Housing and Property Chamber
First-tier Tribunal for Scotland

FIRST-TIER TRIBUNAL FOR SCOTLAND (HOUSING AND PROPERTY CHAMBER)

STATEMENT OF DECISION: in respect of an application under Section 17 of the Property Factors (Scotland) Act 2011 ("the Act") The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("the Rules")

Reference number: FTS/HPC/PF/22/1934

Re: Property at 4/29, Constitution Street, Edinburgh EH6 7BT("the Property")

The Parties:
Mr. Paul Carmichael residing at the Property ("the Homeowner")

Ross and Liddell Limited, 6, Clifton Terrace, Edinburgh, EH12 5DR ("the Property Factor") per their agents, Raeside Chisholm Solicitors Limited, Tontine House, 8, Gordon Street Glasgow G1 3PL ("the Property Factor's Agents")

Tribunal Members

Karen Moore (Chairperson) and Ahsan Khan (Ordinary Member)

Decision

The Tribunal determined as follows:

The Property Factor failed to comply with the Section 14 of the Act in respect of compliance with the Code of Conduct for Property Factors at Sections 2.1 and 5.2 and failed to comply with the Property Factor Duties

The Property Factor had not failed to comply with the Section 14 of the Act in respect of compliance with the Code of Conduct for Property Factors at Section 7.2.

This Decision is unanimous.

Background

1. By application received between 19 June 2022 and 23 July 2022 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Property Factor had failed to comply with the Code of Conduct for Property Factors 2012 ("the Code") at Sections 2.1, 5.2, and7.2 of the Code and had failed to comply with the Property Factor Duties. The Application comprised a copy of the Homeowner's title sheet, copy of the Property Factor's Service Level Agreements being their written statements of services and copy correspondence between the Parties. The Application was accepted by the Tribunal Chamber and a Case Management Discussion (CMD) was fixed for 18 October 2022 at 10.00 by telephone conference call. Prior to the CMD, the

Property Factor's Agents submitted written representations setting out the Property Factor's position that they opposed the Application.

Case Management Discussion

2. The CMD took place on 18 October 2022 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Mr. Doig of the Property Factor's Agents. At the CMD, the core issues of the Application, being the way in which the Property Factor apportioned the common buildings insurance premium for the development of which the Property forms part ("the Development") and the way in which they explained this to the Homeowner, were discussed. The CMD was adjourned to a Hearing.

3. Prior to the Hearing, the Homeowner lodged a written submission and lodged productions being :

i) Correspondence between the Homeowner and the Property Factor dated 3 May 2021 to 26 November 2021;
ii) Complaint response from the Property Factor dated 8 February 2022;
iii) Letter from the Property Factor to all owners dated 23 March 2022;
iv) Complaint final response from the Property Factor dated 1 April 2022 and
v) Copy title sheet MID38829 for the Property.

Hearing

4. The Hearing took place on 20 January 2023 at 10.00 by telephone conference call. The Homeowner was present on the call and was unrepresented. The Property Factor was represented by Mr. Doig of the Property Factor's Agents, accompanied by Ms. J. Johnston of the Property Factor. The Homeowner had no witnesses. Mr Doig had one witness, Mr. Smith, the Property Factor's Property Manager with responsibility for the Development.

5. The Hearing dealt with each head of the Application in turn.

2.1 of the Code "You must not provide information which is misleading or false."

Homeowner's Evidence

6. The Homeowner's written submission referred to correspondence with the Property Factor which, he submitted, contained incorrect information in respect of the apportionment of the buildings insurance premium. The Property Factor's letter of 2 November 2021 stated: *"I would maintain that we have worked in accordance with Development Deed of Conditions, which notes that owners meet apportioned common costs in accordance with the Schedule included within the Deed, and that the Insurance Premium in respect to the required common policy shall be shared on an equitable basis determined by the Property Manager. As Property manager we have applied the same apportionment basis to the Insurance Premium, as that relating to other common costs and services, as detailed in the Schedule included within the Deed."* A further letter of 26 November 2021 repeated this information. In response to a formal complaint by the Homeowner, by letter of 8 February 2022,

the Property Factor repeated this statement, but in that same letter went on to state: *"As noted, there is clear disparity and we do agree, alterations require to be made, to ensure charges are equitably apportioned, based on floor size and in line with the Title Conditions. To rectify, before the upcoming renewal we shall calculate each individual properties required percentage of the full Building Sum Insured, based on floor sizes provided by the Title Deed, and have this implemented accordingly prior to the next renewal and any indexation. We will write to owners in due course to confirm, our planned actions, as this will result in alterations to many, if not all, apportionment percentages by way of increase/decrease against those currently used."* On 23 March 2022, the Property Factor wrote to all owners in the Development stating *"… it has been noted that there should be a single sum insured for the development, excluding the commercial units, which is then apportioned using the specific schedule of floor areas detailed in the Title Deeds, rather than by the individual sum insured for each property which was originally provided by the developer and then amended by individual owners/their solicitors when purchasing: this has then led to individual premiums being calculated and charged accordingly since the development was handed over."* In oral evidence at the Hearing, the Homeowner repeated this submission.

7. In cross-examination by Mr. Doig, the Homeowner accepted that the titles make specific reference regarding the apportionment of costs and gave the Property Factor " sole discretion" in apportioning the premium equitably. He did not accept the Property Factor's position that the Property Factor acted equitably and in accordance with the title deeds and, following the Homeowner raising his concerns, the Property Factor then agreed to a more equitable apportionment. The Homeowner accepted that the Property Factor has sole discretion in respect of the apportionment but did not accept that the two approaches set out in the Property Factor's letter of 8 February 2022 could both be accurate and equitable. He did not accept that the Property Factor applied the floor areas as set out in the Schedule to the Deed of Conditions ("the Schedule") in the title deeds and that this is an equitable basis. The Homeowner maintain that, in practise, the Property Factor did not apportion the premium in this way.

Property Factor's Evidence

8. Mr. Doig confirmed with Mr. Smith that he is aware of the titles to the Property and Development and to Clause 16 of the Deed of Conditions which states *"…policy shall be shared by all of the proprietors of the said flats on such equitable basis as the property manager shall determine in his sole discretion (to include taking into account any special additional premiums resulting from the additional insurance requirements of any proprietor or his lender)".* Mr. Smith explained historically the premium was apportioned on floor size and determined by the Property Factor as an equitable basis. He said that the floor size was taken in relation to the total floor size of 57,610w. He went onto say that, historically, the way the Property Factor applied insurance charges may not have been apportioned based on floor size but it had been done on an equitable basis. He stated that the Property was allocated 2.05%. Mr. Smith clarified that 2.05% was based on floor size and confirmed that this was also the basis for all of the common charges apportionment for the Property. Mr. Smith stated that, when the Homeowner raised an issue that the actual floor sizes differ from the

sizes noted in the Deed of Conditions, the Property Factor adjusted the charges and now apportion the premium based on actual floor sizes. This means that the Homeowner pays a higher share of 2.34%. Mr. Smith confirmed that the insurance cover is based on a collective sum insured and not on individual insurance sums. He stated that in monetary terms the sum payable by the Homeowner had decreased but thought it should have increased as the percentage had increased. Mr. Smith confirmed that the Property Factor had calculated that the loss to the Homeowner, based on the Property Factor's earlier apportionment approach, is £200.00 and confirmed that this had been offered as an *ex gratia* payment to redress the loss. With reference to the Property Factor's letter of 8 February 2022, Mr. Smith stated that the point of this letter was not to offer an apology from the Property Factor but to give an explanation as to why the apportionment had been equitable before and is also equitable now.

9. In cross-examination by the Homeowner and with reference to the Homeowner's Production 1 at page 4, being an email from the Homeowner to Mr. Smith pointing out that, in respect of the new approach, the Homeowner's share of premium had increased to £801.13 and was 146% higher than his neighbour who has as a similar sized property, Mr. Smith was unable to explain the calculation. In response to the Homeowner's question "*is it equitable to apportion premiums based on individual owner's wishes?"*, Mr. Smith said that he was unaware that the Property Factor did this, and that this approach had been picked up by the complaints team. Mr. Smith did not know for certain how or why this happened but did know for certain, that in the Homeowner's case, the amount insured related to the amount requested by the Homeowner's lawyer. Mr. Smith confirmed that there may be instances where the apportioned premium deviated from the floor size and stated that the Property Factor no longer carries out this practice. In response to the Homeowner's question *"how is the premium apportionment reviewed at a retender?"*, Mr. Smith explained that he did not work in that part of the process but understood that it would be based on percentages already noted on the files.

10. In response to questions from the Tribunal, Mr. Smith confirmed that when the Property Factor exercised a discretion in respect of the amounts insured, they still acted in an equitable manner. With regard to the Property Factor's change in approach, Mr. Smith advised that this was a business decision based on various factors. Mr. Smith further confirmed that there is a separate policy for each development based on the title deeds for each and that, where owners asked for increased cover and paid a higher premium, this did not impact on any other owners who did not pay less.

11. In re-examination by Mr. Doig, Mr. Smith confirmed that the terms of Clause 16 of the Deed of Conditions allowed the Property Factor to deviate from the floor size approach. Mr Smith stated that Property Factor would look at the terms of the Deed of Conditions as a starting point and if there was a request for a different sum, the premium would be adjusted. He confirmed that the Property Factor now has accurate reinstatement values.

5.2 Code: **"You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."**

Homeowner's Evidence

12. The Homeowner's written submission referred to correspondence with the Property Factor. He referred to his email of 2 November 2022 in which he asked the Property Factor for the *"actual calculation that has determined the percentage of the total floor area applied to my flat"* and to the Property Factor's reply of 26 November 2021 which stated, *"I can confirm that our calculations are done for the whole development, and I cannot provide you with this information due to Data Protection."* The Homeowner referred to further attempts by him to establish how the premium was calculated and stated that the Property Factor refused to provide clear information showing the basis on which his share of the insurance premium was calculated. In oral evidence at the Hearing, the Homeowner repeated this submission and explained further that, although he directed the Property Factor to the titles and repeatedly asked questions on the determination of the premium, the Property Factor said they could not answer this because of data protection.

13. In cross-examination by Mr. Doig and with reference to letters from the Property Factor and lodged by the Homeowner as Production, the Homeowner did not accept that the Property Factor had provided enough information and had made a full disclosure of the premiums. The Homeowner maintained that the Property Factor failed to show that the apportionment is equitable and stated that he had "to tease out how they apportioned the premium". He did not accept that the Property Factor had furnished him with information on how to apportion and calculate his share of the premium. He accepted that it was possible to calculate the share himself but maintained that his point is that the Property Factor had not apportioned it correctly and stated that "what they offered me is not what they did." The Homeowner accepted that the Property Factor had offered him an *ex gratia* payment of £200.00 to redress any loss he might have suffered but maintained again that the crux of the matter is that the Property Factor do not do in practice what they claim to do in writing in respect of the premium apportionment.

Property Factor's Evidence

14. Mr. Smith confirmed to Mr. Doig that his view is that the Property Factor had given full and transparent information to the Homeowner and had made an offer of the amount which the Property Factor wanted to reimburse to him.

15. With reference to the chain of correspondence between the Homeowner and the Property Factor and as lodged in Productions by the Homeowner, Mr. Smith stated that he had given the Homeowner all of the information requested by him. Mr. Smith stated that his email of 6 August 2021 set out the full policy information and detail of the floor area charge. On 13 August 2021, he had then

given more information to clarify the differences between flats number 4/28 and 4/29 in the Schedule. Mr. Smith stated that he was confident that he had responded to the Homeowner with all of the information available and thought that there was enough information for the Homeowner to carry out his own calculation on the amount of the premium. Mr. Smith confirmed that the new method used by the Property Factor is based on a new Reinstatement Cost Assessment (RCA) which is based on actual floor size, and not the floor size as set out in the Schedule.

16. In cross-examination by the Homeowner, Mr. Smith confirmed that he believed that the Homeowner had been given sufficient information to calculate the actual premium charged. He stated that he did not know if the information is suitable for owners to calculate and it was difficult for him to say if owners can understand the information. He stated that the Property Factor provides information on the sum insured but cannot provide further assistance or go into the level of detail which owners might require. When asked by the Homeowner, if he thought that this position meets with the Code, Mr. Smith stated that he believed it did as the Property Factor's level of transparency is set out in the titles, that Property Factor is not accountable for the title deeds and that this approach is sufficient to meet the Code.

7.2 of the Code "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."

Homeowner's Evidence

17. The Homeowner's written submission referred to the Property Factor's final complaints response letter of 7 April 2022 and stated that not only had the Property Factor provided incorrect information, the Property Factor had also failed to provide details on how to apply to the homeowner housing panel and stated that he had to obtain this information for himself. In oral evidence at the Hearing, the Homeowner Code expanded on this point stating that the Code requires that details how to apply to tribunal should be provided, not just the contact details of the tribunal.

18. In cross-examination by Mr. Doig, the Homeowner stated that he considered that the Code intended some level of guidance other than contact details be provided. He pointed out that his overall frustration with the Property Factor had led him to include this in his complaint and agreed that the interpretation of this part of the Code could be left to the Tribunal to decide.

Property Factor's Evidence

19. Mr. Doig confirmed with Mr. Smith that he is familiar with the Property Factor's complaints process and the sign off on the final letter is a reference that an application can be made to the tribunal. Mr. Smith stated that this is sufficient compliance with the Code.

20. The Homeowner had no cross-examination for Mr. Smith, leaving the question of interpretation of the wording *"details of how"* to apply to the Tribunal.

Property Factor Duties

21. The Homeowner and Mr. Doig for the Property Factor agreed that the evidence relating to this part of the Application was the same as that given in respect of Sections 2.1 and 5.2 of the Code and so there was no need to rehearse it again.

22. There were no examination -in -chief questions for Mr. Smith.

23. The Homeowner asked Mr. Smith to confirm that he stands by his statement that the premiums have always been collected correctly. Mr. Smith confirmed that he did and stated that the Property Factor had collected the premiums correctly before and that the new process is also correct. He did not agree that the Property Factor's letter of 26 March 2021 to all owners contradicted this and maintained that, at no stage, had the Property Factor said that they had been incorrect.

24. In response to questions from the Tribunal, Mr. Smith confirmed that the premium apportionment is now based on the title deeds wording and not the Schedule.

Summing Up

25. In summing up, the Homeowner asked the Tribunal to pay particular attention to the correspondence chain and to note that the letters and emails show that the premiums have not been apportioned correctly. He pointed out that the Deed of Conditions and the Schedule have not changed. He stressed that his original point is that the premiums have not been apportioned in terms of title deeds and there is no evidence to suggest otherwise.

26. In summing up for the Property Factor, Mr. Doig stated that the Homeowner has not raised any points of a failure on their part of factor in respect of Section 2.1 of the Code as there is no evidence of what is false or misleading. The Property Factor has sole discretion in apportioning the premiums and have been consistently equitable in doing so, albeit it that there has been a change of approach. With regard to Section 5.2 of the Code, the Property Factor has given the Homeowner full information on the premia. With regard to Section 7.2 of the Code, there is nothing required of the Property Factor further to the information they have provided. With regard to the Property Factor Duties, Mr. Doig stated that he had broadly covered this already in respect of 2.1 and 5.2 and that the Property Factors had not breached their duties.

Findings in fact and law.

27. The Tribunal had regard to the Application in full, the written representations lodged by both Parties, the Productions lodged by the Homeowner and the evidence given at the Hearing, whether referred to in full in this Decision or not, in establishing the facts of the matter and that on the balance of probabilities.

28. 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 Code and the duty to comply with the Property Factor's Duties;

iv) A Deed of Conditions by Forth Ports plc is registered against the title to the Property and the Development;

v) Clause Sixteenth of the Deed of Conditions states: *'…policy shall be shared by all of the proprietors of the said flats on such equitable basis as the property manager shall determine in his sole discretion (to include taking into account any special additional premiums resulting from the additional insurance requirements of any proprietor or his lender)".*

vi) The Property is number 68 in the Schedule to the Deed of Conditions

vii) The Schedule shows number 68 to be type P, 3BES with an area of 1,349 square feet;

viii) The floor area calculation for the residential properties in the Development carried out in 2016 was 4,674.40 square metres;

ix) The RCA floor area calculation for the residential properties in the Development carried out in June 2020 was 7,944.00 square metres;

x) The floor area for the residential properties in the Schedule is 57,610 square feet;

xi) On 20 May 2019, the Homeowner's solicitor wrote to the Property Factor requesting that the reinstatement valuation of the Property be set at £350,000, and not £281,500;

xii) On 11 May 2021, Mr. Smith wrote to the Homeowner to confirm the solicitor's instruction had been actioned, advised that the RCA had been carried out and the Property had been revalued to £572,237;

xiii) On 13 May 2021, the Homeowner requested an explanation for the increase in the valuation;

xiv) On 20 May 2021, Mr. Smith explained that the increase was a result of previous surveyors using wrong floor area figures which undercalculated the reinstatement values by 41%;

xv) Mr. Smith also explained that the overall building valuation cost had increased;

xvi) The Homeowner's view was that the increase was incorrect as it equated to a 63% increase in his premium compared to a 30% increase for another similar property;

xvii) On 10 June 2021, the Homeowner asked Mr. Smith for further information regarding floor area and other factors applied and to explain what "building declared value " and "property sum insured" mean;

xviii) On 6 August 2021, Mr. Smith replied to the Homeowner that the RCA was carried out according to industry standard, explained how annual indexation works on building cost increases, explained the difference between "declared value" and "sum insured" and enclosed full policy wording and a copy of the Deed of Conditions;

xix) The Property Factor calculated the Homeowner's share of the 2021 premium to be £801.13;

xx) The Homeowner calculated that his share of the 2021 premium should be £422.00;

xxi) Mr. Smith advised the Homeowner that his costs had been worked out in accordance with the Deed of Conditions and in accordance with the ratio of floor area per flat to total floor area with a share of common areas also being included;

xxii) The Homeowner asked the Property Factor to provide the actual calculation for the Property;

xxiii) Mr. Smith confirmed that the calculations are based on the Schedule;

xxiv) Mr. Smith stated that the Homeowner's share of the premium, calculated on floor sizes, is 2.05%

xxv) Marianne Griffith of the Property Factor advised the Homeowner that "*there is clear disparity and …, alterations require to be made, to ensure charges are equitably apportioned, based on floor size and in line with the Title Conditions. To rectify, before the upcoming renewal we shall calculate each individual properties required percentage of the full Building Sum Insured, based on floor sizes provided by the Title Deed" ;*

xxvi) On 23 March 2021, the Property Factor wrote to all owners in the Development explaining that their new approach for apportioning premiums is based on the floor areas in the Schedule and not on requested separate valuations;

xxvii) On 1 April 2021, Jennifer Johnston of the Property Factor advised the Homeowner that his share of the premium, calculated on floor sizes, is 2.34% being £642.40;

xxviii) Jennifer Johnston advised the Homeowner that although owners in past asked for different valuations, all properties are now dealt with in line the Schedule;

xxix) The Property Factor has not provided the Homeowner with an arithmetical calculation of any of the premia apportioned by them;

xxx) The Property Factor made an *ex gratia* payment offer of £200.00 to the Homeowner which he declined to accept;

Issues for Tribunal

29. 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.

30. Core to these issues is the way in which the Property Factor apportioned the common building policy premium and how the Property Factor communicated the details of how it apportioned the common building policy premium to the Homeowner.

Tribunal's assessment of the evidence.

31. The Tribunal found that the Homeowner's oral and written evidence to be straightforward, measured and clear. The Tribunal found the oral evidence given on behalf of the Property Factor to be confused and contradictory but found that there was no attempt to deceive.

Decision and reasons for the Decision

2.1 of the Code "You must not provide information which is misleading or false."

32. The Tribunal found that the Homeowner's written submission, oral evidence and the Productions lodged by him clearly showed that the information provided to him by the Property Factor was contradictory, inaccurate and, at times, incorrect. The questions posed by the Homeowner to the Property Factor in his correspondence were simple in format and wording and related to his own premium. The responses from the Property Factor failed to answer the questions directly and repeated that the Property Factor had complied with the title deeds for the Development. The Property Factor's letters of 2 and 26 November 2021 and 8 February 2022 all stated that the insurance premium had been apportioned "*as that relating to other common costs and services, as detailed in the Schedule included within the Deed."* However, in practice, for the Homeowner's premium, the Property Factor did not apply *"the same apportionment basis … as detailed in the Schedule"*. In practice, the Property Factor used a valuation sum requested by the Homeowner's solicitor. The Property Factor's letter of 8 February 2022 accepts that "*there is clear disparity and we do agree, alterations require to be made, to ensure charges are equitably apportioned, based on floor size and in line with the Title Conditions. To rectify, before the upcoming renewal we shall calculate each individual properties required percentage of the full Building Sum Insured, based on floor sizes provided by the Title Deed".* The Property Factor's letter of 23 March 2022 to all owners in the Development explains that the then current apportionment approach was not in accordance with the title deeds but on the basis of individual sums insured. In his evidence and in his letter of 11 May 2021, Mr. Smith stated that the Homeowner's premium was based on the valuation of the Property. These contradictions support the Homeowner's position that the information provided to him that the premium apportionment was made in line with the title deeds and Schedule is not correct.

33. The Property Factor's letter of 7 April 2022 states that the the Homeowner's share of the premium, calculated on floor sizes, is 2.34% whereas Mr. Smith's evidence is that 2.05% was the percentage applied. Again, the information provided by the Property Factor is contradictory.

34. The Tribunal accepts that the Property Factor has "sole discretion". However, the issue here is not the exercise of discretion but the accuracy of the information provided. The Property Factor had ample opportunity to provide the Homeowner with the correct information he requested, being that his premium share was based on a valuation, but chose to mislead him by insisting that a floor area formula was used and providing him with different premium amounts.

35. The Tribunal agrees with the Homeowner that what the Property Factor did in practice was different from what they told him they had done. The Tribunal finds that the written information provided by the Property Factor is both misleading and false and so finds the Property Factor has failed to comply with Section 2.1 of the Code.

5.2 Code: **"You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum**

insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this."

36. The Tribunal found that the Homeowner's written submission, oral evidence and the Productions lodged by him showed that the Property Factor had not provided him with clear information showing the basis upon which his share of the insurance premium is calculated. As narrated in paragraphs 32 -34 above, the questions posed by the Homeowner to the Property Factor were simple in format and wording and related to his own premium. The responses from the Property Factor failed to answer the questions directly and clearly. The Property Factor did not provide or attempt to provide a calculation to the Homeowner, nor did they provide relevant information which would allow him to calculate the monetary value of his premium share for himself. The Homeowner, in his several emails of May and June 2021, asked for specific figures in respect of how his premium of £801.13 was calculated. The Property Factor's replies concentrated on the outcome of the RCA for the Development as a whole and the floor areas set out in the Schedule. No explanation was given for the 146% increase in the Homeowner's premium in comparison to a 30% increase for another owner and the 41% valuation increase as a result of the RCA. No explanation was given with regard to how the Property Factor used the valuation of the Property to calculate the premium.

37. The Tribunal accepts that the Property Factor is bound by data protection regulations but is of the view that the Property Factor is misconceived in the way in which they applied the regulations to this scenario where the information is not personal or sensitive information but is information relating to property and which is set out in the Schedule, a publicly available document.

38. The Tribunal finds that the Property Factor had not provided the Homeowner with clear information showing the basis upon which his share of the insurance premium is calculated and so finds the Property Factor has failed to comply with Section 5.2 of the Code.

7.2 of the Code "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."

39. The Tribunal accepts the point made by the Homeowner that the wording of 7.2 could be taken to mean that property factors should provide "detail" but agree with the Property Factor's position. The Tribunal takes the view that, as the tribunal process can differ for different complaints and as private rented guidance only requires signposting, the Property Factor's wording is sufficient. Accordingly, the Tribunal finds that the Property Factor has not failed to comply with Section 7.2 of the Code.

Property Factor Duties

40. The Parties agreed that the Homeowner's position is an extension of the points raised in respect of Sections 2.1 and 5.2 of the Code. Having found the Property Factor to be in breach of Sections 2.1 and 5.2 of the Code, the Tribunal, for the reasons given in respect of those Sections, found the Property Factor to be in breach of the wider and more general Property Factor Duties, also.

Property Factor Enforcement Order (PFEO)

41. Having made a decision in terms of Section 19(1)(a) of the Act that the Property Factor has failed to comply with the Section 14 duty and has failed to carry out the Property Factor's Duties, the Tribunal then proceeded to consider Section 19(1) (b) of the Act which states *"(1)The First-tier Tribunal must, in relation to a homeowner's application referred to it … decide … whether to make a property factor enforcement order."*

42. The Tribunal had regard to the fact that, although the Property Factor's failures emanate from the same issues, and so, the Tribunal is mindful not to penalise the Property Factor for this duplication of failings. These failings and breaches have caused the Homeowner unnecessary frustration and financial loss for which the Homeowner ought to be compensated. Further, it appears to the Tribunal that the information requested by the Homeowner in respect of the calculation of his share of the insurance premium remains unanswered.

43. Therefore, the Tribunal proposes to make a PFEO.

44. Section 20 of the Act states: *"(1) A property factor enforcement order is an order requiring the property factor to (a) execute such action as the First-tier Tribunal considers necessary and (b) where appropriate, make such payment to the homeowner as the First-tier Tribunal considers reasonable. (2) A property factor enforcement order must specify the period within which any action required must be executed or any payment required must be made. (3)A property factor enforcement order may specify particular steps which the property factor must take."*

45. The Tribunal proposes to make a PFEO to order the Property Factor to provide the Homeowner with the information requested by him and to make reasonable payment to the Homeowner to compensate him for financial loss, inconvenience frustration and time spent.

46. Section 19 (2) of the Act states: - *"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."* The Tribunal, by separate notice intimates the PFEO it intends to make and allows the Parties fourteen days to make written representations on the proposed PFEO.

47. 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.

Karen Moore,

Chairperson 30 January 2023