

# 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")

**Chamber Ref:** FTS/HPC/PF/18/0333

**Property:** Flat 40, Homeshaw House, 27 Broomhill Gardens, Newton Mearns, Glasgow, G77 5HP ("the Property")

### The Parties:-

**Mr. Robert Crawford, residing at Flat 40, Homeshaw House, 27 Broomhill Gardens, Newton Mearns, Glasgow, G77 5HP ("the Homeowner")**

**Beild Housing and Care, 79 Hopetoun Street, Edinburgh EH7 4QF ("the Factor") hereinafter together referred to as "the parties"**

### Tribunal Members

**Karen Moore (Chairperson)**

**Ann MacDonald (Ordinary Member)**

### Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the tribunal") determined that (i) the factor had failed to comply with the Section 14 duty in terms of the Act in respect of compliance with Section Aa of the Property Factor Code of Conduct ("the Code") and (ii) had failed to comply with the property factor duties in terms of Section 17(5) of the Act.

Having so determined, the tribunal considered whether or not to make a Property Factor Enforcement Order in terms of Section 19 of the Act and determined not to make an Order.

### Background

1. By an application comprising application form dated 22 February 2018 with supporting correspondence and documentation ("the Application"), the Homeowner applied to the tribunal in terms of Section 17(1) of the Property Factors (Scotland) Act 2011 (firstly) for a determination that the Factor had failed to comply with the Property Factor Code of Conduct ("the Code") as required by section 14(5) of the Act and, in particular, had failed to comply with Section Aa (Authority to Act), Section D, (Written Statement of Services), Section 2 (Communication and Consultation) in particular at 2.1 and 2.5, and Section 7 (Complaints Resolution) at 7.1 and (secondly) for a

determination that the Factor had failed to comply with the property factor's duties in terms of Section 17(5) of the Act.

### **Hearing.**

2. A Hearing took place on 11 July 2018 at 10.00am at Glasgow Tribunal Centre, 20 York Street, Glasgow G2 8GT. The Homeowner was present. The Factor was represented by Ms. Kathryn Crombie, (Communications and Marketing Manager), and Ms. Nicola Marcus, (Director of Human Resources), both employees in the Factor's organisation with knowledge of (i) the Property, (ii) Homeshaw House and Shaw Court, the development of which it forms part ("the Development") and (iii) the duties of the Factor's members of staff who provide the factoring service at the Development. Both parties lodged productions with the tribunal and copied to each other in advance of the Hearing.

### **Preliminary matter**

3. The tribunal advised the parties that it was aware that the Homeowner had submitted an earlier application to the Housing and Property Chamber and that the tribunal would not deal with matters already adjudicated on by an earlier tribunal. The tribunal also advised the parties that it was aware that representations had been lodged in respect of matters which post-dated the date of the Application and that the tribunal would not deal with these matters.
4. The Homeowner intimated to the tribunal that he withdrew his complaint in respect of Section 7.1 of the Code. Thereafter, the Hearing proceeded.

### **Matters dealt with at Hearing**

5. Ms. Crombie and Ms. Marcus confirmed to the tribunal that all of the properties in the Development are privately owned retirement residential units, that the Factor's role is as property manager and that the Factor has no role or remit in respect of providing care or support services. There is an on-site scheme manager who deals with the Development's common property. This post is currently held by Mrs. Robertson. The scheme manager is assisted by a cleaner.
6. The tribunal had regard firstly to the Homeowner's complaint that the Factor was in breach of Part Aa of the Code which states that the Factor's written statement of services should set out "*a statement of the basis of any authority you have to act on behalf of all the homeowners in the group*" and, linked to the substantive matter of this complaint being the incident narrated in paragraph 7 of this Statement of Decision, was in breach of Part D of the Code which states that the Factor's written statement of services (the WSoS) should set out "*your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your inhouse complaints handling procedure (see Section 7: Complaints resolution); the timescales within which you will respond to enquiries and complaints received by*

*letter or e-mail; your procedures and timescales for response when dealing with telephone enquiries;*" On reviewing the WSoS, the Homeowner agreed that the WSoS did, in fact, contain the necessary information to comply with Part D of the Code, but was dissatisfied with the way in which the Factor followed its procedures.

7. The tribunal then invited the Homeowner to address it on his complaint that the Factor had acted in breach of Section 2.1 of the Code which states: *"You must not provide information which is misleading or false."*
  
8. The Homeowner explained that one element of his complaint was an incident which occurred in July 2017 when the Homeowner accompanied a neighbour to her bank. The Homeowner later found out that the scheme manager, Mrs. Robertson, had telephoned the neighbour's daughter to advise her of this and a dispute between the neighbour and her family and the Homeowner ensued. The Homeowner complained to the Factor that Mrs. Robertson's actions were outwith the scope of her role as employee of the Factor but that the Factor's internal investigation into the matter failed to recognise this, resulting in the Factor's senior management writing to the Homeowner that Mrs. Robertson's actions were a "moral duty of care" and within the scope of her employment. In addition, the Homeowner stated that the Factor had not followed its complaints process by not speaking to the Homeowner about the matter. If they had, he would have been able to ask them to speak to relatives of the neighbour who were entirely happy with him taking the neighbour out in his car as he had been doing this for some time. He was also concerned that Mrs. Robertson had lied about the reasons she had given the Homeowner for phoning the relative. The Homeowner explained that Mrs. Robertson had told him that she phoned the relative because the Homeowner didn't have car insurance to transport the neighbour as she was terminally ill, the neighbour was vulnerable and that Mrs. Robertson advised the Homeowner that she had a duty of care to the neighbour. The Homeowner submitted to the tribunal that this decision by Mrs. Robertson was misleading information as it was not supported by the scope of the factoring services narrated in the WSoS or in her job description. The Homeowner submitted that the reference by the Mr David MacInnes Owner Services Manager and Ms Caryn Innes, Head of Development on behalf of the Factor in their written responses to him of 18 July 2017 and 11 December 2017 respectively to "duty of care" were lies as the duty of care did not exist.
  
9. In response, Ms. Crombie and Ms. Harcus on behalf of the Factor ("the Factor's representatives") advised the tribunal that, although, as scheme manager, Mrs. Robertson did not have a role or a specific duty to provide care or support services to proprietors in the Development, the Factor's organisational ethos was to foster good personal relations and that owners were not discouraged from approaching Mrs. Robertson for assistance. Ms. Crombie and Ms. Harcus, accepted that the scope of services as set out in the WSoS related solely to property management and that the scheme manager's job description as annexed to the WSoS also related, in the main, to property management. However, neither Ms. Crombie nor Ms. Harcus accepted the point made by the Homeowner that Mrs. Robertson's actions were outwith the scope of her role as the Factor's employee nor that the Factor's response to the Homeowner

had been misleading. They also advised the tribunal that there was a different view between Mrs. Robertson and the Homeowner as to what she said to him and that both versions were unsubstantiated. Ms. Crombie and Ms. Harcus accepted the Factor had not said anything on this point in its responses to the complaint.

10. With further reference to this same incident, the Homeowner questioned the robustness of the Factor's internal investigation and submitted that the process was deliberately flawed so as, in effect, to mislead him. Ms. Crombie and Ms. Harcus accepted that the investigation carried out by Mr MacInnes was flawed and submitted that this had been conceded by the Factor in Ms Innes' letter of 11 December 2017, in that Mr MacInnes should have spoken to the Homeowner before making his decision. They did not accept that there had been deliberate attempt to mislead nor that there had been any collusion. Ms. Crombie and Ms. Harcus explained to the tribunal that the Factor and the Homeowner had taken part in mediation in November 2017 and that one of the matters mediated on was this incident and that they genuinely believed that the Homeowner's concerns had been resolved. As a result, a letter had been sent to all owners at Homeshaw advising that the Homeowner had been very helpful in ensuring amendments to policies and procedures.
11. In response to questions from the tribunal, Ms. Crombie and Ms. Harcus agreed that there was a blurring of lines in the roles and duties of the scheme manager and explained that the job description was generic across the Factor's organisation. They explained that in some of the developments which the Factor manages the tenure is mixed and support is given to residents and so the job description is more accurate in relevance to those properties. Ms. Crombie and Ms. Harcus explained that the Factor is currently reviewing its WSoS as an outcome of its dealings with the Homeowner and the mediation.
12. Another incident to which the Homeowner referred in respect of this part of his complaint arose from an ad hoc owner's meeting on 8 June 2017 which had been chaired by Mr MacInnes and for which no minute of the meeting was available. The Homeowner's position on this is that in terms of the WSoS at Sections C.3 and C.4 a minute must be taken and that at no time during the meeting did Mr MacInnes state that there would be no minute. The Homeowner's position on this is that, in a later conversation with the Homeowner, Mr MacInnes said that he had stated there would be no minute at the end of the meeting and accordingly, the Homeowner's view is that Mr MacInnes lied.
13. With further reference to this same incident, the Homeowner advised that he had raised two items of "AOB" at the meeting but that, although a note of the meeting was circulated, the Homeowner's AOB items were not mentioned. The Homeowner's position on this omission from the notes is that it amounts to misleading information and a further lie on the part of Mr. MacInnes.
14. Ms. Crombie and Ms. Harcus accepted that there had been no minute and explained that the notes were circulated in place of a minute. They submitted that the explanation given by Mr. MacInnes for the omission of the Homeowner's AOB items

was that the meeting had been largely about works planned for the Development and that, as the Homeowner had not raised the AOB items at the beginning of the meeting, it was not competent for him to do so later in the meeting. The Factor's representatives did, however, accept that AOB items were usually at the end of a meeting and that the agenda had AOB as an item. Ms. Crombie and Ms. Harcus explained that a meeting had been held between the Homeowner, accompanied by a supporter, Mr. MacInnes and Mr. Dow, one of the Factor's senior managers who is Mr. MacInnes' line manager, on 19 October 2017 but both the Homeowner and Mr. MacInnes held firm in respect of what said or not said at the June meeting. Ms. Crombie and Ms. Harcus also explained that this matter was also discussed during the mediation in November, again with both the Homeowner and Mr. MacInnes adhering to their respective version of events.

15. The next incident to which the Homeowner referred in respect of this part of his complaint arose from an Annual General Meeting ("AGM") on 21 August 2017 which, again, had been chaired by Mr. MacInnes and which the Homeowner submitted had not been carried out in accordance with the WSoS. The Homeowner's complaint was twofold and centred on (firstly) Mr. MacInnes raising at the meeting an AOB matter concerning the Homeowner without the Homeowner's prior knowledge or consent, the matter being the Homeowner volunteering to be a member of the Owners' Forum ("the Forum") if no other owner wished to do so and (secondly) Mr. MacInnes reneging on a promise made by him to the Homeowner after the ad hoc meeting that any ballot for his election to the Forum would be held in secret. The Homeowner explained that at the ad hoc owner's meeting on 8 June 2017, he had spoken with Mr. MacInnes and offered to stand for election to the Forum as he knew that there was a vacancy and that, in his view, owners were generally reluctant to take part. The Homeowner said that he made this offer on the basis that his election to the Forum would be conducted by a secret ballot of the proprietors in the Development and that Mr. MacInnes shook his hand in agreement to this. The Homeowner explained that, by secret ballot, he had asked the Factor to provide the owners with envelopes in which to place their marked ballot papers before returning these to the scheme manager's office and that this was what Mr. MacInnes had agreed with him at their meeting following the ad hoc meeting. The Homeowner explained that he heard no more about his offer to stand for election until the matter was raised by Mr. MacInnes at the AGM. The Homeowner explained further that, at the AGM another owner indicated that he wished to be appointed to the Forum, and so, following the AGM, Mr. MacInnes proceeded to conduct a ballot without issuing envelopes into which the marked ballot papers could be placed. The Homeowner's position on this was that, as the ballot was conducted over a number of days, without sealed envelopes, the running total of votes cast would be known to the Factor, and in particular, to Mrs. Robertson and Mr. MacInnes, who could thereafter manipulate the outcome of the ballot by putting pressure on owners who had still to cast a vote to vote for the Factor's preferred candidate. The Homeowner further submitted that the ballot was held in a manner that was contrary to the WSoS at paragraph C4. which states that ballot papers would be "opened" in the presence of the scheme manager and an owner, the inference being that the ballot papers had to be in a sealed envelope if they were to be opened. The Homeowner cited the conduct of Mr. MacInnes in failing

to hold a secret ballot having promised to do so as another example of Mr. MacInnes, as a representative of the Factor, lying to him.

16. With further reference to Mr. MacInnes' handling of the immediately foregoing incident, the Homeowner submitted that it was inappropriate for the matter to have been raised as AOB as Mr. MacInnes had had knowledge of the matter since it was raised by the Homeowner on 8 June 2018 and so it could have been included on the AGM agenda as a separate item. The Homeowner's position was that this omission was a deliberate action by Mr MacInnes and amounted to misleading information.
17. The Homeowner referred the tribunal to a further issue arising from the meeting of 8 June 2018 and the AGM of 21 August 2018 which is that, at the meeting of 8 June 2018, the Homeowner had raised another matter of AOB and had requested that the Factor's Complaints Handling Procedure should be made available in the scheme manager's office. This was not displayed and he submitted that this selective approach to dealing with matters is misleading and deliberate.
18. In response, Ms. Crombie and Ms. Harcus accepted that the ballot had been conducted as outlined by the Homeowner and accepted that errors had been made by Mr. MacInnes in this regard. They submitted that by the time Mr. MacInnes was aware that the process agreed with the Homeowner was not being followed, the ballot was underway and could not be halted. Ms. Crombie and Ms. Harcus stated that they had thought this matter was resolved at mediation as Mr. MacInnes had issued a letter of apology to the Homeowner and had issued a separate letter to the Development owners accepting the errors in the ballot process. The Homeowner's position was that the content of the letters misrepresented what had happened in respect of the ballot and so was misleading.
19. Ms. Crombie and Ms. Harcus submitted that they understood that the matter of the ballot had been resolved at mediation and that the Homeowner had accepted Mr MacInnes's apology and explanation of the confusion which had arisen. They further stated that the Factor had offered to rerun the ballot but that the Homeowner declined this offer. The Homeowner held firm in his position that there was no confusion and that this was a deliberate false action on the part of Mr. MacInnes. He explained that he declined the offer as, by that time, he no longer wished to stand for election to the Forum and that that was consistent with his original position that he only intended to stand if no one else wanted to do so.
20. The tribunal of its own accord questioned Ms. Crombie and Ms. Harcus on the owners' meeting and ballot procedures set out in the WSoS and the manner in which meetings were conducted at the Development. Ms. Crombie and Ms. Harcus explained that there is a generic process for conducting meetings and that the instructions to the Factor's staff on this matter is set out in an operational manual and will comply with the title deeds for the Development. They assured the tribunal that Mr. MacInnes, as the member of the Factor's staff with responsibility for the Development, would be aware of the terms of the title deeds for the Development. Ms. Crombie and Ms. Harcus went on to advise the tribunal that, as a result of a

combination of its recent dealings with the Homeowner, the earlier tribunal application by the Homeowner and the mediation, the Factor is reviewing its WSoS but is holding back the issue of an amended WSoS until the Scottish Government completes its consultation and review of the Code.

21. The tribunal then turned to the Homeowners' complaint in respect of Section 2.5 which states: *"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)."*
22. The Homeowner complained of consistent failures by the Factor's staff to respond to his email correspondence to them. The Homeowner accepted that he had received responses but that as the responses did not answer his questions, he considered these not to be compliant with the Code.
23. In response, Ms. Crombie and Ms. Harcus explained to the tribunal that the Homeowner regularly sent an extraordinarily excessive amount of emails to several of the Factor's members of staff and that it had become difficult for the Factor's members of staff to manage this volume of correspondence. Accordingly, the Factor had put in place a single point of contact for the Homeowner but the Homeowner had not adhered to this arrangement. Ms. Crombie and Ms. Harcus explained further that the Homeowner often asked the same question but in a slightly different way leaving the Factor's members of staff unable to determine if the enquiry had been answered or not. They submitted that the Factor's members of staff had tried their best to respond timeously but the volume, the number of different people contacted by the Homeowner and the changing nature of the issues raised made it very difficult. They had tried to resolve the problem by going to mediation and were at a loss as to how to deal with the volume of correspondence any better. Ms. Crombie and Ms. Harcus demonstrated the volume of correspondence received from the Homeowner with reference to a spreadsheet which the Factor's staff had prepared in order to manage the enquiries and complaints received from the Homeowner and ensure as best they could that correspondence was answered. Ms. Crombie and Ms. Harcus submitted that the Homeowner had not submitted a full record of the correspondence between the parties as could be seen from the spreadsheet.
24. At this point in the Hearing, it became evident to the tribunal that, although the Homeowner had a considerable amount of evidence which he wished to put before the tribunal in support of his Application, the Homeowner was having some difficulty in assimilating this evidence in a meaningful way. The tribunal, therefore, adjourned the Hearing for a short time to allow the Homeowner to organise his paperwork in this respect. When the Hearing recommenced, the tribunal took the parties through a selection of entries on the Factor's spreadsheet and the Homeowner's evidence to ascertain the parties' positions in respect of those parts of the Homeowner's complaint which related to the way in which the Factor dealt with communication. The outcome being that the Homeowner agreed in broad terms with Ms. Crombie and Ms. Harcus' submissions on the volume and repetition of his correspondence to the Factor

and that the Factor had made efforts to manage this, including putting in place a single point of contact for the Homeowner and accepted that he chose not to avail himself of the benefit of this action.

25. The tribunal then turned to the Homeowner's complaint in respect of the Factor's failure to carry out its property factor duties. The Homeowner submitted that his complaint in this regard arose from the Factor's practice of overcharging for the hours worked by the scheme manager and advised the tribunal that although the Factor charged the Development owners the equivalent of 28 hours per week, the scheme manager actually worked 26 hours per week. The Homeowner submitted further that the current scheme manager, Mrs Robertson, in fact, worked less than 26 hours per week as she took lunch and tea breaks for which she was paid and to which she was not entitled. The Homeowner submitted that this complaint could also fall under his complaint in respect of Section 2.1 as the actions of Mrs Robertson were fraudulent and so false and misleading. In addition, the Homeowner submitted that Mr. MacInnes had condoned Mrs Robertson's fraudulent actions by allowing it to continue for over a year after the Homeowner had made a formal complaint about it.
26. In response, Ms. Crombie and Ms. Harcus explained that the scheme managers are contracted to work 26 hours per week but are paid for 28 hours per week and that this is a contractual arrangement to take account of additional hours which might be worked so that the Factor as employer does not need to pay overtime or allow time off in lieu. Ms. Crombie and Ms. Harcus advised the tribunal that a meeting, being the meeting referred to in paragraph 14 of this Statement of Decision, was held to discuss the scheme manager's contracted hours and that they had understood that the Factor's position had been adequately explained. At the meeting, the Factor had undertaken to remind Mrs. Robertson of her core hours and had done so. Ms. Crombie and Ms. Harcus explained that following further allegations from the Homeowner that Mrs. Robertson is taking unauthorised breaks, the Factor has begun a formal conduct investigation. Ms. Crombie and Ms. Harcus advised the tribunal that it is open to the owners at the Development to take a group decision to change the scheme manager's contracted hours but that Mr Crawford had asked them not to do this.
27. The Homeowner maintained his position that as the scheme manager is the employee of the Factor, the Factor is ultimately responsible for her actions and if her actions are a breach of the Code or a failure to carry out property factor duties, the breach and failure is by the Factor.
28. With further reference to his complaint in respect of the Factor's failure to carry out its property factor duties, the Homeowner referred to an incident in which mail had gone missing in the Factor's office. The mail in question was part of the Application notification process which the Homeowner had intimated to the Factor at its Edinburgh office. The Homeowner had re-used an envelope bearing the logo of the Factor's solicitors and this envelope and its contents eventually returned to the Homeowner. The Homeowner's view is that this incident of allowing his mail to go astray was a deliberate action on the part of the Factor to thwart his Application.



29. Ms. Crombie advised the tribunal that she had investigated this incident and had been unable to find out exactly what occurred but, in her opinion, the most likely explanation was that the person opening the envelope in the Factor's office had not recognised the case and as the envelope was not directed to any particular person had assumed it was from the Factor's solicitors and so had returned it to them. The Factor's solicitors, on receiving the item of mail, could not trace a record of the matter and so had returned the item to Royal Mail who in turn returned it to the Homeowner. In any event, the Factor had apologised to the Homeowner. The Homeowner maintained his position that this was a deliberate action on the part of the Factor.
30. At the close of the Hearing, the tribunal asked both parties if they wished to comment further or make further submissions. The Factor's representatives submitted that they had prepared the Factor's case on the understanding that some of the matters raised by the Homeowner had either been resolved at the mediation or at the meetings which had been held with him. Accordingly, they had not lodge full productions in support of the Factor's position and requested that the Hearing be continued to allow further productions being a full record of email correspondence between it and the Homeowner to be lodged. The Homeowner did not object to this course of action and was assured that he would be given an opportunity to comment on the further productions.
31. The tribunal adjourned the Hearing and had regard to Rule 28 of the Rules. Having determined that Rule 28 had been satisfied, the tribunal adjourned the Hearing to 10 October 2018 at 10.00 to allow the Factor to submit further productions, being a full record of email correspondence between it and the Homeowner, to be lodged. The tribunal directed the Factor to also lodge a copy of the title deeds to the Development to ascertain if the title deeds contained guidance on voting rights and meeting procedures at the Development and a copy of the operational manual to which the Factor's representatives had referred in the course of the Hearing. The tribunal directed that copies be sent to the Homeowner for him to comment to the tribunal.

#### **Further Productions.**

32. Both parties submitted further productions to the tribunal. Both sets of further productions were copied to the other party.

#### **Adjourned Hearing**

33. The adjourned Hearing took place on 10 October at 10.00 at the Glasgow Tribunal Centre, 20 York Street, Glasgow G2 8GT. The Homeowner was present. The Factor was again represented by Ms. Kathryn Crombie and Ms. Nicola Harcus.
34. The tribunal enquired of the Factor as to why it had not lodged a copy of the title deeds to the Development to ascertain if the title deeds contained guidance on voting rights and meeting procedures at the Development and a copy of the operational manual to which the Factor's representatives had referred in the course of the previous Hearing as directed at the close of the previous Hearing. Ms. Crombie explained that the Factor had misunderstood the tribunal's direction and had

understood that only relevant documents should be lodged and as neither the title deeds nor the operational manual contained guidance on voting rights and meeting procedures at the Development, the Factor had not lodged these. Ms Crombie, however, produced a copy land certificate REN61109 for Flat 30, Homeshaw Court which property the Homeowner confirmed forms part of the Development. The tribunal read aloud the relevant parts of the land certificate which confirmed the Factor's position that the title deeds did not contain guidance on voting rights or procedures for owners' meetings. The Homeowner advised that it was his understanding that these matters were not addressed in the title deeds. The tribunal accepted the Factor's position that the operational manual did not cover these matters either. The tribunal having heard Ms Crombie and the Homeowner, accepted the Factor's explanation in respect of the tribunal's direction and proceeded with the Hearing.

35. The Homeowner advised the tribunal that part of his complaint under failure to comply with factors' duties related to the Factor failing to provide a copy of its Complaints Handling Procedure (CHP) at the Development. Ms. Crombie on behalf of the Factor advised the tribunal that this document was available in the scheme manager's office in the Development and had been since the mediation attended by the parties in November 2017. The Homeowner disputed this. The Homeowner further complained the CHP did not form part of the WSoS but accepted that it was referred to in that document with an explanation as to where it could be obtained. The tribunal noted that this point had been raised and addressed at the earlier Hearing.
36. The Homeowner advised the tribunal that he remained unsatisfied in respect of how the factor had managed owners' meetings and that these did not accord with the Factor's WSoS. As this point had been raised at the previous Hearing and as the Factor had requested that the previous Hearing be continued to allow the Factor to lodge further productions in response to matters raised by the Homeowner, the tribunal invited the Factor to take it through the productions which it had lodged.
37. The Factor had lodged a note of a telephone conversation between Ms. Crombie and the Homeowner on 21 July 2017, which note had been made by Ms. Crombie and had been issued to the Homeowner. Ms. Crombie explained that the purpose in lodging the note was to demonstrate the difficulties which the Factor faced in getting to the root of the Homeowner's complaints and in dealing with the volume of correspondence received from the Homeowner. Ms. Crombie explained that the purpose of her call was to clarify what the actual issues were with the Homeowner. The Homeowner agreed that he had received the note and that it was a true reflection of the telephone conversation which dealt with dates on which the Homeowner had written to the Factor and either the Factor or its solicitors had responded to the Homeowner.
38. The Factor had lodged a note of a meeting of 19 October 2017 attended by Mr Dow and Mr. MacInnes of the Factor, the Homeowner and a fellow resident at the Development. The Homeowner agreed that he had received this note but disputed its factual accuracy in respect of a statement made by Mr. MacInnes. The tribunal noted that this point had been raised and addressed at the earlier Hearing.

39. The Factor had lodged a note of a meeting of the Forum and explained that the membership of the Forum was drawn from all of the developments managed by the Factor and that the purpose in lodging the note was to demonstrate that the Factor was complying with its commitment to the Homeowner made as part of the mediation process to improve its WSoS and to consult with the Forum and the Homeowner in this respect. Ms Harcus explained to the tribunal that, at the mediation, the Factor had acknowledged that its WSoS was not as robust as it could be and had taken legal advice on how to improve the WSoS. She explained that the Factor would have preferred to wait for the publication of the Scottish Government's new Code of Conduct before undertaking this task, but as the new Code of Conduct was not forthcoming, the Factor had decided to go ahead with its improved WSoS and so had begun the process of notifying the Forum, of which the Homeowner is not a member, of its intention. Ms. Crombie and Ms. Harcus stated that the Factor planned to consult with the Homeowner on the updated WSoS as part of the process. The Homeowner agreed that the Factor had given this commitment at the mediation but stated that he had not been consulted. The Homeowner advised that tribunal that he expected to be actively involved in the whole process of the new WSOS and not consulted at the end of the process when the new WSoS, in effect, had been written.
40. The Factor had lodged a spreadsheet showing 188 entries of correspondence from 1 May 2018 to 29 September 2018 between it and the Homeowner, of which entries 143 were emails from the Homeowner, and explained that the purpose in lodging the spreadsheet was to demonstrate the volume and frequency of correspondence received from the Homeowner and the way in which the Factor attempted to manage this in order to comply with its duties. Both Ms Crombie and Ms Harcus advised the tribunal that the manner in which the Homeowner corresponded with the Factor's employees caused it difficulty in ascertaining if the correspondence had been answered. Ms. Crombie asserted that the email correspondence lodged by the Homeowner as productions had been edited by him to give the impression that the Factor had failed to respond to him within the timescales stated in its WSoS. Ms. Crombie further advised the tribunal that if the Homeowner did not accept the response given to him by the Factor, he continued to question the outcomes of the Factor's investigations even when the Factor's internal processes had been exhausted and the only route open to the Homeowner was a referral to the First-tier Tribunal. In response to questions from the tribunal on these points, the Homeowner agreed that he emailed the Factor's employees frequently, leaving very short spaces of time, sometimes less than an hour, between emails and, that, if a different member of staff to the member of staff to whom he had sent an email replied, he treated this as a failure to reply to him as he expected each person to whom he wrote to reply personally. The Homeowner agreed that if his complaints were escalated to a senior manager and investigated by that senior manager, he continued to repeatedly contact that senior manager raising his complaint if he did not accept the outcome of the investigations.
41. With reference to the Homeowner's productions which comprised copy email correspondence some of which had been lodged previously, the Homeowner advised the tribunal that he had not intended to edit or otherwise manipulate the correspondence and email chains but wished to show that the Factor had failed

correspondence and email chains but wished to show that the Factor had failed to respond in the way which he expected and wished to show to the tribunal that the Factor's staff lied to him. In response to questions from the tribunal, the Homeowner agreed that he used the term "lie" where the Factor's staff held a different viewpoint from his or did not agree with him. The Homeowner highlighted what he considered to be a lie in the meeting note of 19 October 2017 as, in the Homeowner's opinion, the statement that no minutes would be taken was said at the end of the meeting, if at all, and not at the beginning of the meeting. The Homeowner gave a further example of a lie on the part of the Factor as the incident narrated in paragraph 28 and 29 of this Statement of Decision where mail sent by him to the Factor had been returned to him, the lie being that the Factor stated that it had not received the item of mail when, in fact, it had.

### **Summing Up by Parties**

42. In summing up, the Homeowner advised the tribunal that he remained unhappy that Mrs. Robertson still did not work her full hours and that this was not being addressed by the Factor and remained of the view that the Factor "always do something that is not right". The tribunal asked the Homeowner what outcome he hoped for from the tribunal. The Homeowner responded that he wanted the Factor to act as a factor and not a landlord and to be honest and truthful.
43. In summing up, Ms. Crombie and Ms. Harcus advised the tribunal that it tried its utmost to meet its duties and comply with the Code in respect of its dealings with the Homeowner and that, where failings in its process had become apparent, it had taken steps to address these. In particular, Ms. Crombie and Ms. Harcus advised the tribunal that it had put in place a single point of contact to assist both the Homeowner and its staff to manage the Homeowner's communications but the Homeowner refused to use the single point of contact and continued to write to whichever of the Factor's staff he considered to be the appropriate person to deal with his enquiry, regardless of whether that person was in fact the appropriate person. Ms. Crombie and Ms. Harcus stressed that the Factor, as an organisation, was genuinely at a loss as to how to deal with the Homeowner and his complaints and, with reluctance, had invoked its vexatious complainer policy meaning that it would no longer respond to the Homeowner unless his correspondence was justified.

### **Findings of the tribunal**

44. The tribunal took into account the Application, the productions lodged by the Homeowner and the Factor and the submissions made by the Homeowner and on behalf of the Factor at both Hearings. The tribunal found that all parties did their best to give evidence in a straightforward and truthful manner and had no difficulty in believing their accounts of the events, even though the opinions of the parties differed.

45. The Homeowner is the heritable proprietor of the Property which forms part of a development of flats and houses designed for use and occupation by retired persons. The title conditions which applied to the Property and the Development reflected this use restriction and provided for the appointment of a factor to manage the common property. Factor took over the appointment of factor and property manager in 2011 and its duties under the Act arose from that date.
46. The Factor has issued a WSoS as required by the Act. The WSoS is generic to all of the developments in the Factor's portfolio but, nonetheless, complies with the Act.
47. The key points of the WSoS which are relevant to the Application are the scope of the Factor's services, communication response times and procedure at owners' meetings.
48. The WSoS explains how the Factor provides management services at the Development, which services relate to common property. The WSoS and the submissions by the parties confirm that the management services do not include the personal care and support of owners and residents. The Factor carries out its duties in this respect by employing a scheme manager and cleaner who are based at the Development. The WSoS contains a generic job description for the scheme manager which describes the main duties as property maintenance, safety and security of the development, advice and assistance to residents in respect of paying for service charges, fostering community spirit and ensuring confidentiality in respect of residents, managing and cleaning communal facilities and responding to emergency calls. The WSoS sets out that the cost of the scheme manager is recharged to the owners of the properties in the Development in relation to contracted hours worked.
49. In respect of the Factor's personnel, the current scheme manager is Mrs. Robertson and her line manager is Mr. MacInnes who has responsibility for the Development and other developments in the Factor's portfolio. Mr. MacInnes' line manager is Mr. Dow, the Factor's Director of Asset Management. Ms. Crombie and Ms. Harcus and members of the Factor's senior staff, whilst not having been personally involved in all of the Factor's dealings with the Homeowner, have had dealings with the Homeowner, are aware of his complaints and were able to address the tribunal on these matters at the Hearings.
50. Mrs. Robertson, in carrying out her duties as scheme manager, telephoned a relative of the Homeowner's neighbour to advise her that the Homeowner had taken the neighbour on an errand in his car. This telephone call set in motion a series of telephone calls and complaints which caused considerable upset to the Homeowner and resulted in the relations between the Homeowner and his neighbour becoming strained. The Factor carried out an internal investigation into the actions of Mrs. Robertson. The reason for contacting the neighbour's relative given by Mrs. Robertson to the Factor as her employer during that investigation differs from reason which the Homeowner states was given to him by Mrs. Robertson at the time of the incident. Neither version can be verified by any other

party. The outcome of the investigation was that the Factor exonerated and supported Mrs. Robertson, which outcome caused the Homeowner further distress.

51. The WSoS sets out the Factor's response times as a 90% target of responding to written and telephone enquiries within 10 working days and issuing records of meeting within 20 working days.
52. The Homeowner is a vociferous and frequent complainer to the Factor. His emails are repetitious. He frequently emails several of the Factor's staff with the same or a similar complaint, often outwith the Factor's normal working hours and allows the Factor little time to respond, before emailing a reminder. When the Factor carries out its internal processes and procedures to investigate the Homeowner's complaints, if the Homeowner does not agree with the outcome of investigations, the Homeowner accuses the factor's staff of collusion or lying, regardless of whether or not he has facts to substantiate his accusations.
53. The Factor put in place a single point of contact for the Homeowner to assist it in dealing with his correspondence but the Homeowner declines to use this system. The Homeowner, by his own admission, expects each member of the Factor's staff to whom he writes to reply to him personally, regardless of whether that person is best placed to do so or if another member of the Factor's staff has responded. Given the manner in which the Homeowner contacts the Factor, the tribunal could not be certain that the Factor had in fact replied to each and every piece of correspondence within its stated timescales. However, the tribunal accepts and so finds that, in the main, and as far as is reasonably possibly, the Factor had complied with its response times.
54. The WSoS sets out general procedures which are to be followed when calling and conducting owners' meetings, including taking a minute of proceedings and how to conduct a ballot. The title deeds for the Development are silent in respect of how the Factor should conduct owners' meetings and in respect of how the Factor should ballot owners.
55. On 8 June 2017 and on 21 August 2017, Mr. MacInnes chaired owners' meetings and an AGM without taking a minutes of the proceedings. The lack of minute-taking did not comply with the process set out in paragraph C.4 of the WSoS. Following the AGM on 21 August 2017, Mr. MacInnes arranged a ballot of owners to elect a representative to the Factor's owners' forum using a process which did not follow the process set out in paragraph C.4 of the WSoS.
56. The scheme manager is employed by the Factor and contracted to work 28 hours per week and this weekly cost is recharged to the owners of the properties in the Development. The scheme manager's weekly work rota as set by the Factor, however, is for a working week of 26 hours. The Factor justifies this weekly discrepancy as hours in lieu to accommodate incidences when the scheme manager works more than 28 hours in week and would otherwise be entitled to time off or overtime. The scheme manager's contracted hours can be changed by

the owners of the Development. The factor had offered to consult with the owners on this point, but the owners declined this offer.

57. The Homeowner raised this apparent discrepancy in the scheme manager's hours paid for and hours worked with the Factor towards the end of 2017 and throughout 2018. The Factor responded by reference to its WSoS but failed to recognise that an essential part of the Homeowner's complaint was, and still is, that Mrs Robertson habitually takes breaks to which she is not entitled and for which she is paid. The Factor took until around September of 2018 to respond to and investigate the Homeowner's complaint in this respect.
58. There was an incident whereby mail sent to the Factor by the Homeowner was returned to the Homeowner which caused the Homeowner to complain to the Factor. The Factor investigated the complaint and found that the most likely explanation for this was that the Homeowner had re-used an envelope which bore the details of another organisation without deleting these details and so led the Factor's office staff to believe that the Homeowner's mail had been sent by that organisation. Factor's office staff returned the mail to that organisation who in turn returned it to the Homeowner.
59. In general, relations between the Homeowner and the Factor have broken down. The parties attended mediation in November 2017 with a view to resolving several issues, some of which are the subject of the Application, and, although a mediation agreement was signed by both parties, the Homeowner remains dissatisfied. An outcome of the mediation was a series of recommendations to the Factor in respect of service improvements which the Factor has taken on board in respect of its practices.
60. The Factor has taken professional advice on its WSoS and is in the process of updating it. The Factor offered to consult with the Homeowner in respect of the updated Code of Conduct and intends to do so at the appropriate stage in the process. The Homeowner considers that he should have input throughout the process.

#### **Decision and reasons in respect of the Homeowners' complaint in respect of Section Aa of the Code**

61. Part Aa of the Code states that the Factor's written statement of services should set out "*a statement of the basis of any authority you have to act on behalf of all the homeowners in the group*". The Homeowners complaint in this respect is that Factor has no power or authority to act in any capacity other than land and property manager and so exceeded its power and authority when its scheme manager contacted a relative of one of his neighbours to advise that the Homeowner had taken the neighbour on an errand in his car. The tribunal has no difficulty in whole heartedly agreeing with the Homeowner on this point. The Factor by its own admission and in its own WSoS is clear that it is a property

manager managing common property and that it does not provide care and protection services to residents. The tribunal notes that the title deed produced by the Factor, being copy land certificate REN61109, states that residents in the Development should be capable of independent living. The tribunal cannot see how any reasonable and professional property manager can interpret this as authority to interfere in the personal and private lives of homeowners.

**Decision and reasons in respect of the Homeowners' complaint in respect of Section D of the Code**

62. Part D of the Code states that the Factor's written statement of services should set out *"your in-house complaints handling procedure (which may also be available online) and how homeowners may make an application to the homeowner housing panel if they remain dissatisfied following completion of your inhouse complaints handling procedure (see Section 7: Complaints resolution); the timescales within which you will respond to enquiries and complaints received by letter or e-mail; your procedures and timescales for response when dealing with telephone enquiries;"* As outlined in paragraph 6 of this Statement of Decision, the Homeowner accepts that the Factor's WSoS complies with this part of the Code. However, the Homeowner's complaint is truly that the Factor failed to follow its procedure in respect of investigating his complaint relating to compliance with Part Aa of the Code. In the tribunal's view, this complaint sits properly under the heading of failing to comply with property factor duties, and, so the tribunal deals with it under this heading. As with the Homeowner's complaint relating to compliance with Part Aa of the Code, the tribunal has no difficulty in whole heartedly agreeing with the Homeowner on this point and that the Factor's staff who conducted the investigation into the Homeowner's complaint of exceeding authority, misguided themselves in respect of the nature and scope of the Factor's authority.

**Decision and reasons in respect of the Homeowners' complaint in respect of Section 2.1 of the Code**

63. Section 2.1 of the Code states: *"You must not provide information which is misleading or false."* The Homeowner's complaints in this respect relate to three incidents which he considers as "lies". The first of these complaints relates to the incident involving the Homeowner taking a neighbour on an errand by car and the reason given to the Homeowner by the scheme manager for contacting the neighbour's relative. The Homeowner is of the firm view that was the difference of views expressed by the Homeowner and the scheme manager in respect of the reason given by the scheme manager for contact the neighbour's relative is a lie on the part of the scheme manager. The second of these complaints is the statements by Mr. MacInnes in respect of the minute-taking at the meetings on 8 June and 21 August, both 2017, and, the third of these complaints is the incident of the mail which had gone astray in the Factor's office and was eventually returned to the Homeowner. The tribunal's view is that these are relatively minor matters and could not reasonably be interpreted as deliberate lies or deception. The tribunal cannot be certain of the reason given by Mrs Robertson in respect of contacting the neighbour's relative. Mrs Robertson was not called as a witness by



either party and so the tribunal has no way of assessing her apparent truthfulness. Whether or not Mr. MacInnes made the statement about not taking minutes at the start or at the end of the meetings, appears to the tribunal to be irrelevant and could not be held to fall within the meaning of this part of the Code, which, in the tribunal's opinion, is to prevent unscrupulous factors from acting in a fraudulent way. In the opinion of the tribunal, the mail incident was a genuine and understandable error on the part of the Factor's office staff given the way in which the Homeowner had failed to address his letter properly and, again, could not be held to fall within the meaning of this part of the Code. On these occasions, the Factor had acted responsibly in handling the Homeowner's complaints. Accordingly, the tribunal has no hesitation in finding that the Factor has not failed to comply with this part of the Code. However, the tribunal is of the opinion that the Homeowner's complaint relating to the conduct of Mr MacInnes both at the ad hoc meeting and at the AGM by failing to take minutes and by holding an open ballot should properly sit under the heading of failing to comply with property factor duties, and, so the tribunal deals with it under this heading.

#### **Decision and reasons in respect of the Homeowners' complaint in respect of Section 2.5 of the Code**

64. Section 2.5 which states: *"You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement (Section 1 refers)."* A great deal of evidence was put before the tribunal by both parties in respect of mail and email between the parties and the tribunal has a great deal of sympathy with the Factor and its staff in respect of their genuine frustration in dealing with the Homeowner. In the opinion of the tribunal, the Factor had gone to extreme lengths to comply with its stated response times and any failure on its part to meet the response times was because it was prevented in doing so by the unreasonable behaviour of the Homeowner in his persistent and confusing approach. The tribunal has no hesitation in finding that the Factor has not failed to comply with this part of the Code.

#### **Decision and reasons in respect of the Homeowners' complaint in respect of property factor duties.**

65. The Homeowner's complaint in this regard related to the hours worked by the current scheme manager and the way in which these costs are recharged to the residents in the development and the failure or delay of the Factor in dealing with his complaint about the unofficial work breaks taken by Mrs Robertson. The tribunal noted that the Factor, no doubt for sound operational and fiduciary reasons, adopted an approach of paying the scheme manager for two extra hours per week in lieu of paying overtime or allowing time off in lieu. However, this approach is not reflected in its WSoS nor has it been agreed formally with residents in the development. The tribunal also noted that it took the Factor some months to recognise that the Homeowner's complaint in respect of the scheme

manager's work practices was in fact a complaint about Mrs Robertson's particular work practices and so failed to formally investigate this within a reasonable timescale. The tribunal agrees with the Homeowner that the Factor has failed to comply with its property factor duties in dealing with these matters.

66. As referred to in paragraph 63 of this Statement of Decision, the tribunal considers that the Homeowner's complaint that that the Factor failed to follow its procedure in respect of investigating sits properly under the heading of failing to comply with property factor duties. As with the Homeowner's complaint relating to compliance with Part Aa of the Code, the tribunal has no difficulty in wholeheartedly agreeing with the Homeowner on this point and that the Factor's staff who conducted the investigation into the Homeowner's complaint of exceeding authority, misguided themselves in respect of the nature and scope of the Factor's authority and so the Factor failed to comply with its property factor duties in this respect.

67. As referred to in paragraph 64 of this Statement of Decision, the tribunal considers that the Homeowner's complaint that that the Factor failed to follow its WSoS procedure in respect of minute-taking at formal meetings sits properly under the heading of failing to comply with property factor duties. The tribunal has no difficulty in agreeing with the Homeowner that Mr. MacInnes ought to have taken a minute of the meetings and ought to have held the ballot in accordance with the Factor's WSoS and so the Factor failed to comply with its property factor duties in this respect.

#### **Property Factor Enforcement Order.**

68. Having determined that the Factor has failed to carry out its duty in terms of Section 14 of the Act, the tribunal then considered whether to make a property factor enforcement order in terms of Section 19 of the Act. The tribunal had regard to the full facts of the Application and all of the matters before it. With regard to the conduct of Mrs Robertson in respect of hours actually worked the tribunal noted that the Factor has recently concluded an internal investigation into this matter.. The tribunal took the view that, on the whole, the Factor had acted in the best interests of the Homeowner and his fellow residents and that the attitude of the Homeowner is such that the Factor will never meet his expectations and will never provide the service to which he feels he is entitled. The Homeowner's closing statement to the tribunal that "Bield always do something that it is not right" and his general accusatory demeanour towards Ms. Crombie and Ms. Marcus during the Hearings attest to this. Although the tribunal found that the Factor's handling of the Homeowner's complaint in respect of exceeding its authority to act had caused the Homeowner upset, the tribunal did not consider that the Factor acted in bad faith. The tribunal noted that the Factor is reviewing its WSoS and is consulting with its customers in this respect. The tribunal took into account the considerable efforts to which the Factor had gone to atone for its failings and perceived failings towards the Homeowner and considered that any property factor enforcement order and action which the tribunal might imposed

was being undertaken by the Factor of its own volition. The tribunal had regard to the effect of a property factor enforcement order on the Factor and on its reputation and considered that the effect of a property factor enforcement order outweighed the extent of the breach. Accordingly, the tribunal determined not to make a property factor enforcement order.

### **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

K Moore

Chairperson 5 December 2018