposal
g. a further explanation regarding the consultation procedure in respect of the planting of trees.

Many of these matters had been on-going for some time and a number of them are dealt with specifically elsewhere in this Decision.

81. The tribunal finds in general terms that the factors' communications fall short of the standard expected in the Code. Fuller explanations and information should have been provided in relation to the tendering process for grounds maintenance contract, which is covered in points (a) and (c) above, if only for increased transparency and openness. In addition, although the matter of the fire insurance claim related to a different property, the factors failed to provide an adequate explanation of the situation to Mr Snowie which caused him to persist in his enquiries. Much of the information provided to the tribunal in the factors' documents could have been given to Mr Snowie at an earlier stage.

82. The tribunal finds that the factor has adequately explained the differences in the management charges as between the houses and the apartments. It is evident that the factors will not be involved in any aspect of the buildings on the house plots, but will be involved in matters pertaining to the common parts of the apartment blocks and the common parking areas pertaining thereto.

83. It was not entirely clear to the tribunal whether Mr Snowie's concern was about the explanation of the reasons for the differences, or the actual charges imposed. The level of charges imposed by the factors is a commercial matter for them and, unless they can be said to be excessive and unreasonable, it is not a matter for the tribunal.

84. The tribunal notes that the Scope of Services refers to 'meet twice per annum with owner / resident committee representatives / groups'. The factors' position was that they had written to the owners in the development and asked for feedback about any concerns or issues that owners might have. They did not make it clear to owners that such concerns would form the basis of a meeting to be arranged and in the absence of sufficient response there would be no meeting. The tribunal also noted that the Factoring & Management Fee provided for in their Presentation of Proposal dated February 2008 (item A of the factor's documents), upon which their appointment was based, provides for two meetings per annum and the failure to arrange such meetings amounts to a failure in the factors' duties.

Section 3.3 of the Code:

85. There was no specific reference by the parties at the hearing to this complaint but it is referred to by Mr Snowie in his application and his letter to the factors of 19 June 2016 (item 6 of his documents). The tribunal finds that the factors are not in breach of this section as they issue quarterly statements in a format which

enables owners to find details about charges through a link to the factor's website. This is the level of detail required by the Code.

86. Mr Snowie's letter of 19 June 2016 also refers to information regarding the insurance details but that is not covered by this section of the Code and is dealt with elsewhere in the Decision.

Complaints Procedure

87. Mr Snowie complained in his letter of 19 June 2016 that the factors had failed to comply with their complaints procedure on the basis that there had been no response from 'the director' (presumably Mr Burnett) to emails into which he had been copied.

88. The tribunal could not uphold such a complaint as Mr Burnett had been copied in and it was not clear why a response from him was specifically required when responses were provided by Ms Troup.

89. The tribunal could not find that the factors had failed to comply with their own Complaints Procedure in failing to respond timeously to Mr Snowie's letters of 19 June 2016 (item 6 of the homeowner's documents) and 31 July 2016 (item 12n of the homeowner's documents) addressed to Mr Rochfort. The final response from Mr Rochfort was his letter dated 19 August 2016 which was within 21 working days of 31 July 2016. There was other correspondence regarding Mr Snowie's complaints leading up to the letter of 19 August 2016.

Proposed Property Factor Enforcement Order:

90. Having determined that the factor has failed to comply with the Code of Conduct, the tribunal was required to decide whether to make PFEO.

91. In his email of 28 March 2016 (item 1 of homeowner's documents) Mr Snowie listed a number of outcomes which he would like from the process which the tribunal considered when deciding the terms of any PFEO.

    a. Having determined that the factors had failed to provide information regarding the tendering process for the ground maintenance contract or the basis on which Proserv were appointed as contractors, the tribunal requires the factors to produce such information and details within a period of one month from the date of issue of the PFEO.
    b. Having determined that the factors were not in breach of the Code or their duties in relation to the tree planting, the tribunal is unable to require the factors to take any action in this regard.
    c. Having determined that the factors were not in breach of the Code or their duties in relation to the insurance claim in respect of number 10, the tribunal is unable to require the factors to take any action in this regard.
    d. Mr Snowie maintains that there is support for a change of factor. It is always open to the homeowners to propose such a change in terms of the procedure laid out in the titles. The tribunal determined that in view of the terms of the factors' Scope of Service with regard to meetings with owners

the factors will make arrangements for such a meeting and to include the proposal for a change of factor as well as agreement for a level of delegated authority as items of business for discussion. The tribunal considered that a period of two months would be reasonable within which arrangements could be made for a meeting to take place.

e. The tribunal considered whether a letter of apology for the terms of their letter of 8 December 2015 should be sent to all owners as suggested by Mr Snowie. On balance it determined that nothing would be gained from such a requirement apart from increased publicity of the issue which would not benefit Mr Snowie. It determined, however that a letter of apology for their handling of the issue should be sent to Mr Snowie personally.
f. Having determined that the matter of fee charging was a commercial decision for the factors, the tribunal is unable to require the factors to take any action in this regard.
g. Having determined that the factors were not in breach of the Code or their duties in relation to the terms of the standard block insurance policy, the tribunal is unable to require the factors to take any action in this regard.
h. The tribunal determined that in respect of the factors' failure to comply with section 6.9 of the Code in relation to the car park light issue, it would be reasonable for the factors to bear his share of the cost of the recent replacement of the fitting.
i. The tribunal found that Mr Snowie had been subjected to considerable strain and anxiety over the remaining issues relative to the factors' failings which principally arose as a result of poor or inadequate communications and an almost total lack of consultation with homeowners, in contravention of section 2 of the Code and determined that the factors should pay to him, from their own funds, the sum of £250.

Right of Appeal:

In terms of section 46 of the Tribunals (Scotland) Act 2014, a homeowner or 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.

D Preston Chairman 30 January 2017