



Statement of Decision with Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) in respect of an application made under Section 17 of the Property Factors (Scotland) Act 2011 (“the Act”)

Reference number: FTS/HPC/LM/21/1076

Re: Property at 5 Brent Road, Thornliebank, Glasgow, G46 8JG (“the Property”)

The Parties:

Mr. Lawrence McGovern residing at the Property (“the Homeowner”)

James Gibb Residential Factors, Bellahouston Business Centre, 423, Paisley Road West, Glasgow, G51 1PZ (“the Property Factor”)

Tribunal Members

Karen Moore (Chairperson) and Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Property Factor: -

- (i) has not failed to comply with the Section 14 duty in terms of the Act in respect of compliance with the Property Factor Code of Conduct Section 1 Bc, Section 2.1, Section 3.4, Sections 4.3 and 4.8; Section 6.4 and Section 7.2
- and
- (ii) has not failed to comply with the Property Factor’s Duties.

Background

1. By application received between 5 May 2021 and 21 October 2021 (“the Application”) the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the Code of Conduct for Property Factors (“the Code”) and had failed to comply with the Property Factor Duties.
2. The Application comprised the following documents: -application form dated 5 May 2021 comprising the First-tier Tribunal standard application form indicating that the parts of the Code complained of are Section 1 Bc, Section 2.1, Section 3.4, Sections 4.3 and 4.8; Section 6.4 and Section 7.2 and alleging a failure to comply with the

Property Factor Duties; copy correspondence between the Homeowner; and Property Factor, some with prints of photographs and plans; and a copy of the Homeowner's Land Certificate GLA150700.

3. On 27 September 2021, a legal member of the Chamber with delegated powers of the Chamber President accepted the Application and a Case Management Discussion (CMD) was fixed for 11 January 2021 at 10.00 by telephone conference call.
4. Prior to the CMD, the Property Factor submitted written representations together with copies of their written statements of services (WSS), copy title sheet with the Deed of Conditions relative to the Property and copy correspondence between the Parties.

Case Management Discussion

5. The CMD took place on 11 January 2021 at 10.00 by telephone. The Homeowner took part and was unrepresented. The Property Factor was represented by Ms. Lorraine Stead, Regional Director, and Mr. Jason Millar, Senior Development Manager. At the CMD, the Parties agreed that the Application was lodged following debt court proceedings raised by the Property Factor against the Homeowner in respect of unpaid common charges. The Parties also clarified that the services carried out are land management only for amenity or common ground at the Regent's Park development ("the Development"). The Property Factor disputed all of the Homeowner's complaints and disputed the facts as set out by the Homeowner.
6. The outcome of the CMD was that a Hearing was fixed and Direction 1 was issued by the Tribunal in respect of the evidence required at the Hearing. Direction 1 is set out in the Annexure to Direction 2 referred to in paragraph 10 hereof.
7. A Hearing by video conference fixed for 15 March 2022 was postponed to a later date due to the ill health of the Homeowner.

Compliance with Direction 1

8. The Parties submitted productions in part compliance with Direction 1 but did not paginate or inventory the productions as directed by the Tribunal.

Hearing

9. The Hearing by video conference took place on 20 April 2022 at 10.00 am. The Homeowner was present and was unrepresented. The Property Factor was represented by Ms. Lorraine Stead and Mr. Jason Millar. Shortly after the commencement of the Hearing and the Homeowner's evidence in respect of the first element of his complaint, it became clear to the Tribunal that Homeowner was not in possession of the full papers submitted by the Property Factor in response to the Tribunal's Direction. Accordingly, the Hearing was adjourned for the Tribunal Chamber administration to ensure that the Parties have a complete set of all submissions. Mr. Millar of the Property Factor offered to meet with the Homeowner on site with a view to attempting to resolve the Homeowner's issues. The Tribunal encouraged the Parties to pursue this course of action.

10. Given the volume of productions lodged by the Parties, the Tribunal issued Direction 2 to clarify and manage the Parties' submissions and productions received to date as follows: -

“Further to the oral enquiries made by the Tribunal of the Parties at the Case Management Discussion proceedings on 11 January 2022 and the evidence heard in part at the Hearing on 22 April 2022, the Tribunal directs the Parties to lodge or to extract from the productions already lodged and to resubmit as separate productions the following items:

- 1. With reference to the complaint under Code Section 1: B. that the Homeowner did not receive a Written Statement of Services (WSoS) and did not receive any information on what the routine ground maintenance is, the Tribunal directs the Property Factor to lodge a timeline or record of the dates on which it issued either its WSoS to the Homeowner or provided advice on where the WSoS might be accessed by the Homeowner;*
- 2. With reference to the Tribunal's Direction dated 11 January 2022, the Property Factor is directed to re-submit its productions of 1 March 2022 with each page consecutively numbered and with a contents or inventory page explaining the nature of the production and its relevance;*
- 3. With reference to the Tribunal's Direction dated 11 January 2022, the Homeowner is directed to comply with paragraphs 1, 3, 4, 6, 8 and 10 and to submit his productions in one tabbed bundled with each page consecutively numbered and with a contents or inventory page explaining the nature of the production and its relevance;*
- 4. The Tribunal directs the Tribunal Chamber Administration to issue to the Homeowner hard copies of all of the written submissions and productions lodged by the Property Factor to date.*

For ease of reference, the wording of the Direction of 11 January 2022 is annexed. The said documentation should be lodged in hard copy by the Parties with the Chamber and copied to the other Party no later than close of business on the day which falls fourteen days before the date of the Hearing to be fixed and any further written responses and evidence to be relied on should be lodged no later than close of business on the day which falls seven days before the date of that Hearing.

Annexure referred to:

Further to the oral enquiries made by the Tribunal of the Parties at the Case Management Discussion proceedings on 11 January 2022, the Tribunal directs the Parties to lodge or to extract from the productions already lodged and to resubmit as separate productions the following items:

- 1. With reference to the complaint under Code Section 1: B. that the Homeowner did not receive a Written Statement of Services (WSoS) and did not receive any information on what the routine ground maintenance is, the Tribunal directs the Parties to lodge all documents issued and received in respect of the WSoS and the scope of those works carried out.*
- 2. With reference to the complaint under Code Section 2.1 that Property Factor provided information which is misleading or false, the Tribunal directs the Homeowner to lodge correspondence evidencing his requests of the Property Factor together with the replies, if any, received and directs the Property Factor to lodge documents to show the extent of the land management contracts or works passed to them by their predecessors.*

3. *With reference to the complaint under Code Section 3.4, that the Property Factor does not have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property), the Tribunal directs the Homeowner to lodge correspondence evidencing his requests together with the replies, if any, received and directs the Property Factor to lodge documents to show the extent of the payment processes passed to them by their predecessors, to lodge the accounts issued and paid throughout the Homeowner's ownership of the Property and to lodge documents relating to the appointment of their predecessor, Grant and Wilson.*
4. *With reference to the complaints under Code Section 4.3, that the Property Factor's charges for late payment are unreasonable or excessive and Section 4.8 that the Property Factor took legal action without taking reasonable steps to resolve the matter and without giving notice of that intention, the Tribunal directs the Homeowner to lodge correspondence evidencing his interaction with the Property Factor together with the replies, if any, received and directs the Property Factor to lodge its debt recovery procedure and its pre-court action correspondence with the Homeowner.*
5. *With reference to the complaints under Code Section 6.4 that the Property Factor does not prepare a planned programme of cyclical maintenance and the complaints under the property factor duties that the Property Factor does not comply with the title deeds and the scope of works required by the title deeds, the Tribunal directs the Property Factor to lodge the programme and schedule of works, the instructions received from the residents' association and the documents in its possession relating to the residents' association and the committees of the residents' association.*
6. *With regard to the ownership and maintenance of the common ground for the development of which the Property forms part, the Parties are directed to lodge maps or plans or colour photographs showing the ownership, as far as they understand it, by colour coding.*
7. *The Tribunal directs the Property Factor to lodge their complaints' procedure.*
8. *The Tribunal directs the Property Factor to lodge colour coded maps or plans of the areas which they maintain, the schedule of works carried out and the rota for the works directs the Homeowner to lodge similar colour coded maps or plans, together with the schedule of the works which he considers should be carried out by the Property Factor.*
9. *The Tribunal directs the Property Factor to lodge a statement of account showing the accounts invoiced to the Homeowner and the sums paid by him from the start of his ownership in 2006.*
10. *The Tribunal directs the Homeowner to lodge a statement of the sums paid by him or tendered in payment by him together with the conditions for encashment of the payments from the start of his ownership in 2006.*
11. *The Tribunal directs the Parties to provide the documents in response to this Direction in one tabbed bundle, consecutively numbered, with a contents page.*
12. *The Tribunal directs the Parties to lodge a list of witnesses, if any."*

11. The adjourned Hearing was fixed for 28 July 2022.

Compliance with Direction 2

12. The Property Factor complied with Direction 2 and resubmitted its productions and written submissions as directed by the Tribunal within the prescribed time scale.
13. The Homeowner did not comply with Direction 2 and did not resubmit his productions and written submissions in the format directed by the Tribunal. The Homeowner, by email dated 14 July 2022, submitted new evidence, being copy correspondence which post-dated the Hearing. The Homeowner's submission did not have an inventory, was not paginated nor was it in hard copy. By email shortly before close of business on Friday 22 July 2022, the Homeowner submitted further new evidence, again being copy correspondence which post-dated the Hearing. Again, the Homeowner's submission did not have an inventory, was not paginated nor was it in hard copy.

Adjourned Hearing

14. The Adjourned Hearing by video conference took place on 28 July 2022 at 10.00 am. The Homeowner was present and was unrepresented. The Property Factor was again represented by Ms. Lorraine Stead and Mr. Jason Millar. The Tribunal asked the Homeowner why he had not complied with the Directions. The Homeowner apologised for non-compliance and explained that his understanding was that his Application sufficed. The Tribunal advised the Homeowner that his submissions of new evidence had been received late and would not be admitted into the proceedings.

Procedure at Hearing.

15. The Tribunal, having regard to Rule 2 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules"), which states: *"2.(1) The overriding objective of the First-tier Tribunal is to deal with the proceedings justly. (2) Dealing with the proceedings justly includes (a) dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties; (b) seeking informality and flexibility in proceedings; (c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course they should take; (d) using the special expertise of the First-tier Tribunal effectively; and (e) avoiding delay, so far as compatible with the proper consideration of the issues."*, advised the Parties that it would deal with each head of complaint in turn, with the Homeowner outlining his position and the Property Factor responding.
16. For the avoidance of doubt, the Tribunal's following note of evidence is not a verbatim account or transcript of the oral statements made at the Hearing on 28 July 2022 and at the adjournments of the Hearing.

Code SECTION 1: WRITTEN STATEMENT OF SERVICES You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner

B. Services Provided c. the core services that you will provide. This will include the 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 service).

17. The Homeowner's complaint is that he did not receive a WSS and had no information on what the level of routine garden maintenance for the Development is. He advised that the factoring history at the Development is that the initial factors were Hacking and Paterson, Grant and Wilson were then appointed and Grant and Wilson were taken over by the Property Factor, albeit that the Homeowner questioned that the appointment of Grant and Wilson had been made in full compliance with the title deeds. The Homeowner maintained that he had not received a WSS from Grant and Wilson or the Property Factor. With reference to correspondence lodged as part of the Application, the Homeowner pointed out that he had written to the Property Factor and its Group Managing Director on several occasions requesting a copy of the WSS but none had been received by him. The Property Factor's position was that the WSS has been issued to the Homeowner on more than one occasion. Ms. Stead, with reference to the Property Factor's productions, advised that each version of the WSS had been sent to the Homeowner by email and, on some occasions, by hard copy. She explained that, in addition, the WSS is available on the Property Factor's portal to which the Homeowner has access and that a newsletter accompanies each common charges account issued to the Homeowner and, from the newsletter, the Homeowner is signposted to the WSS. As the Homeowner receives his common charges accounts by mail, the newsletter would be issued to him by mail. The Homeowner disputed having received the WSS. However, he explained that the hard drive of his computer had failed and that he lost documentation stored on it. He accepted that he could have had a copy of the WSS on that hard drive. With reference to email of 12 August 2020 from the Property Factor's then Senior Development Manager, Hannah Findlay, to the Homeowner which enclosed the WSS, the Homeowner, at first refuted that he had received the email. He later accepted that he had received this email, having replied to it in a chain of emails but disputed having received any documents attached to it. He accepted that he had not raised the fact that he had not received the documents attached to Ms. Findlay's email with the Property Factor and explained that, as he had written to the Property Factor by recorded delivery mail, he expected the reply to be issued the same communication method and not by email. The Homeowner accepted that he had received newsletters but took the view that he was not under a contractual obligation to read them.

Code SECTION 2: COMMUNICATION AND CONSULTATION Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes.

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

18. The Homeowner's complaint in respect of this section of the Code is that his requests for a schedule of works for the common ground and for proof that the previous factor, Grant and Wilson, had been "lawfully appointed" have not been answered. He maintained that he has been given false information either by Grant and Wilson or by

the Property Factor. His reason for stating this is that Grant and Wilson advised that the rough ground areas at the Development (“the Rough Ground”) were part of the maintenance contract and the Property Factor advised that this is not the case. Therefore, one of these statements must be wrong. The Homeowner made particular reference to an email with a coloured-up plan of 23 July 2014 sent to him by Graeme Stewart, Property Manager of Grant and Wilson, which refers to the areas coloured yellow on the plan as “Rough Ground” and states that this should be cut back once a year. He stated that Mr. Millar of the Property Factor has since advised that the “Rough Ground” is not part of the maintenance contract. Ms. Stead confirmed to the Tribunal that the “Rough Ground” is not part of the current contract. Mr. Millar also confirmed this, advising that the “Rough Ground” cannot be accessed from the common parts of the Development and that there are health and safety concerns for contractors in gaining access. The Homeowner maintained that this is misleading or false information as the “Rough Ground” should form part of the ground maintenance or the Property Factor should reduce its management fee to reflect that it is not managing this part of the Development common area.

19. For the Property Factor, Ms. Stead referred the Tribunal to the Gardening Schedule and the Ground Maintenance Specification lodged by Property Factor. She explained that the Gardening Schedule was the schedule in place when the Property Factor took over from Grant and Wilson and that the Ground Maintenance Specification was the schedule thereafter agreed with the Development residents’ association, although she could not say on what date the schedule had changed. She confirmed that this was on the Property Factor’s portal and available for the Homeowner to view. She stated that it was her understanding that the Homeowner had been sent a copy of it. The Homeowner disputed that he had seen either the Gardening Schedule or the Ground Maintenance Specification before it was lodged by the Property Factor. The Homeowner referred to correspondence lodged as part of the Application and disputed that the Property Factor had proper authority to act as they were taking instructions from an improperly formed residents’ association. He stated that his understanding was that the committee or meeting which instructed the Property Factor was inquorate, had no authority to give any instructions and so the Property Factor had no contract with him for the services they provided. The Homeowner referred the Tribunal to the several letters lodged with the Application which he had sent to the Property Factors raising the issue of problems with hogweeds and other invasive plants. These letters dated from 2016/2017 to date. He stated that the Property Factor had taken no action. He stated that although the Ground Maintenance Specification mentioned litter picking, tree and shrub cut back and weed killer spraying to the “Rough Ground”, this work was not carried out. Mr. Millar of the Property Factor reconfirmed that that lack of access to the “Rough Ground” prevented work being carried out safely.

Code SECTION 3: FINANCIAL OBLIGATIONS While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

20. The Homeowner's complaint is that he has asked on several occasions that the Property Factor invoice him in advance for the annual common charges but the Property Factor refuses to do so. The Homeowner explained that this would take away any risk of late payment charges and should be easy for the Property Factor to do. The Homeowner's position is that advance invoicing would mean that, if owners were on holiday or absent from home when the accounts arrived, they would not be penalised with late payment charges. He explained that he makes payment in advance of £50.00 per quarter to cover the invoices but accepted that he attaches conditions to some of the cheques tendered by him. The Homeowner accepted that he could set up a direct debit or standing order but chose not to do so as the costs were too low.
21. For the Property Factor, Ms. Stead confirmed that various payment methods are acceptable to the Property Factor including payment when the invoice is issued. She explained that the Property Factor issues accounts in arrears so that the invoices are accurate and contain the actual sums due, not estimates. She stated that the Homeowner's cheques do not cover the actual costs and so has arrears of common charges of around £800.00. The Homeowner advised the Tribunal that he tenders the £50.00 payment based on his assessment of what he should pay and what is a fair sum for him to pay and not in respect of the sum invoiced. In response to questions from the Tribunal, he agreed that the costings set out in his letter of 31 July 2020 are costings and figures prepared by him. He explained that he based the costs on amounts which had been charged by Hacking and Paterson and that he apportioned them on the basis that different house types and sizes should pay different amounts. He accepted that the title deeds applied an equal share for each property in the Development but stated that his understanding was that Hacking and Paterson agreed with him that this was unfair and that they intended to change the charging approach. He stated further that the Property Factor should have a forward funding approach and should take a levy from residents to cover future and ongoing maintenance. Ms. Stead advised the Tribunal that she was not aware of the arrangement with Hacking and Paterson to change the charging approach and that the residents' association had decided against a forward funding or contingency fund. When asked by the Tribunal if he had anything in writing from Hacking and Paterson, the Homeowner stated that he did not and that anything might have been on his computer hard drive which had failed.
22. With reference to its appointment and authority, Ms Stead stated that Grant and Wilson were appointed by the Development's residents' association in line with the title deeds, that Grant and Wilson invoiced in arrears and that the Property Factor continued with this approach. As stated at the CMD, Ms. Stead and Mr. Millar advised that there is an active residents' association for the Development with which the Property Factor deals.

23. The Homeowner did not accept the Tribunal's suggestion that 3.4 of the Code as set out above refers to situations where accounts are paid in advance and an account reconciliation is required when the property changes hands.

SECTION 4: DEBT RECOVERY Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason, it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem. It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.

4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.

4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

24. With regard to 4.3, the Homeowner's position is that late payment charges are excessive and cited a charge of £18.00 for a debt of around £2.00. He stated that he had actually paid in advance by tendering cheques albeit with conditions for encashment attached. He stated that the title deeds provide for interest at 4 % above base rate for late payment and not for penalty charges. Ms. Stead for the Property Factor stated that a standard late payment charge of £30.00 to cover all costs is charged and that the email of 12 August 2021 from Hannah Findlay explained that the Property Factor does not charge interest on sums due. In response to questions from the Tribunal, Ms. Stead stated that accounts are issued quarterly in arrears on the 27th day of each of February, May, August and November and that payment was due within a month of that date. She stated that if an owner paid late due to being on holiday or for another good reason, the Property Factor had discretion to waive the late payment charge.

25. With regard to 4.8, the Homeowner's position is that the Property Factor proceeded to court action at a time when the Parties had been trying to resolve matters, with Ms. Catherine Flanagan dealing with matters for the Property Factor on behalf of Mr. Reid, the Property Factor's managing director. Ms. Stead for the Property Factor stated that the Property Factor had proceeded with court action due to lack of contact from the Homeowner. She stated that the action in the Sheriff Court is sisted pending the outcome of the Application and explained that, in addition to the Homeowner's personal arrears, the Homeowner is liable for a share of the Development common debt which is approximately £6,000.00 shared by 329 owners.

26. The Homeowner stated that it was his understanding the main reason for the move from Hacking and Paterson to Grant and Wilson by the Development residents' association was that Grant and Wilson agreed not to pursue debt so that owners who

could not afford the costs would not be harassed. The Homeowner stated that Hannah Findlay of the Property Factor, by email of 2 October 2020, had advised him that Ipm Limited who own the Property Factor had changed its debt recovery policy. He stated that it was his understanding that the Ipm Limited had no contract with him and so had no authority to change the debt recovery process to the current “short sharp tactic” process. He maintained that there should be a fairer distribution of the costs and the Property Factor should reduce its management charge to reflect the reduced work it now carried out. Ms. Stead advised the Tribunal that she was not aware of the arrangement with Grant and Wilson not to pursue debt. When asked by the Tribunal if he had anything in writing from Grant and Wilson, the Homeowner stated that he did not and that anything might have been on his computer hard drive which had failed.

27. The Homeowner stated that the Property Factor’s procedure should include a process for Alternative Dispute Resolution (ADR) as recommended by the Law Society of Scotland to avoid unnecessary court actions.

SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE This section of the Code covers the use of both in-house staff and external contractors.

6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

28. The Homeowner maintained that there is no programme of works for the common areas and that the terms of the title deeds are not being complied with by the Property Factor. He stated that there should be a planned maintenance programme to deal with problems before they arise and that this should be an easy task for a competent factor to put in place and to manage. He stated that the maintenance programme should include the “Rough Ground” and that the treatment of invasive species should be carried out to SEPA standards. He stated that his understanding was that, if work had been carried out, it had not been carried out properly or effectively. With reference to correspondence lodged as part of the Application, pointed out the frequency of his complaints to the Property Factor in this regard.
29. For the Property Factor, Ms. Stead, with reference to the Ground Maintenance Specification, stated that there is a general ground maintenance contract of 20 visits per annum with the winter visits being litter picking. She advised that the Property Factor was awaiting instruction from the Development residents’ association on additional hogweed works which would require to be carried out by a specialist contractor. Mr. Millar advised that, as the garden contractors work outside, they do not have a sign-in sheet. In response to questions from the Tribunal, Mr. Millar stated that the contractors report to the Development Manager, Charlene Fox, who monitors the work and reports in turn to the Development residents’ association. Ms. Stead stated that she understood that the reports would be available on the portal. The Homeowner agreed that Charlene Fox had attended a site meeting in July 2022.

SECTION 7: COMPLAINTS RESOLUTION *Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code. To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them. It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.*

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. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.*

30. The Homeowner's complaints in respect of this part of the Code is that his complaints as set out in his letters of 31 July 2020, 11 March 2021 and 17 March 2021 had not been treated as complaints in terms of the Property Factor's complaints procedure, that he had not been offered ADR and had not been advised of his right to make an application to the tribunal.
31. For the Property Factor, Ms. Stead stated that the Property Factor had been dealing with the Homeowner's correspondence on a routine business basis and that it had been very difficult for the Property Factor to determine the exact nature of the Homeowner's complaints from his correspondence which was frequently addressed or emailed to different employees with the Property Factor's organisation. She explained that because of the Homeowner's approach, Mr. Reid, the Property Factor's Group Managing Director and his assistant, Ms. Catherine Flanagan, took direct ownership of dealings with the Homeowner but could still not identify the core issues. The Homeowner agreed that Mr. Reid and Ms. Flanagan had been dealing with him and that Ms. Flanagan, in particular, had been very helpful. In response to questions from the Tribunal, the Homeowner accepted that he had not used the word "complaint" in his correspondence and had not specifically asked that his correspondence be treated as complaints. He re-stated that he expected the Property Factor to reply to him using the same communication method which he had used and re-stated that he considered that he did not have a contract with the Property Factor which obliged him to read the newsletters sent to him.
32. Parties agreed that the Application came about, not through the complaints' procedure, but as an outcome of the Property Factor's debt court action. Ms Stead for the Property Factor confirmed that referral to the tribunal is in the WSS and in the complaints' procedure.

Adjournment of the Hearing.

33. The Tribunal adjourned the Hearing to a later date being 14 October 2022 due to lack of time and advised the Parties that it proposed to carry out a site inspection of the common areas of the Development before that date. The Tribunal stated that, as the site inspection will be part of the tribunal proceedings which are already underway, the attendees will be the Parties and the Tribunal Members and will not be open to the Development residents or its residents' association. The site inspection will be a visual inspection only without evidence being heard to provide the Tribunal with a better understanding of the common areas of the Development.

Site Visit

34. The site visit took place on 30 September 2022 at the Development. The Homeowner, his partner as a supporter and Mr. Millar of the Property Factor attended. The Tribunal viewed the common areas of the Development adjacent to the Property. The Tribunal noted that the Rough Ground sits to the rear of the Property and that the Homeowner has created a gate access to the Rough Ground at the rear fenced boundary of the Property. The Rough Ground extends along the westmost boundary of the Development between the houses built on the west side of Brent Road and Brent Avenue and continues northerly behind Foinhaven Way and Foinhaven Gardens. The Rough Ground adjacent to the Brent Road and Brent Avenue houses is bounded on its western edge by parkland. Trees from the parkland overhang the Rough Ground adjacent to the Property. The Rough Ground is accessed at cul-de-sac type points. However, it appears that owners of properties adjacent to some of these access points have incorporated the access points into their gardens and so block the accesses. The Tribunal noted that there is one access point on Brent Avenue which is not blocked and on which the boundary fence has collapsed. The Tribunal noted that the Rough Ground is overgrown and does not appear to be maintained. The common grassed areas in the Development appear to be maintained with the exception of a small triangular area close to 23 Brent Road, which was overgrown.

Adjourned Hearing

35. The adjourned Hearing took place on the morning of 14 October 2022 by video conference call. The Homeowner was present and was unrepresented. The Property Factor was again represented by Ms. Lorraine Stead and Mr. Jason Millar.

Property Factor's Duties

36. The Homeowner's complaint here is that there has been non-compliance with (i) title deeds on late charges and amounts charged and (ii) a general failure to maintain the common areas in accordance with the title deeds. The Homeowner explained that the previous property factor, Grant and Wilson, which had been acquired by the Property Factor, was under contract to maintain the Rough Ground but that the Property Factor is not fulfilling this contract. His position is that, as they acquired Grant and Wilson, they should be fulfilling Grant and Wilson's obligations. The Homeowner referred to the letter from Graeme Stewart of Grant and Wilson to him dated 23 July 2014 in which Grant and Wilson undertook to cut back the Rough Ground once a year. The Homeowner stated that the Property Factor did not carry

out this annual work and did not carry out the full ground maintenance which Grant and Wilson's contractors, Forest Green, carried out. The Homeowner stated that in his view, the Property Factor did not understand the extent of the ground maintenance required and, in particular, left invasive weeds like hogweed and Japanese knotweed unchecked. He stated that these invasive weeds had not been attended to in the Rough Ground behind the Property. The Homeowner referred to his letters of 22 July 2016 and 2 July 2017 which point out to the Property Factor the work which requires to be done to maintain the Rough Ground. With regard to his letter of 22 July 2016, the Homeowner explained that this had been sent following a site visit by the then property manager, David Smith, to whom the Homeowner had highlighted the issues with the Rough Ground.

37. The Homeowner disagreed that the Property Factor could not access the Rough Ground. He stated that, in his view, if access points have been taken over by neighbouring homeowners, the Property Factor should take action to recover possession of the access points, and, if the access point is inaccessible because of fencing, then the fence is part of the common area and so the responsibility of the Property Factor.
38. The Homeowner disputed that the Property Factor has been properly instructed in respect of the scope of the works which it carries out. The title deeds state that that instruction should be given by the residents' association and the Homeowner's view is that, as there is not a properly constituted residents' association for the Development, there is no body capable of giving a proper instruction.
39. The Homeowner stated that the Property Factor does not act consistently and does not communicate consistently with homeowners. He stated that it is his understanding is that they are required to communicate consistently. He stated that on more than two occasions boundary fences have been repaired by the Property Factor and the cost charged to the Development homeowners as part of the common charges. Therefore, the Property Factor should repair the fencing which blocks the access to the Rough Ground. He stated that a reason for the fencing to have collapsed is that the Rough Ground is not maintained.
40. The Homeowner stated that the Property Factor does not act consistently in respect of the maintenance specifications and pointed out that the Property Factor has invoiced for the removal and treatment of hogweed and common fence work. He referred to invoice dated 2 December 2015 and numbered 210 in the Property Factor's bundle which shows charges for the removal and treatment of giant hogweed and to invoice dated 1 June 2016 and numbered 212 in the Property Factor's bundle which shows charges for repairs to a common gate.
41. The Homeowner stated that the Property Factor's contractor's treatment and removal of hogweed has not been done correctly and has not been done in compliance with the relevant legislation. In particular, as his letter of 22 July 2016 to the Property Factor points out, the Wildlife and Natural Environment (Scotland) Act 2012 has not been complied with as the invasive weeds were removed and this is prohibited by the legislation. He stated that the weeds should have been incinerated on site and the

destruction monitored thereafter. The Homeowner referred to document 28 of his bundle which shows that the contractor, the Invasive Weeds Agency Ltd., did not comply with the legislation as they treated the invasive weeds on site.

42. In response to questions from the Tribunal, the Homeowner stated that the Property Factor was not doing the work it should and that the work which it did carry out was not carried out properly. For this reason, the Homeowner is withholding payment. From his own observations, the Homeowner stated that he is aware that the Property Factor has carried out work at the back of numbers 19 and 21 Brent Avenue and has done some work at Foinhaven Way. He stated that the hogweed is chronic.
43. With regard to the residents' association, the Homeowner stated that he is not a member of the residents' association and that the office bearers refuse to meet with him. His concern is that the Property Factor takes instructions from a minority of two owners on the residents' association and not from another nineteen who are not happy.
44. The Tribunal adjourned the Hearing to a later date to hear the Property Factor's position on the Property Factor Duties complaint.

Adjourned Hearing

45. The adjourned Hearing took place on 16 January 2023 at the Glasgow Tribunal Centre. The Homeowner was present and was unrepresented. The Property Factor was again represented by Ms. Lorraine Stead and Mr. Jason Millar.
46. The Homeowner lodged a bundle of papers on 9 January 2023. The bundle contained statements prepared by the Homeowner, copy correspondence and copy invoices, some of which post-dated the date of the Application. The Homeowner advised the Tribunal that he had lodged this paperwork as it related to the Sheriff Court actions as he "had assumed that we would sit down and look at the figures of the claim" lodged by the Property Factor in respect of its performance the Property Factor Duties. He stated that he had received new information from the Property Factor from which he calculates that he has overpaid the Property Factor and that this relates to the Property Factor Duties. The Tribunal advised the Homeowner that the time limit for lodging productions had long passed and so the bundle would not be admitted into the proceedings.
47. In response to questions from the Tribunal, the Homeowner confirmed that he had been made aware by his lawyer when he bought the Property in 2016 that he would have to pay land maintenance costs and that the figure given to him at that time was £60.37 plus VAT.
48. In response to questions from the Tribunal, Ms. Stead stated that the arrears of common charges due by the Homeowner were around £600.00 when the Simple Procedure action was raised and have risen since.

49. In addressing the Homeowner's Property Factor Duties complaint, Ms. Stead stated that the Property Factor was still not clear and entirely sure what the Homeowner expected of the Property Factor as he raised different issues each time the Property Factor addressed his comments. She stated that the Property Factor had explained how they had been appointed and had explained the costs charged but the root of the issues seemed to be that the Homeowner has own thoughts as to what the Property Factor should do. Ms. Stead referred to a letter dated 17 May 2021 from Catherine Flanagan of the Property Factor to the Homeowner which set out the difficulties the Property Factor faced in dealing with the Homeowner and which asked direct questions to try to understand his concerns but which had not achieved that aim.
50. The Homeowner stated that his complaint was that the Property Factor did not carry out work properly and in line with legislation. He stated he was aware that Network Rail, an adjacent landowner, agreed with him that ground investigation works were required on the Rough Ground after they had carried out a walk-around inspection and had offered the Property Factor a payment of £350.00 towards the cost of this. Mr. Millar and Ms. Stead disputed this, explaining that Network Rail had contacted the Property Factor to advise that they intended to carry out investigation on their land in respect of the electrification of the rail line and had offered £350.00 to the Development owners in recognition of any disruption this might cause. This offer had been relayed by the Property Factors to the residents' association.
51. Ms. Stead stated that treatment of hogweed is not part of the core services and that works have been ongoing since 2015 to address the issue. She accepted that the Property Factor did not know when the invasive weed problem started but it was being addressed over the years and was a standing item on meetings with the residents' association.
52. The Homeowner did not accept that the Property Factor was taking appropriate action as they did not walk the site as required by the WSS. He accepted that invoices had been issued for invasive weed treatment but did not accept that the work was the correct approach or that it had been done properly. He disputed that hogweed was discussed at the residents' association meetings and, in particular, stated that it was not discussed at the recent AGM on 31 October 2022. Mr. Millar, who had attended that meeting, noted that it was discussed after the Homeowner left the meeting. The Homeowner accepted that he had left the meeting.
53. With regard to questions from the Tribunal in respect of the residents' association meeting, the Homeowner confirmed that he could ask for items to be placed on the agenda. He agreed with Mr. Millar that he had put items on the agenda, explaining that these related to the constitution of the residents' association and accepted that he had written to all owners of the Development in respect of the invasive weeds and the discussion to be had at the AGM. The Homeowner stated that the AGM was more focussed on the residents' association name change and maintained that the meeting was not carried out properly. He maintained that the chair of the AGM did not put his questions in respect of the invasive weeds on the AGM agenda.

54. The Homeowner accepted that the Property Factor had instructed specialist works but stated that he did not know if the work had been carried out or not and if it had, it had been ineffective, as the weeds had been treated and not removed, and so the work did not comply with the legislation. In response to questions from the Tribunal, the Homeowner accepted that he did not know from where the invasive weeds had originated.
55. The Homeowner did not accept that the Property Factor had authority to act as he considers that the residents' association has no status in terms of the title deeds. His position is that there is no-one to instruct the Property Factor. He expressed a further concern that the Property Factor, does not treat all owners in the Development equally. The Homeowner gave, as examples, the fact that the Property Factor treated the repair of a fence at 84 Brent Road which is owned by the chair of the residents' association as a common cost and another occasion treated work to trees at 90 Brent Road as a common cost. The Property Factor's position is that these works were in respect of common property and so fell to be shared by all of the Development owners. The Property Factor refuted that the residents' association office bearers are treated differently.
56. In response to questions from the Tribunal and with reference to the productions lodged, the Property Factor confirmed that the ownership of fencing in the Development fell into three categories: (i) wholly owned by individual homeowners, (ii) part owned by individual homeowners and part owned by the Development owners and (iii) wholly owned in common by the Development owners. The Property Factor confirmed that fences wholly owned by individual homeowners were not attended to by the Property Factor and that fences in which there was a common interest were attended to and the cost borne in relation to ownership shares.
57. The Homeowner stated that the email dated 18 August 2020 from Hannah Findlay of the Property Factor was an admission by the Property Factor of a failure to carry out the Property Factor Duties properly as the Property Factor stated that they were not happy with the work carried out by the then contractor. He accepted that the email went on to state that the Property Factor intended to change contractors to address this and that new contractors were then instructed.

Summing Up

58. The Tribunal explained to the Parties that the purpose of summing-up was to give the Tribunal a brief overview of their respective positions as evidenced and to set out why the Tribunal should prefer one over the other. The Tribunal advised that the purpose was not to give evidence or to revisit the evidence.

Summing Up - Homeowner

59. The Homeowner stated that, fundamentally, he shares the use of the "common confusion" expressed by the Property Factor. He stated that he is accustomed to organisations with a clear scope of supply but the Grant and Wilson and the

Property Factor organisations were not clear in what they did. The Homeowner stated that Grant and Wilson had been appointed to replace Hacking and Paterson as Grant and Wilson said they would do the same as Hacking and Paterson but for less money and that Grant and Wilson had undertaken not to take legal action to recover debt if it was a case of poverty or a disputed account. In this case, the Property Factor has taken action and placed an inhibition on the Homeowner's title even though all debt action should have been halted during the Tribunal process. The Homeowner stated that the debts and costs should be proportional in accordance with house size and that the terraced building 1 – 7 Brent Road should be treated as one building with each owner having a one-quarter share of the common fence for that terraced building. The Homeowner maintained that the Property Factor should appoint "a man of skill" to make a judgment on the fencing. In the Homeowner's opinion, as there are 202 buildings in the Development, the shares should 1/202, but he was prepared to accept that some areas are common to all owners and some are shared between different owners.

60. As the Homeowner appeared to be bringing in new matters, and, in order to assist with his summing up, the Tribunal took the Homeowner through each element of the Application in respect of the evidence before it.

Code SECTION 1: WRITTEN STATEMENT OF SERVICES

61. The Homeowner maintained that he had not received a copy of the WSS.

Code SECTION 2: 2.1 You must not provide information which is misleading or false.

62. The Homeowner maintained that the statements made by the previous factors and the Property Factor are conflicting and so are misleading of false.

Code SECTION 3: 3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

63. The Homeowner maintained that he should be able to pay in advance but now accepted that the purpose of this part of the Code is to ensure financial reconciliation is carried out properly. He accepted that there is no contingency fund for the Development.

SECTION 4: DEBT RECOVERY. 4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.

64. The Homeowner maintained that the charges are excessive and not proportionate in respect of the debts due.

SECTION 4: DEBT RECOVERY. 4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

65. The Homeowner maintained that the Property Factor should not have raised debt proceedings whilst the debt was under dispute and that the Property Factor should have offered an Alternative Dispute Resolution before raising court action.

SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE 6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

66. The Homeowner maintained that the Property Factor did not carry out periodic inspections by walking the site and did not have a programme of works.

SECTION 7: COMPLAINTS RESOLUTION 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. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

67. The Homeowner maintained that the Property Factor had not advised him of his right to refer matters to the tribunal.

Property Factor Duties

68. The Homeowner maintained that the Property Factor had not carried out the maintenance of the common parts to a reasonable standard and that overgrown trees and shrubs are a hazard to the elderly and nursing mothers. He maintained that the invasive species work instructed by the Property Factor was not carried out properly and caused seeds to scatter and so caused the invasive species to spread. The Homeowner stated that the result of the Property Factor's failures is that trees have become dangerous and it is predictable that the poor state of the common amenity land will cause damage to individual gardens.

Summing Up – Property Factor

69. Ms. Stead summed up the Property Factor's position. She stated that the Property Factor manages the Development on behalf of 329 owners and does so in line with the WSS and the Code. In terms of the title deeds, each terraced house has an equal share of the common costs and the Property Factor is bound to manage in terms of the title deeds, even though the Homeowner finds this unfair. Ms. Stead stated that the WSS and the Development schedules in respect of works carried out and level of service provided are clear and that the information is distributed by way of newsletters by post and by email. She stated that the WSS is on the Property Factor's portal.

70. With regard to particular points, Ms. Stead disputed that any false or misleading statements had been made and re-stated that the Property Factor acted in accordance with the instructions received from the residents' association and that the works carried out are a matter for the Development owners to decide. She stated that the Property Factor cannot force the Development owners to do works which they do not want to do and pointed out that the Property Factor's delegated spending level is low at £250.00. With regard to debt recovery, Ms. Stead stated that the late payment charge of £30.00 is applied for anyone who is in arrears and is not unreasonable. She stated that the Property Factor invoices in arrears and has a debt recovery procedure. With regard to the Homeowner, as his negative balance is now near to £900, it is reasonable to apply the debt recovery procedure.

71. With regard to a sinking fund and an additional programme of works, Ms. Stead stated that this is more appropriate for flatted developments with more communal areas. This Development is ground maintenance only service and there are clear core services. She stated that the works are Development owner led and are discussed at the residents' association AGM and that it is the responsibility of the residents to attend and make their views known.
72. Ms. Stead stated that throughout the court process and the tribunal process, the Property Factor has tried to determine the exact nature of the Homeowner's complaints but it is still unclear. She stated that a number of staff at the highest level have tried to find a resolution without success. Ms. Stead stated that the Property Factor can only manage as they are contracted to do and it appears that, as the Homeowner does not accept that, this is the root of the problem.

Findings in Fact.

73. The Tribunal had regard to the Application in full, the written submissions and productions as properly lodged, the Site Visit and to the evidence at the Hearings, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.
74. The Tribunal found the following facts established:
- i) The Parties are as set out in the Application;
 - ii) The Homeowner is a homeowner in terms of the Act;
 - iii) The Property Factor is a property factor in terms of the Act and is bound by Sections 14 and 17 of the Act, being the duty to comply with the statutory codes of conduct and the duty to comply with the Property Factor's Duties;
 - iv) The Property Factor raised debt recovery proceedings in Glasgow Sheriff Court against the Homeowner in respect of unpaid common charges;
 - v) In the course of those debt recovery proceedings, the Sheriff instructed the Homeowner to lodge the Application;
 - vi) The services carried out by the Property Factor are land management only in respect of the amenity or common ground of the Development;
 - vii) Deed of Conditions by Beazer Home (Scotland) Limited was registered against the parent title for the Development on 19 January 1995;
 - viii) The said Deed of Conditions states that the Regent's Park, Thornliebank Owners Association or a Committee thereof has full power in respect of all works in relation to the amenity or common ground of the Development;
 - ix) The said Deed of Conditions states that the Regent's Park, Thornliebank Owners Association or a Committee thereof has full power to instruct and delegate all works in relation to the amenity or common ground in the Development to any property manager;
 - x) The said Deed of Conditions allows the Regent's Park, Thornliebank Owners Association or a Committee to change its name and constitution;
 - xi) There is a residents' association for the Development;
 - xii) The said residents' association meets at least once a year at its AGM;
 - xiii) Minutes are taken at the AGM;
 - xiv) The initial property factor for the Development was Hacking and Paterson who were replaced by Grant and Wilson;

- xv) The Property Factor acquired Grant and Wilson in March 2015;
- xvi) The Property Factor has been property manager since March 2015;
- xvii) The Property Factor and its predecessors communicate with the residents' association and take instructions from the residents' association;
- xviii) The Property Factor and its predecessors attend the residents' association AGM but do not take part in the voting or decision-making;
- xix) There have been a number of WSSs for the Development;
- xx) The Property Factor has made successive versions of the WSS available to the Homeowner;
- xxi) In particular, the Property Factor made the WSS available to the Homeowner by letter dated 4 July 2017; on its web-based portal, by reference in newsletters and by attachment to an email of 2 August 2020;
- xxii) By email dated 23 July 2014 sent by Graeme Stewart, Property Manager of Grant and Wilson, the Homeowner was advised that the "Rough Ground" should be cut back once a year;
- xxiii) At a site meeting on 13 May 2022, the Homeowner was advised by Mr. Millar of the Property Factor that the "Rough Ground" is not part of the Property Factor's maintenance contract;
- xxiv) The Property Factor does not maintain the "Rough Ground";
- xxv) The "Rough Ground" cannot be accessed easily from the common parts of the Development;
- xxvi) The Property Factor does not make a current charge for maintenance of the "Rough Ground";
- xxvii) The Property Factor maintains the remainder of the amenity or common ground of the Development to a reasonable standard;
- xxviii) Grant and Wilson issued a Gardening Schedule for the Development which was adopted by the Property Factor;
- xxix) The said Gardening Schedule did not include annual work to the "Rough Ground";
- xxx) The Property Factor then issued an updated Ground Maintenance Specification;
- xxxi) The Ground Maintenance Schedule is more detailed than the Gardening Schedule but does not include annual work to the "Rough Ground";
- xxxii) The Ground Maintenance Schedule is on the Property Factor's portal and available for the Homeowner to view;
- xxxiii) Treatment of invasive weeds is not part of the Ground Maintenance Schedule core services;
- xxxiv) Treatment of invasive weeds is an additional specialist service which requires an additional instruction the Property Factor and an additional payment;
- xxxv) From time to time, the Property Factor has been instructed to engage a specialist contractor to carry out invasive weeds treatment and has complied with this instruction;
- xxxvi) The Homeowner has written repeatedly to the Property Factor raising the issue of problems with invasive plants and stating that ground maintenance work is not being done properly or at all;
- xxxvii) The Property Factor has provided detailed written responses to the Homeowner's correspondence;

- xxxviii) The Property Factor issues invoices quarterly in arrears based on actual cost;
- xxxix) The Property Factor apportions the costs in accordance with the said Deed of Conditions which is that each of the 329 properties in the Development has an equal share of the liability for the Development;
- xl) From time to time, the Homeowner offers payment based on his view of what he considers the cost for the Property should be based on the size of the Property and the service he considers has been provided by the Property Factor;
- xli) In addition to making a self-assessment of the common charges due by him, the Homeowner offers payment by cheque on a conditional basis;
- xlii) The sums offered by the Homeowner are not sufficient to meet his liability in terms of the Property Factor's invoices and the conditions imposed by him are not acceptable to the Property Factor;
- xliii) The Property Factor is not able to accept payment from the Homeowner on the terms offered by him;
- xliv) The Homeowner is in arrears of common charges and costs in excess of £800.00;
- xliv) The said Deed of Conditions allows the Property Factor to impose penalty interest on overdue accounts;
- xlvi) The Property Factor does not impose penalty interest on overdue accounts;
- xlvii) The WSS allows the Property Factor to make a late payment charge;
- xlviii) The Property Factor makes a late payment charge of £30.00;
- xlix) There is no contingency fund for the Development;

Issues for Tribunal

75. The issues for the Tribunal are: has the Property Factor breached those parts of the Code as complained of in the Applications and has the Property Factor failed to comply with the Property Factor's Duties.
76. Although there have been several Hearing of evidence sessions and a significant volume of productions lodged by the Parties, the core issues are relatively narrow being the authority of the Property Factor to act, the standard and scope of service provided by the Property Factor and the way in which the Property Factor issues common charges accounts and pursues these.
77. The Property Factor presented their case and their oral and written evidence in a straightforward and clear factual manner, in accordance with the Tribunal's Directions. The Homeowner did not. A great deal of the Homeowner's written evidence was a confusion of speculation and his opinion, with little factual evidence. The Homeowner's oral evidence was in the same vein and, at times, was contradictory or a distortion of the facts to suit his own view. The Homeowner had little regard for the Tribunal's Directions and continued to submit evidence having been told that the time scale for submissions had passed. The Tribunal was mindful of its duty in terms of Rule 2 of the Rules as set out in Paragraph 15

above and afforded the Homeowner as much assistance as was possible without causing prejudice to the Property Factor.

Decision of the Tribunal with reasons.

78. Section 19 of the Act states: *“(1) The First-tier Tribunal must, in relation to a homeowner’s application referred to it ... decide (a) whether the property factor has failed to carry out the property factor’s duties or, as the case may be, to comply with the section 14 duty, and (b) if so, whether to make a property factor enforcement order.”* Having heard the Parties, the Tribunal proceeded to make a decision in terms of Section 19 (1)(a) of the Act.

Property Factor’s authority to act.

79. As a considerable amount of the Homeowner’s oral evidence and parts of his written submissions and productions asserted that the Property Factor and its immediate predecessor had no authority to act, the Tribunal took the view that this was a preliminary matter, which if upheld, would mean that the Tribunal had no jurisdiction. Therefore, the Tribunal dealt with this issue first.

80. The evidence before the Tribunal and reflected in the Findings in Fact is that (i) there is a Deed of Conditions which applies to the Development and which empowers a residents’ association to appoint of a property manager and (ii) there is a residents’ association. The Homeowner’s position is that the residents’ association has not been properly constituted and so could not appoint the Property Factor or its immediate predecessor. However, the Homeowner led no evidence other than his own supposition and conjecture that this is the case. Therefore, the Tribunal is of the view, that, in the absence of any evidence to the contrary, the Property Factor and its predecessor have been properly appointed.

81. A second and supplementary strand in the Homeowner’s evidence challenging the Property Factor’s authority to act, was his assertion that, as there was no properly constituted residents’ association, there was no competent legal entity to instruct the Property Factor to act. Again, the Homeowner led no evidence other than his own supposition and conjecture that this is the case. Therefore, the Tribunal is of the view, that, in the absence of any evidence to the contrary, the Property Factor has been properly instructed.

82. In any event, Section 2(1)(c) of the Act defines a “property factor” as *“a person who, in the course of that person’s business, manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (but only where the owners of those properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of that land),”*.

83. On the evidence before it, the Tribunal is satisfied that the Property Factor falls under this definition and so the Property Factor is a “property factor” in terms of the Act and the Tribunal has jurisdiction.

Breaches of the Code.

Code SECTION 1: WRITTEN STATEMENT OF SERVICES *You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner*

B. Services Provided c. the core services that you will provide. This will include the 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).

84. The Tribunal did not accept the Homeowner's evidence that he had not received the WSS or the Ground Maintenance Schedule. The Tribunal had no hesitation in preferring the Property Factor's evidence in this respect and finding that the Property Factor has not breached this part of the Code.

Code SECTION 2: COMMUNICATION AND CONSULTATION *Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes.*

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

85. The Homeowner failed to evidence that the Property Factor's responses to his requests for a schedule of works and for proof that the previous factor had been "lawfully appointed" went unanswered fall into the category of "*provide information which is misleading or false*". The Property Factor's response to him were accurate and complete.

86. The Homeowner's contention that either (i) the statement by Graeme Stewart, Property Manager of Grant and Wilson, that the "Rough Ground" should be cut back once a year or (ii) Mr. Millar of the Property Factor's statement that the "Rough Ground" is not part of the maintenance contract must be false is not substantiated or evidenced. There is no evidence in respect of the scope of the maintenance contract at the time of Mr. Stewart's statement and so there is no evidence that it is false. There is clear written evidence that the "Rough Ground" is not part of the core services of the current maintenance contract and the Tribunal accepts Mr. Millar's evidence on this point.

87. Accordingly, the Tribunal found that the Property Factor has not breached this part of the Code.

Code SECTION 3: FINANCIAL OBLIGATIONS *While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.*

3.4 You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property).

88. Part 3.4 of the Code applies to situations where accounts are paid in advance and an account reconciliation is required when the property changes hands. The

Homeowner's complaint that he is entitled to be invoiced in advance is misconceived and without merit. No evidence was provided by him that either the Property Factor has no procedure compliant with 3.4 of the Code or that the Property Factor is obliged to invoice in advance.

89. With regard to the general preamble of Section 3 of the Code, no evidence was provided by the Homeowner that the Property Factor's invoicing does not comply with the generalisation. The Tribunal accepts Ms. Stead's evidence that various payment methods are acceptable to the Property Factor including payment when the invoice is issued and that, as accounts are issued in arrears, the invoices are accurate and are not estimates. This is substantiated by the copy invoices lodged by the Parties.

90. Accordingly, the Tribunal found that the Property Factor has not breached this part of the Code.

SECTION 4: DEBT RECOVERY *Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts (if they are jointly liable for the debts of others in the group). For this reason, it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem. It is a requirement of Section 1 (Written statement of services) that you inform homeowners of any late payment charges and that you have a debt recovery procedure which is available on request.*

4.3 Any charges that you impose relating to late payment must not be unreasonable or excessive.

4.8 You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.

91. The Tribunal accepted the Property Factor's position that a standard late payment charge of £30.00 as set out in the WSS to cover all debt and income recovery costs is reasonable. The Tribunal's view is that the Property Factor is entitled to the full cost of the work involved in debt or income recovery from the debtor, regardless of the amount of the debt. The Tribunal accepted Ms. Stead's evidence that the Property Factor would exercise discretion to waive the late payment charge if appropriate.

92. The Tribunal accepted the Property Factor's position that court action was raised as a last resort and after attempts to resolve matters with the Homeowner had been unsuccessful. No evidence was provided by the Homeowner to show that he attempted a resolution or put forward a payment plan to reduce his debt. Other than opinion and speculation on his part, no evidence was provided by the Homeowner to show why the Property Factor should deviate from the binding terms of the title deeds or reduce the management charge.

93. Accordingly, the Tribunal found that the Property Factor has not breached this part of the Code.

SECTION 6: CARRYING OUT REPAIRS AND MAINTENANCE *This section of the Code covers the use of both in-house staff and external contractors.*

6.4 If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.

94. The Tribunal did not accept the Homeowner's evidence that there is no programme of works for the common areas and that the terms of the title deeds are not being complied with by the Property Factor. The Homeowner's position is he did not know if work had been carried out, but, if it had been carried out, it had not been carried out properly or effectively. This is vague conjecture, at best. The written and oral evidence by the Property Factor is unequivocal that there is a programme of work and that it is followed. The Tribunal had no hesitation in preferring the Property Factor's evidence in this respect and finding that the Property Factor has not breached this part of the Code.

SECTION 7: COMPLAINTS RESOLUTION *Section 17 of the Act allows homeowners to make an application to the homeowner housing panel for a determination of whether their property factor has failed to carry out their factoring duties, or failed to comply with the Code. To take a complaint to the homeowner housing panel, homeowners must first notify their property factor in writing of the reasons why they consider that the factor has failed to carry out their duties, or failed to comply with the Code. The property factor must also have refused to resolve the homeowner's concerns, or have unreasonably delayed attempting to resolve them. It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the homeowner housing panel.*

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. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

95. Part 7.2 of the Code applies to situations where a homeowner's complaint cannot be resolved in-house and obliges the property factor to advise the homeowner of their right to apply to the tribunal. In this case, the Homeowner was instructed by the Sheriff at Glasgow to lodge the Application and so the final part of the Property Factor's complaints procedure had not been reached. The Homeowner's complaint is misconceived and premature. No evidence was led by him that the Property Factor's procedure does not comply with the Code. The WSS narrates a clear explanation of the steps which an aggrieved homeowner should take to apply to the tribunal.

96. Accordingly, the Tribunal found that the Property Factor has not breached this part of the Code.

Property Factor's Duties

97. Although the Homeowner spoke at length in respect of what he considered the Property Factor should do in respect of the Rough Ground and access thereto, how the Property Factor should correspond with him and how common charges should be apportioned, and, although he gave his opinions in respect of the environmental legislation and regulations which should apply, he did not lead any factual evidence to substantiate his complaints. The Property Factor, on the other hand, evidenced that it had carried out works in accordance with the WSS and the Ground Maintenance Schedule as instructed by the residents' association and that it apportioned costs in accordance with the Deed of Conditions. The Tribunal's own view from the site visit is that the ground maintenance is carried out to a reasonable standard. With regard to treatment of invasive weeds, the Tribunal accepted the Property Factor's position that it carried out this work in accordance with the residents' association's instructions and engaged a specialist contractor. There was no evidence that the Property Factor acted preferentially with regard to the residents' association office-bearers, as alleged by the Homeowner.
98. The Tribunal had no hesitation in preferring the Property Factor's evidence and found that the Property Factor has not breached the Property Factor Duties.
99. The decision is unanimous.

Appeal

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

Signed

Karen Moore, Chairperson

20 February 2023