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

Proposal regarding the making of a Property Factor Enforcement Order: Property Factors (Scotland) Act 2011 Section 19(2)

Chamber Ref: FTS/HPC/PF/17/0134

Flat 2/2 2 Houston Street, Renfrew, PA4 8NR ("The Property")

The Parties: -

A & M Lettings Ltd, 27 Dowanhill Street, Glasgow, G11 5QR ("the Applicant")

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH "the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
Elizabeth Dickson (Ordinary Member)

This document should be read in conjunction with the First-tier Tribunal's Decision of the same date.

The First-tier Tribunal proposes to make the following Property Factor Enforcement Order ("PFEO"):

(1) The Tribunal order the Respondent to pay to the Applicant the sum of £550 as compensation for their time, effort and inconvenience within 28 days of intimation of the Property Factor Enforcement Order.

Section 19 of the 2011 Act provides as follows:

"(2) In any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so—

(a)give notice of the proposal to the property factor, and

(b)allow the parties an opportunity to make representations to it.

(3) If the First-tier Tribunal is satisfied, after taking account of any representations made under subsection (2)(b), that 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, the First-tier Tribunal must make a property factor enforcement order."

The intimation of the First-tier Tribunal's Decision and this proposed PFEO to the parties should be taken as notice for the purposes of section 19(2)(a) and parties are hereby given notice that they should ensure that any written representations which they wish to make under section 19(2)(b) reach the First-tier Tribunal by no later than 14 days after the date that the Decision and this proposed PFEO is sent to them by the First-tier Tribunal. If no representations are received within that timescale, then the First-tier Tribunal is likely to proceed to make a property factor enforcement order without seeking further representations from the parties.

Failure to comply with a PFEO may have serious consequences and may constitute an offence.

J Bonnar

Josephine Bonnar,
Legal Member

4 September 2017

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

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

Chamber Ref: FTS/HPC/PF/17/0134

Flat 2/2, 2 Houston Street, Renfrew, PA4 8NR ("The Property")

The Parties: -

A&M Lettings Ltd, 27 Dowanhill Street, Glasgow, G11 5QR ("the Applicant")

Apex Property Factor Limited, 46 Eastside, Kirkintilloch, East Dunbartonshire, G66 1QH ("the Respondent")

Tribunal Members:
Josephine Bonnar (Legal Member)
Elizabeth Dickson (Ordinary Member)

DECISION

The Respondent has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with sections 1.1aBc, 1.1aBd, 1.1aCe, 1.1aCh, 2.1, 3, 3.3, 3.4, 4.8, 6.3 and 6.4 of the Code of Conduct for Property Factors.

The decision is unanimous

Introduction

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

The Respondent became a Registered Property Factor on 1 November 2012 and it's duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. By application received on 10 April 2017 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Respondent had failed to comply with the Code of Conduct for property factors. The Applicant stated that the Respondent had failed to comply with sections 1, 1.1aBc, 1.1aBd, 1.1aCe, 1.1aCh, 1.1aCi, I.1aCj, 1.1aFp 2.1, 3, 3.2, 3.3, 3.4, 4.8, 5.8, 6.3, 6.4 and 6.5 of the Code.

2. On 1 June 2017, a Convenor on behalf of the President referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Wellington House, 134 – 136 Wellington Street Glasgow on 14 August 2017.

3. On 24 July 2017, the Tribunal issued a direction to the parties requiring both parties to lodge documentation by 7 August 2017. The Tribunal also directed that the application would be heard with application FTS/HPC/PF/17/0141 in terms of Regulation 16 as both applications related to the same property factor.

4. In response to the direction both parties lodged a bundle of documents. In a covering letter, the Respondent indicated that he objected to the applications being heard together, and indicated that he did not want to attend a hearing. He also provided written representations.

5. On 12 August 2017 at 6pm a fax was received from the Respondent indicating that he would not attend the hearing. No explanation was offered for non-attendance and there was no request for a postponement of the hearing. The fax reiterated the Respondent's objection to the applications being heard together.

Hearing

6. The hearing took place before the Tribunal on 14 August 2017. Mrs Ann Halsey, a director of the Applicant, attended and gave evidence. Also present was Mrs Doreen Watt, the applicant in the other application FTS/HPC/PF/17/0134 (the other applicant), accompanied by her husband, Mr Gus Watt. Their solicitor, Mr George McDonald attended as her representative accompanied by Gina Cameron, a trainee solicitor. Linda Ferguson (owner of another flat at 4 Houston Street) attended as witness for the other Applicant. The Respondent was not present.

7. The Tribunal first dealt with some preliminary matters. The first of these was the fax from the Respondent. The Tribunal advised those in attendance of the terms of the fax as this had arrived late on the Friday evening and had not been circulated to the applicants. The Tribunal advised that as there was no explanation for the respondent's non attendance and no request for a postponement the Tribunal proposed to continue with the hearing. In terms of the objection to the applications being heard together, the Tribunal advised

that this matter had already been determined by the direction dated 24 July 2017. However, as the objection had been raised, the tribunal asked the applicants for their views on the issue. The applicant and the other applicant confirmed that they had no difficulty with the applications being heard together. The Tribunal proceeded to consider the Respondents objection. There were 3 reasons given. The first was that different contracts exist, there were disputed invoices and it would be contrary to the Respondent's business interests for these to be discussed. As the Respondent was not present, no additional information was forthcoming regarding these issues. The tribunal was not satisfied any of these reasons prevented the applications being heard together. Secondly, the respondent indicated that there were data protection considerations, and in particular the issue of homeowner debt. Again, no additional information was provided at the hearing. The applicants had confirmed that they had no objection to the cases being heard together. Furthermore, the Tribunal noted that the hearing is a public hearing. The tribunal also took account of the fact that even if personal data issues arose, exemptions in the Data Protection Act exist in relation to information being processed for the purposes of legal proceedings and furthermore that the Data Protection Act protects people, not limited companies. Lastly, the Respondent indicated that it was contrary to the overriding objective in terms of the Regulations. The tribunal took the view that there was no information to suggest that any party would be prejudiced by the hearing of the applications together and that the overriding objective, to deal with the proceedings justly, would not be undermined by the hearing of the applications together. The Tribunal then proceeded to consider an earlier letter from the Respondent which indicated that the hearing could not proceed until a sheriff court action relating to factoring debt had been concluded. Again, the applicants present had no concerns regarding this issue. The tribunal concluded that as the Sheriff Court had an entirely different jurisdiction from the Tribunal, and as the processes could operate independently of each other, the tribunal was satisfied that the hearing could proceed. Lastly, the Tribunal confirmed that it would hear from the other Applicant and her witnesses before hearing evidence from the Applicant. The Applicant, Mr Watt and Ms Ferguson all gave evidence in relation to the other Application. Thereafter the Applicant gave evidence.

8. The Applicant first advised the tribunal that she is a director of A& M lettings Ltd, a company she owns with her husband. The company owns a number of buy to let properties. Like the other applicant, she does not reside at the property. She advised that most of the properties in the tenement are private lets. There are 11 properties in the block. There is a slight anomaly in the title deeds as this refers to 12 properties. It is assumed that one of the flats has become part of another one at some point in time. The Applicant gave evidence in relation to the appointment of the Respondent as property factor. The previous factors went into administration. The managing director of the Respondent, Christine Davidson-Bakhshee, had been an employee of that company and set up APEX. She called a meeting of the residents of the 3 blocks involved (2 and 4 Houston Street and Wilson Street). Only a few owners attended the meeting, including herself and the other applicant. Ms Davidson-Bakhshee persuaded the residents that they should appoint the

Respondent and promised that a much better service would be provided than that provided by the predecessor. Mrs Halsey had objected, but had been overruled by the majority. A letter was issued to all owners on 28 May 2012 by the Respondent confirming that they had been appointed as factor. The Applicant also advised that at a recent meeting of homeowners, the decision had been taken to terminate the factoring contract with the respondent, who was no longer the property factor for the property.

9. **Section 1 – "Written statement of services"; 1.1aBc - "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"; 1.1aBd - " the types of services and works which may be required in the overall maintenance of the land in addition to the core services, and which may therefore incur additional fees and charges(this may take the form of a menu of services)and how those fees and charges are calculated and notified"; 1.1aCe - "The management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing the fee"; 1,1aCh "any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment (at change of ownership or termination of service)"; 1.1aCi - "any arrangements for collecting payments from homeowners for specific projects or cyclical maintenance, confirming amounts, payment and repayment (at change of ownership or termination of service"; 1.1aCj - "how often you will bill homeowners and by what method they will receive their bills"; - 1.1aFp - "clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. The information should state clearly any cooling off period, period of notice or penalty charges for early termination."** The Applicant advised that the Respondent has issued 4 statements of services since 2013, all undated. The last was received on 4 November 2016 and contained 9 changes from the previous version, although the covering letter said there was only one change. The tribunal considered two versions of the statement, identified by the applicant as the 3rd and 4th. The Applicant pointed out that the clause relating to payment of a float and the circumstances for this being refunded has the words "provided the new owner has paid the float" added in version 4. In the "Frequency of billing" section in version 4 the words "We reserve the right to vary the frequency in circumstances outwith our control" have been added. The section on complaints handling has a timetable for processing complaints in version 4, absent from the previous versions. Several other alterations were also referred to. The Applicant pointed out that the current statement of services, version 4, has no target times for taking action when repairs are reported. In addition, the document is silent as to additional fees and charges which may arise, indeed there are no details of any fees and charges, including the management fee. The Applicant advised that she didn't know until April 2017 that most of the services were carried out by in house staff. As she doesn't live at the property, she was not aware of what services were being provided. In November 2016, the respondent issued invoices for the period February 2014 to October 2016. Prior to the invoices being received, the applicant said that, like the other applicant, she had assumed

that the respondent was no longer providing factoring services to the property. Following receipt of the invoices she asked the respondent for evidence of the services having been provided but this was not provided. She sought clarification regarding a number of charges on the invoices and was not satisfied by the responses. For example, a charge of £71.94 on invoice 19551 for a member of staff to investigate a complaint about the door entry. She couldn't understand why the respondent had not just sent a tradesman to repair the door. The response she received indicated that the staff member had accompanied the tradesman, giving rise to the charge. The Applicant pointed out that the statement of services does not provide for such charges. The Applicant then pointed out that the statement of services does not identify a management fee. She also advised that although the invoices include a management fee she doesn't know what is included in same. At this point, Mr Watt indicated that he understands that 4 annual inspections are included, with any additional inspections being charged at a fee of £7.50 per property. The applicant went on to advise the Tribunal that the amount of the float is not detailed in the statement, although she conceded that it is stated in the title deeds. She objects to the provision in the statement that says that the float is not refunded to a former owner if the new owner has not paid. However, she indicated to the tribunal that she has not in fact paid the float so that will not apply to her. The Applicant advised that she had paid a fee of £32.72 in July for a survey to be carried out. The survey was never instructed and although she has repeatedly asked for a refund, this has never been forthcoming. The Respondent informed her, when she complained, that they were still awaiting payment from other owners. However, as the payment was in 2013 and the survey has still not been instructed that she ought to have been refunded the money long ago.

10. The Respondents written representations state the following in response to the various complaints in terms of section 1; (1).there was only one amendment in the most recently issued statement, namely the addition of late payment charges, (1.1aBc) the statement indicates that repairs reported will be carried out as quickly as possible after payment and homeowner approval, (1.1aCh) the title deeds make provision for a float of £100,(1.1aCi) The homeowner was not given a refund of the survey fee because it was explained that it might take time to collect payments from all the owners, (1.1aCj) homeowners were advised that IT problems and ill health had been the reason for the delayed invoices and a 6 month payment period was allowed, (1.1aFp) the statement of services details how homeowners can terminate the contract and provides for a 3 month notice period. There are no charges for early termination. The respondent also refers to the copies of internal timesheets which it has lodged as evidence of the factoring carried out. The Respondent also lodged a number of statements of services.

11. **Section 2.1 – You must not provide information which is misleading or false**. In the application Mrs Halsey states that on 2 February 2016 the respondent issued a pro forma invoice for a roof repair in the sum of £4253.92, being £386.72 per homeowner. On 8 February 2016, she telephoned and requested copies of the quotes which had been obtained. At the hearing, she explained that she did this because she was having a similar

repair carried out elsewhere at a much lower cost. Three copy quotes were sent to her and lodged as part of her application. The tribunal proceeded to consider the documents. The first, from Real Building Contractors, is dated 8.1.16. It is for £3545 with no mention of VAT. No address is detailed on the document, just a website and a mobile number. The second, Concept Building contractors, is dated 11 February 2016, and is for £3950, again no mention of VAT. The applicant attempted to contact Concept Building using the mobile number listed, but it was not in use. The website did not exist. The postal address turned out to be a mail box drop company who confirmed that the company no longer used the mail box drop and indeed were thought to have ceased trading. She also noted that the quote is dated 3 days after her request and 9 days after the issue of the pro forma invoice. She tracked down a company with the same name who denied that they were the company who had provided the quote. The last quote, Quality Property Maintenance, is undated and is for £3995. A landline number is detailed which turned out to be a branch of a shoe shop at Parkhead Forge. The mobile number was answered by someone who denied all knowledge of, or association with the company. No address was detailed and again no mention of VAT. The Applicant thought it strange that none of the companies appeared to be VAT registered. None of the quotes mentioned insurance. The Applicant advised that Real Building Contractors appear to be genuine and their contact details accurate. She phoned them to discuss the matter, however no one called her back. She contacted the respondent regarding her concerns about the quotes. Thereafter, on 1 March 2016, a man called her and advised her that he had been on the roof of her property the previous week. When asked, he was unable to identify the property or advise what company he worked for. She had also asked the respondent for the three company's insurance details and they refused to provide same, saying that was confidential information.

12. The Respondent states in the written representations that 3 quotes were obtained for the roof repair. In addition, they state that, whether a contractor is registered for VAT, or not, the respondent is required to charge VAT to homeowners. On completion of the work a contractor will produce an invoice with VAT details. The respondent further states that all contractors instructed must meet the respondent's requirements in terms of liability insurance, which information is provided to them on a confidential basis. The remainder of the applicant's concerns are not addressed.

13. **Section 3 - " Clarity and transparency in all accounting procedures", 3.2 – "Unless the title deeds specify otherwise you must return any funds due to homeowners (less any outstanding bills) automatically at the point of settlement of final bill following change of ownership or property factor", 3.3 – " you must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation, for inspection or copying" , 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 the sale of the property)". In her application, the Applicant accused the respondent of questionable accounting practices and provided 2 examples. The first involved letters demanding payment of outstanding invoices which referred to three different amounts of money, for the same period, and failed to take account of a payment she had made of £121. The tribunal considered the various letters which had been lodged by the Applicant. It was noted that an undated copy small claims summons sought £447.12, a statement of account dated 20.11.13 shows a balance due of £425.62 and a solicitor's letter dated 11 December 2013 demands the sum of £476.52. The second involved a demand for £606.90 which by the following month had become £1034. In between the demand for £606.90 and £1034 there appeared to be a routine invoice for £27 but nothing to explain the sudden increase in the debt. With regard to section 3.2 the Applicant took issue with the provision in the statement of services that float funds would only be refunded on change of ownership if the new owner had paid. With regard to section 3.3 the Applicant explained that no invoices for factoring charges had been issued for a 33-month period. On 4 November 2016, the invoices for February 2014 to October 2016 were issued all together, although the covering letter wrongly identified the period as December 15 to October 16. The letter explained that an IT problem and the Director being off sick were the reasons for the delay. The letter offered a payment period of 6 months. It was noted by the applicant that the other application before the Tribunal contained a similar complaint, although in that case it had been 25 months without invoices. The Applicant did not know why the Respondent's difficulties had lasted longer in relation to her property. By letter dated 27 January 2017 the applicant requested copies of invoices and receipts for the work carried out over the 33 months. These were not provided. In relation to section 3.4 the Applicant advised that she had paid £32.72 following an invoice being received for a structural survey to be carried out. The survey was never instructed, but the money has been retained by the respondent despite numerous requests. In September 16, the respondent said they would reimburse the payment if the survey did not proceed.

14. The respondents written representations state that all queries from the homeowner have been answered. Copy correspondence is produced although the respondent does not identify which documents he considers have addressed the complaints. In terms of section 3.2 the respondent states that her complaint about the float is irrelevant because she has not sold her property or paid the float. In terms of 3.3 the Respondent states that in November 2016 a summary of all work carried out since their appointment was provided and financial details are on the invoices. With regard to the structural survey fee the respondent indicates that it takes time to collect funds from homeowners and it is not feasible to constantly refund and then re-charge homeowners.

15. **Section 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"**. In the application, Mrs Halsey states that she sought a meeting with the respondent to discuss the invoices from February

14 to October 16 but they refused to meet. At the hearing, she advised that she contacted the respondent by phone to make the request and thereafter sent an email. On 4 January 2017, a response by email was received saying that her queries had already been answered and a meeting would only be arranged if there was something new she wanted to discuss. She sent a further email on 27 January 2017 regarding a meeting and received a reply dated 30 January 2017 again advising that the queries had been answered and they would only meet if it was to discuss something different. Mrs Halsey then advised the tribunal that she could not understand why the other applicant was being given 12 months to pay the invoices when she had only been offered 6. Furthermore, she was not in fact given 6 months since the legal action against her was raised well before the 6 months had elapsed. She conceded however that she had intimated that until she was satisfied that payment was due she was not prepared to pay.

16. The Respondents written representations state that they followed their debt recovery procedures and answered all queries raised. Furthermore, they had been willing to meet with the Applicant if she had additional points to raise. They also advised that they had arranged a meeting with all homeowners but that the Applicant had cancelled this.

17. **Section 5.8 – "you must inform homeowners of the frequency with which property revaluations will be undertaken for the purposes of building insurance, and adjust the frequency if instructed by the appropriate majority of homeowners in the group"** In her application the Applicant states that she is of the view that the current statement of services conflicts with this requirement as it places the onus on the homeowners to ensure that the property is adequately insured. The applicant advised the tribunal that, like the other applicant, she has arranged her own insurance. Her reason for this was that the Director of the respondent had been employed by the previous factor who had collected insurance premiums but not actually arranged insurance. She said that although she accepts that block insurance is compulsory in terms of the title deeds, Neil Cowan, an employee of the Respondent advised her that she could be excluded from the block policy. Later he retracted this statement and said she would have to pay it. She is of the view that the respondent is responsible for getting insurance revaluations, if they are arranging the insurance.

18. The Respondent's position, as per the written representations, is that on 23 April 2014 they wrote to all homeowners recommending that a professional valuation be undertaken. The homeowners were not prepared to pay so it did not proceed.

19. **Section 6.3 - " on request you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in house staff", 6.4 - "if the core services agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works and 6.5– " you must ensure that all contractors appointed by you have public liability insurance".** In

the application, the applicant advised that she following receipt of the 33 invoices in November 2016, she sought clarification from the respondent of the identity of companies carrying out factoring services such as cleaning, landscaping, rubbish disposal and lighting works. She was not provided with this information. This led her to the conclusion that either the respondent was using in house staff or not providing the services at all. She stated that the owners were not consulted about the use of in house staff. She advised that she was only told in April 2017 the extent to which in house staff were being used. She further advised that owner occupiers in the block have indicated that litter picking was not carried out as frequently as the invoices suggest and that a cleaning schedule in the close suggests that cleaning was also carried out less frequently than invoiced. Where contractors have been used, the applicant thinks that charges have seemed excessive. For example, a fee of £198 for the removal of a computer desk from the back court. The applicant also advised that she had asked for the factor to stop litter picking and had been told that as she was the only one making the request, it would continue. The Applicant advised that the homeowners are charged for periodic inspections but that no programme of works has been provided at any time. In terms of contractors having liability insurance, she has asked the Respondent for evidence of this, particularly in relation to the contractors who quoted for the roof repair, and this has not been forthcoming.

20. The Respondent advises in his representations that in house staff are used wherever possible as this is more cost effective and that this information has always been freely available. Staff are identifiable on site by their uniforms. With regard to close cleaning, the schedules referred to by the applicant are unreliable as they can be tampered with and therefore do not accurately reflect the service provided. Reference is made to the timesheets which are produced. It is further stated that there is a procedure for rubbish removal. A letter is issued to homeowners asking for discarded items to be removed failing which the Respondent arranges removal and charges for same. This charge is for labour, transport and disposal. Where additional work is needed, there is a competitive tendering process with work being instructed once payment is received. Quarterly inspections take place and if there are maintenance issues, homeowners are notified.

The tribunal make the following findings in fact:

(i) The Applicant is the owners of the property.

(ii) The Respondent was the property factor for the property. This contract has now been terminated.

(iii) On 6 November 2016, the Respondent sent a letter to the Applicant enclosing an amended statement of services and factoring invoices for the period February 2014 to October 2016.

(iv) The invoices issued to the Applicant for the period February 2014 to October 2016 included charges for fortnightly close cleaning and litter picking.

(v) Close cleaning and litter picking are carried out by in house staff of the respondent and not by external contractors. The Respondent did not advise the Applicant that most factoring services were being carried out by in house staff.

(vi) The Respondent has issued the applicant with 4 statements of services. These statements of services do not detail fees and charges being charged by the Respondent for its services.

(vii) The Applicant sought a meeting with the respondent to discuss the invoices issued in November 2016. The Respondent refused to agree to ~~attend~~ this meeting.

(viii) The Respondent provided the Applicant with copy estimates for a roof repair in February 2016 which contained information which was not true.

(viiii) The Respondent did not exhibit invoices and evidence of factoring work carried out when asked by the Applicant to do so.

Reasons for Decision

21. In her application, the Applicant states that the Respondent has breached Sections 1, 1.1aBc,1.1aBd,1.1aCh, , 1.1aCi, I.IaCj, 1.1aFp 2.1, 3, 3.2, 3.3,3.4, 4.8, 5.8, 6.3, 6.4, and 6.5 of the Code. The Tribunal found the Applicant to be credible and reliable. ~~He~~ The evidence was supported by the written documentation she had lodged. There were issues raised which were also raised by the other applicant and her witnesses and the tribunal noted that where this was the case, the applicants evidence was consistent with the other applicant. No evidence was presented by the Respondent who had lodged representations which did not address all of the complaints. Documents lodged by the respondent were also considered by the tribunal.

22. **Section 1.** The Tribunal considered the terms of the statement of services issued to the Applicant in November 2016 together with the three earlier versions previously received by the Applicant. The Tribunal noted that between the third and fourth versions there are a number of changes, some more significant than others. This is disputed by the respondent who insists there is only one change. It was clear to the tribunal, from a comparison of the documents, that this was not the case. However, the Applicant's complaint as to the number of statements and the changes made does not on the face of it appear to be a breach of section 1. It is not in dispute that there is a statement of services or that it was issued to the homeowner. The Tribunal therefore concluded that there was no identifiable breach of this section, although did agree with the applicant that the number of statements and the frequent changes to same could give rise to confusion and uncertainty as to the arrangements which were in place.

23. **Section 1.1aBc.** The tribunal agreed with the applicant that there are no target times in the statement. The Respondent's submission that the reference to work being carried out "as quickly as possible" meets the requirement in the code was rejected by the Tribunal who took the view that property factors are clearly expected to identify a specific timescale.The tribunal found the respondent to be in breach of this section.

24. **Section 1.1aBd.** The Tribunal noted that the statements of services (and in particular the version of same most recently received by the applicant), does not contain details of fees and charges. The Respondent made no comment on this issue. The tribunal concluded that the respondent is in breach of this section of the code.

25. **Section1.1aCa.** The Tribunal noted that the statements of services (and in particular the version of same most recently received by the applicant), do not contain details of the management fee to be charged although invoices issued disclose that this is routinely charged. The Respondent did not address this issue. The tribunal concluded that the respondent is in breach of this section of the code.

26. **Section 1.1aCh.** Although it is accepted that the amount of the float is in the title deeds, this section of the code requires the statement of services to stipulate the amount of the float. The current statement does have a section which relates to the float and the circumstances for repayment of same, but otherwise only stipulates that a float is payable – not the arrangement for paying same or the amount. The Respondent only refers to the title deeds in his representation on this issue. The tribunal concluded that the respondent is in breach of this section of the code.

27. **Section 1.1aCi.** The applicant's complaint in terms of this section is that the Respondent has failed to repay to them the sum of £32.72 which was their share of a survey fee which was never instructed. However, while it is conceded by the Respondent that they have not repaid the sum of money, the tribunal concluded that this failure did not give rise to a breach of this section of the code which is about the contents of statements of services. The applicant's complaint related to the Respondent's actions rather than the terms of the statement of services.

28. **Section1.1aCj.** The applicant's complaint in terms of this section relates to the failure by the Respondent to issue invoices for a 33-month period. The tribunal accepted the Applicant's evidence in relation to this issue and agreed that the Respondents explanation was not convincing. However, this particular section of the code relates to the contents of the statement and it is evident from reading the statement that the respondent does stipulate that invoices are to be issued monthly. Evidently, they failed to adhere to this. However, the statement itself does make provision for frequency of billing and therefore the Tribunal concluded that there had been no breach of this section.

29. **Section1.1aFp.** The applicant states that the statement does not clearly state any cooling off period, period of notice or penalty charges for early termination. It appears from the Respondent's representations that there is no cooling off period or charges for early termination. This being the case, it does not appear to the Tribunal that the absence of same from the statement could amount to a breach. The statement does provide for a notice period. In terms of signposting to applicable legislation, the applicant did not specify what legislation ought to have been referred to. The tribunal concluded that there was no breach of this section.

30. **Section 2.1 The** Tribunal heard extensive evidence about this matter. The Tribunal was satisfied that the applicant had made enquiries to establish the validity of the 3 quotes provided for the roof repair and had reasonable grounds to doubt their authenticity. She had clearly raised her concerns with the respondent and provided them with the opportunity to provide her with evidence that they were genuine quotes. They failed to do so and their representations to the tribunal do not address the concerns raised. It is not possible from the evidence to establish categorically that any of the quotes are fabricated, but there is sufficient evidence to establish the documents contain information which is not accurate, particularly in relation to contact details. The Tribunal concluded that the quotes provided by the Respondent in response to a request from the applicant did contain information which was misleading and false and that the respondent was in breach of this section of the code in relation to same.

31. **Section 3.** The Applicant provided 2 examples of accounting which she described as questionable and a breach of this section. The tribunal accepted her undisputed evidence that a payment she had made did not appear on the statements. It also appeared from the correspondence issued to the Applicant that she was issued with demands for payment of different amounts of money, for the same period, with no explanation for the difference. The tribunal accepted that there may well be an explanation for the discrepancies, but the Respondent did not offer any explanation in his representations or dispute that such discrepancies exist. The tribunal is satisfied that the various demands for payment must have caused confusion and uncertainty as to what was due to be paid and did give rise to a breach of this section of the code due to a lack of clarity and transparency.

32. **Section 3.2** The applicant's complaint in terms of this section is that the statement of services only provides for repayment of the float if the new owner has paid the float. However, the applicant conceded that she had not paid the float and had not sold the property. The tribunal took the view that this section of the code did not relate to the contents of the statement of services but is concerned with whether a property factor is due to refund money to a homeowner. The Tribunal also noted that as there is understood to be some dispute between parties regarding outstanding factoring charges, it is arguable that the property factor has not failed to implement this part of the code until that dispute is resolved. The Tribunal concluded that there is no breach of this section

33. **Section 3.3.** The Applicant led evidence that no invoices or other statement of account or breakdown of charges was issued between February 2014 and October 2016. This is not disputed by the Respondent. The Tribunal was not persuaded by the Respondent's explanation for the time lapse. The tribunal also accepted the evidence of the applicant that she made a reasonable request, following receipt of the 33 invoices for supporting documentation and contractor's invoice's (if any) and the Respondent failed to provide same. The tribunal concluded that the respondent had breached this section of the Code.

34. **Section 3.4** The Applicant's evidence with regard to the payment of £32.72 for a survey which was not carried out is not disputed by the Respondent. It is accepted that it was paid and not refunded despite requests for a refund. The tribunal noted the respondent's position that it would be difficult to get anything done if it was expected to refund payments made by some homeowners while it was waiting for others to pay. However, it appears that this particular payment was made in 2013 for a survey that has never been instructed. The Respondent offers no explanation for the length of time which has elapsed. It does therefore appear that the Respondent does not have a procedure in place for such circumstances. At the very least, the tribunal would expect payments paid in advance for specific projects to be refunded within a few months if the project does not proceed. The tribunal found the respondent to be in breach of this section of the code.

35. **Section 4.8** The Tribunal accepted the evidence of the applicant that she sought a meeting regarding the disputed invoices. The Respondent refused to have a meeting unless it was to discuss other, additional issues. It is not clear what the Respondent meant by this. What is clear is that the Applicant had raised concerns, was not satisfied with the responses received and sought a meeting to discuss these concerns. In the circumstances, with no invoices issued for 33 months and then issued all at once, this seems to be a very reasonable request. The respondent's failure to agree to such a meeting amounts to a breach of this section of the code.

36. **Section 5.8** The Tribunal noted the applicants concern that the statement of services appears to place the responsibility for insurance valuations on the homeowner. The tribunal also noted that the respondent does arrange block insurance for the property. However, the tribunal is of the view that this section of the code relates to the frequency of such valuations, where these are arranged by the property factor. There is no suggestion by the applicant that the homeowners had asked for revaluations which had not been carried out. Indeed, the applicant has made her own arrangements with regard to insurance. In the circumstances, the tribunal concluded that there had been no breach of this section of the code.

37. **Section 6.3** The Applicant gave extensive evidence regarding this issue. The tribunal noted that following receipt of the invoices for February 2014 to October 2016 on 6 November 2016 the Applicant sought information from the Respondent, and specifically asked for sight of contractor's invoices. She had not appreciated that most of these services had been carried out by in house

staff. The tribunal formed the view that for homeowners to be in a position to challenge the use of in house staff, they must first know that they are being used. The employment of in house staff may well have been more cost effective, but the Applicant was entitled to know what she was being asked to pay for. It was unclear from the evidence and the Respondent's representations whether the respondent's failure to advise owners of the use of in house staff was deliberate or simply the result of poor administration. It certainly left the applicant, a non-resident owner, in some difficulty when she tried to establish if the services she was being asked to pay for had in fact taken place. It was evident to the Tribunal that the respondent had not consulted with or otherwise advised the Applicant of the services which their in-house staff would be providing. Furthermore, when the applicant raised concerns about cleaning and litter picking it does not appear that the respondent immediately informed the applicant that in house staff had been used. Where external contractors had been used, such as for the removal of an item from the back court, it appeared to the Tribunal that the Applicant had cause for complaint. The choice of contractor and the cost of the work are both questionable, and it does not appear that the respondent made any effort to justify same. The applicant said in her application and in her evidence that she did not believe that close cleaning, litter picking had been carried out in terms of the invoices. The Tribunal took the view that this was a complaint about property factor duties in terms of section 17(5) of the Act rather than the code of conduct. As the applicant had not included a claim that the respondent had failed to carry out its property factor duties in the application or intimated such a claim to the respondent, the tribunal was unable to consider this. The applicant also indicated that if they were carried out, the cost of the services was excessive. However, no evidence was led by the applicant that the services could have been provided more cheaply. The tribunal concluded however that the Respondent had failed to advise the applicant in advance that most services were carried out by in house staff thus preventing the applicant from having the opportunity to question the cost effectiveness of the arrangement. The lack of invoices for 33 months further compounded the issue. Lastly, when the applicant did question the Respondent about the invoices and ask for evidence, the Respondent failed to provide same. The tribunal concluded that the respondent is in breach of this section of the code.

38. **Section 6.4 The** parties are agreed that a quarterly inspection of the property is carried out by the respondent as part of the core services detailed in the statement of services. The applicant's complaint is that no programme of works has ever been provided. The respondent indicates that where maintenance issues are identified at such inspections, homeowners are notified. However, this does not appear to the tribunal to comply with this section of the code which provides that a programme of work is mandatory where periodic property inspections are carried out. The tribunal found the respondent to be in breach of this section of the code.

39. **Section 6.5 The** applicant advised the tribunal that she had not been provided with evidence that contractors being instructed by the Respondent had public liability insurance. The respondent indicates that all contractors

instructed have the necessary insurance, but that this is confidential information. The tribunal is not persuaded by such an argument. It seems reasonable for homeowners to be provided with details of the insurance. However, the Tribunal notes that the section of the code only requires the property factor to ensure that insurance is in place. No evidence was led that any contractor actually instructed did not have the necessary insurance. The Tribunal concluded that there was no breach of this section of the code.

Proposed Property Factor Enforcement Order

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

Appeals

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

J Bonnar Legal Member

Josephine Bonnar
4 September 2017