

Housing and Property Chamber

First-tier Tribunal for Scotland



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

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

Chamber Ref: FTS/HPC/LM/19/2134

**Loch Tay Highland Lodges, Milton Morenish Estate, Killin FK21 8TY
("the Property")**

The Parties:-

**Mrs Eleanor Morrison, 12 Donmouth Terrace, Bridge of Don, Aberdeen AB23
8DN
("the Homeowner")**

**Loch Tay Highland Lodge Park Limited, Loch Tay Highland Lodges, Milton
Morenish Estate, Killin FK21 8TY
("the Factor")**

Tribunal Members:

Graham Harding (Legal Member)

David Godfrey (Ordinary Member)

DECISION

The Factor has failed to carry out its property factor's duties.

The Factor has failed to comply with its duties under section 14(5) of the 2011 Act in that it did not comply with sections 1.1bAb, 1.1bBc, 1.1bCd, 1.1bCf, 1.1bCg, 1.1bCh, 1.1bDI, 1.1bDm, 2.1, 2.4, 3.2, 3.5a, 4.1, 5.9, 6.1, 6.4 and 7.1 of the Code.

The decision is unanimous

Introduction

In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules"

The Factor became a Registered Property Factor on 7 November 2016 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

1. By application dated 3 July 2019 the Homeowner complained to the Tribunal that the Factor was in breach of Sections 1.1bAb, 1.1bBc, 1.1bCd, 1.1bCf, 1.1bCg, 1.1bCh, 1.1bDI, 1.1bDm, 2.1, 2.4, 2.5, 3.1, 3.2, 3.5a, 4.1, 4.3, 4.6, 5.9, 6.1, 6.3, 6.4, 6.6-6.9 and 7.1 of the Code. The Homeowner also complained that the Factor had failed to carry out its property factors duties by failing to provide the Homeowner a Written Statement of Services within the prescribed period in terms of the 2011 Act.
2. The Homeowner provided the Tribunal with copies of correspondence between the parties with regards to the issues concerning the Homeowner together with copies of the Constitution of Loch Tay Highland Lodge Park Owners Association, Extracts from Owners Associations AGMs, copy of the Management Agreement between Loch Tay Highland Lodge Park Limited and the Homeowner, and a copy of the draft Written Statement of Services.
3. By Notice of Acceptance dated 29 August 2019 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.
4. A hearing assigned for 30 October was postponed due to the non-availability of Joanne Barrie, Park Manager. A further hearing was assigned to take place on 4 December 2019.
5. The Homeowner submitted further written representations to the Tribunal by email dated 26 September 2019. The Factor did not submit any written representations to the Tribunal.

Hearing

6. A hearing took place at STEP Stirling on 4 December 2019. It was attended by the Homeowner. The Factor was represented by its Director Mr Rupert Barrett and Ms Joanne Barrie. The Tribunal requested that Mr Barrett provide some background information as to the history of the development.
7. Mr Barrett explained he had bought the development from the previous owner, Clive Booth in 2006. The development consisted of 45 lodges. They were permanent structures and the solum was conveyed to the purchasers. The land around the lodges was retained by the Factor's Company that was wholly owned by Mr Barrett.
8. Mr Barrett went on to explain that the previous owner, Mr Booth had all sorts of inclusions in the management agreement. This included free cleaning of the lodges and free painting of the exteriors. What had been included was not possible economically and following his purchase of the development Mr Barrett said he had a meeting with owners and had set up an Owners Committee and worked with the committee to restructure the management agreement in 2007

and agree to the removal of all the free benefits. Mr Barrett said that since that time there had been a constant process of improving the site. There had also been further development of another part of the site that did not form part of the land forming part of this application. .

9. Mr Barrett went on to say that in 2016 it had been suggested that his company should be a Property Factor and he had approached his solicitors, Biggart Baillie. They had indicated that this was something of a grey area but as it would be a criminal offence to carry out the role of a Factor and not be registered, he had arranged for the company to be registered as a Property Factor in November 2016. Mr Barrett went on to say that as Biggart Baillie did not have the necessary expertise to draw up appropriate Written Statement of Services he had approached a number of firms including CKD Galbraith before going to T C Young, Solicitors, for advice. Mr Barrett suggested that that firm had no real expertise in drafting the wording of a Written Statement of Services. They had pointed out that matters had been complicated by the fact that the title deeds did not bind owners to sign up to the management agreement. Generally, owners did agree to sign up and new owners were now required to sign up. T C Young had recommended either amending the owners title deeds or registering a Deed of Conditions or changing the Management Agreement.
10. Mr Barrett confirmed that the Owners Committee represented the owners in discussions with the company but that did not exclude individual owners taking action. He went on to say that the Committee were not prepared to agree to change the title deeds. He felt he had sometimes been given conflicting advice from his solicitors who had wished to examine every individual owners' title deed. In the end the decision had been made to draft a Written Statement of Services and this had taken some time. It was still in draft form as it had been his intention to agree its terms with the Committee. Mr Barrett said the Written Statement of Services had been produced in June this year and he understood had been voted on in November and he expected the result of the vote in December.
11. Mr Barrett confirmed that as well as being the sole owner of the company he was also the owner of eight of the lodges and was in the process of purchasing a further two lodges.
12. It was accepted by Mr Barrett that despite conflicting advice as to whether the company had become a Factor by custom and practice or by appointment of the owners by registering as a Factor the company was holding itself out as a Factor and was therefore subject to the provisions of the 2011 Act

Summary of submissions

Section 1.1bAb of the Code

13. The Homeowner advised the Tribunal that at the time of submitting the application no map of the development had been attached to the draft Written Statement of Services ("WSS"). This map identified the lower part of the site and excluded the top part that had been separately developed by the Factor's

company. The Tribunal noted that the access road although part of the area being factored was not identified on the map provided.

Section 1.1bBc of the Code

14. The Homeowner submitted that the WSS did not provide any minimum service delivery standards or target times. Ms Barrie said that a Service Level Agreement had been produced for the Owners Association AGM on 7 September 2019.

Section 1.1bCd of the Code

15. The Homeowner commented that the WSS did not specify how many properties contributed towards the maintenance costs. This was important as Mr Barrett owned a number of the lodges. It was accepted that the WSS did not specify the number of properties and that this would require to be addressed.

Sections 1.1bCf and g of the Code

16. The Homeowner explained that the WSS lacked any detail about the arrangements for repayment to an owner of funds that may be due on a change of ownership. Ms Barrie suggested that had been dealt with in Section 4 of the WSS but accepted that only dealt with payments that may be due by an owner to the Factor. It did not deal with occasions where for example an owner had made an advance payment for work that had not taken place prior to the sale of his property.

Section 1.1bCh of the Code

17. The Homeowner pointed out that the WSS was silent on how any additional fees and charges were calculated. It was accepted that the WSS was silent on this matter.

Section 1.1bDI and m of the Code

18. The Homeowner suggested that the WSS did not have any timescales for responding to enquiries or complaints received by email, letter or telephone. Ms Barrie referred the Tribunal to Section 8 of the WSS which did provide timescales for dealing with complaints. It was accepted however that the WSS did not have timescales for dealing with initial enquiries or complaints prior to the completion of a complaint form.

Section 2.1 of the Code

19. The Homeowner submitted that the Factor had provided her with false or misleading information with regards to lodge insurance and referred the Tribunal to Production 1.4. A provision in the Appendix to the Management Agreement was that "Loch Tay Highland Lodges will arrange insurance for all shared lodges and re charge the premium to individual owners on a pro rata basis." However, the Homeowner had been told in an email from the Factor that

as she had not paid her share of the insurance premium for her lodge the property would not be insured and if payment was not made that day the insurance would lapse and there would be additional administration charges. Furthermore Section 9 of the WSS confirmed that the Factor could arrange insurance for property owners.

20. For the Factor Ms Barrie said that the Factor had been told that they were not allowed to encourage owners to insure with one particular company. It was up to one co-owner to insure the property and recover the other owners share.
21. The Tribunal noted that it did not appear that the appendix to the management agreement had been changed despite apparently there being a change in the arrangements nor did it appear that owners had been notified of any such change.
22. The Homeowner cited Productions 1.5, 1.6 and 1.7 as further evidence of the Factor providing misleading or false information. She submitted that the Factor had attempted to claim in October 2018 that it was not yet the Factor despite having registered as a Factor in November 2016. The Homeowner complained that Ms Barrie had claimed in December 2018 that only Mr Barrett as landowner had the right to appoint the Factor but had then stated that in the future lodge owners may wish to appoint another factor. The Homeowner also suggested that it was misleading of the Factor to state in the Lodge Owners Association Newsletter of February 2018 that as it had been advised by its legal advisers that as the Management Agreement was never legally attached to the title deeds it has no relevance in the Property Factor's WSS and therefore the title deeds of all the lodges required amendment to allow for the appointment of a property factor. The Homeowners position was that homeowners with different title deeds can be provided with Property Factor Services through an agreed Service Level Agreement and referred the Tribunal to a decision in the case of Mr Craig Roberts v Morrison Walker Property Management Limited HOHP/PF/18/0035.
23. For the Factor Mr Barrett re-iterated that the advice from solicitors had been to amend the title deeds or to have a Deed of Conditions.

Section 2.4 of the Code

24. The Homeowner submitted that whilst the current management agreement required consultation with and the written approval of the lodge owners before providing services which require additional charges or fees the WSS did not have such a provision. It was therefore in breach of this section of the Code. The Homeowner went on to refer to Production 2.1, a series of email exchanges between Gail Gibson of the Owners Association and Ms Barrie in December 2018. The Homeowner suggested that this showed that the Factor had failed to abide by the Management Agreement by including additional costs that required to be agreed in advance with core services and calling the result an underpayment of the Annual Maintenance Charge.

25. For the Factor it was suggested that the terms of Section 3 of the WSS set out the basis on which additional fees could be charged but this was separate from underspends or overspends on the Annual Maintenance Charge. The Factor also referred to Section 4 of the WSS. It was acknowledged that it might be possible to have a float fund in place to deal with contingencies but that there was nothing in the WSS that provided for this.

Section 3. of the Code

26. With regards to the overriding objectives, the Homeowner suggested that there had been a lack of clarity and transparency in the Factor's accounting procedures and referred the Tribunal to Productions 1.5 and 2.1 mentioned above. With regards to the lack of ability to distinguish between Homeowners' funds and Factor's funds the Homeowner referred to Productions 2.1 and 2.2. Production 2.2 was an email from the Homeowner to Ms Barrie querying the calculation of the Annual Maintenance Charge for the six months to November 2018. Her position was that the basis of the charge was the previous years AMC +RPI. There had not been any exceptional costs intimated that would justify an additional charge. Ms Barrie's response had been to explain that the additional charge was in respect of an overspend in the year 2017/2018. The Homeowner in her response to Ms Barrie had indicated that there had been a number of disputed figures within the accounts and there had been a lack of consultation with owners before decisions on expenditure had been made.
27. With regards to Section 3.1 of the Code the Homeowner explained that the WSS did not provide for financial information being made available to homeowners who were selling their homes. Furthermore, in respect of Section 3.2 of the Code as had been mentioned earlier there was no provision within the WSS about returning any funds due to a homeowner on the sale of the property.
28. With regards to Section 3.5a of the Code the Homeowner's position was that there was no provision made in the WSS for holding homeowners' funds in a separate account.
29. For the Factor Mr Barrett confirmed that the cost to owners varied according to the size of the lodge and the extent of ownership. As an example, a one quarter share of a two bedroom lodge like that of the Homeowner cost about £500.00 every six months. Mr Barrett went on to say the Management Charge element of that was approximately 15-16%. He said that in 2007 a points system had been devised to apportion the costs between the lodges and the park and this had produced a charge which was then increased each year in line with the RPI. Mr Barrett confirmed that the funds paid by Homeowners were paid directly into his company's own bank account. Homeowners funds were not kept in a separate client account. He suggested it would add additional costs to operate a separate account. He acknowledged it was a provision of the Code that homeowners' funds must be kept in a separate account. Ms Barrie acknowledged that the WSS did not contain provision for making financial information available to homeowner's who were selling their property and as previously acknowledged did not make provision for returning funds to

Homeowners following a sale. She said that the WSS would require to be amended.

30. The Homeowner submitted that there was a lack of clarity and transparency in the way in which the Factor submitted its accounts and that this had been an ongoing problem for some time. In response to a query from the Tribunal it was confirmed that the invoices issued to the Homeowners contained little detail other than the amount due. Mr Barrett explained that the Owners Committee was sent the audited accounts for comment and it would be open to individual owners to inspect the accounts upon request.

Section 4 of the Code

31. The Homeowner said that with regards to Section 4.1 of the Code the WSS failed to state how the Factor would deal with disputed debts. Ms Barrie accepted this was the case.
32. With regards to Section 4.3 of the Code the Homeowner submitted that the charges imposed for late payment were excessive with it being possible to incur a late payment charge of £100.00 on a late payment of an £80.00 bill. For the Factor Mr Barrett said there was a need to ensure that bills were paid timeously and there were costs involved in chasing payment. It was therefore reasonable to charge an administration fee. Ms Barrie commented that perhaps the timescales for imposing charges could be extended and clarified in the WSS.
33. With regards to Section 4.6 of the Code the Homeowner explained that she felt that the Factor was not keeping homeowners properly informed of any debt recovery problems simply by giving details at the AGM when it was known that not all owners attended that meeting. In response Mr Barrett said that there had in the past been one particular problem with an owner. There were restrictions under the data protection legislation as to what could be disclosed to homeowners.

Section 5.9 of the Code

34. According to the Homeowner the Factor as owner of the land should provide homeowners with details of its public liability insurance and how any share of the cost of this is apportioned to homeowners.
35. In response Mr Barrett said that this was a matter that had been determined by agreement with the Owners Committee.

Section 6 of the Code

36. With regards to Section 6.1 of the Code the Homeowner suggested the Factor did not have procedures for providing homeowners with reports on the progress of works and timescales for completion. She was also not aware of any agreed cost threshold that would preclude this. In response Ms Barrie said that there was a log kept of matters requiring repair reported by homeowners. There was no maximum spend agreed. Ms Barrie said she always responded to a Homeowner to let them know what was happening.

37. With regards to Section 6.3 of the Code the Homeowner said she was not aware as to how and why the Factor decided to use in-house staff or an external contractor but was unable to provide specific examples and subsequently accepted that this part of her complaint was not applicable.
38. With regards to Section 6.4 of the Code the Homeowner submitted that she had not been aware of any planned programme of cyclical maintenance as there was no site plan and no appendix to the WSS giving the frequency of service. Ms Barrie explained to the Tribunal that the Committee had now been provided with a Service Level Agreement that dealt with these matters. This was acknowledged by the Homeowner but still had not been incorporated into the WSS.
39. With regards to Sections 6.6-6.9 of the Code it was the Homeowner's position that she was not aware of any fees or commission or other benefit that the Factor received from a contractor or insurance company and with regards to pursuing a contractor for defective work the WSS was silent on this matter. Mr Barrett confirmed that the Factor did not receive any commission from contractors. A referral fee was paid by the insurance company for the insurance of homeowners' properties.

Section 7 of the Code

40. The Homeowner complained that the complaints section of the WSS did not provide a timescale for handling a homeowner's initial complaint.
41. Ms Barrie acknowledged that whilst the WSS provided a timescale for dealing with a complaint once a completed complaint form had been submitted it did not provide a timescale for dealing with any initial complaint and accepted the WSS would require to be amended.

Property Factors Duties

42. With regards to the Factor failing in its Property Factors Duties the Homeowner's position was that the Factor had failed to follow the Code. It had failed to provide a WSS within the prescribed time. Furthermore, it had said that the homeowners were required to change their title deeds to allow the Loch Tay Highland Lodge Park Limited to act as Factor when this was not correct as it was only a suggestion from its legal advisers. The Homeowner also submitted that it was not the case, as she had been told, that only the landowner could appoint an alternative Factor.
- 43 Mr Barrett acknowledged the need to comply with the Code having taken the decision to register as a Property Factor. He explained that the matter had not been at all straightforward and that he had tried to take advice from experts and to liaise with the Owners Committee to reach agreement on the terms of the WSS and this had all taken time but progress was being made. There was an issue with tying in owners to an agreement if it was not written into their titles.

Final Submissions

43. The Homeowner emphasised the need for clarity and transparency in the communications and dealings between homeowners and the Factor. She felt the role of the Owner's Association was not clear and that it was important that she as an individual homeowner could communicate directly with the Factor and obtain a response within agreed timescales. She also submitted that there needed to be a resolution to issues over disputed debt. In this regard she explained that the agreement that was reached with the management company in 2007 provided for a fixed price that could increase each year in line with the RPI. It did not make any provision for an underspend or overspend in any year being carried forward or charged as an additional charge. There was within the management agreement provision for additional charges. In the last bill sent to her the Factor had charged £537.95 for the previous six months but the charge according to the agreement ought to have been £490.72. The Homeowner said she had paid the lower amount and was disputing liability for the additional amount.
44. For the Factor Mr Barrett said that the way in which the system operated inevitably meant that some years there would be an underspend and others an overspend and it was only reasonable to recover the overspend from the homeowners as they were benefiting from the services that were being provided. He agreed that there was a need for clarity and transparency but submitted that this was the case the Owners Association were kept fully informed and could challenge the accounts if they wished. As he had previously indicated he had spent a lot of time and money taking advice on preparing the WSS and how best to deal with the issues over the titles. As the landowner he believed he would have the right to approve any alternative Factor should the homeowners wish to go down that route. There would in his view be likely to be additional costs to homeowners if another Factor was appointed and then his company would continue with the management of the Park.

The Tribunal make the following findings in fact:

45. The Homeowner is the one quarter owner of the lodge known as Milton Bay, Loch Tay Highland Lodge Park, Milton Morenish Estate, Killin ("the Property")
46. The Property is a lodge within the Loch Tay Highland Lodge Park, Milton Morenish Estate, Killin (hereinafter "the Development").
47. The Factor has performed the role of the property factor of the Development since registering as a Factor on 7 November 2016.
48. The Factor produced a draft Written Statement of Services in June 2019.

49. The Factor has failed to provide the Homeowner with a Written Statement of Services within one year of initial registration as a property factor.
50. The draft Written statement of Services is in breach of Sections 1.1bAb, 1.1bBc, 1.1bCd, 1.1bCf, 1.1bCg, 1.1bCh, 1.1bDI and 1.1bDm of the Code.
51. The Management Agreement entered into between the Homeowner and the Factor provides that the Factor will arrange the insurance of lodges and recharge sharing owners.
52. The Factor wrote to the Homeowner advising that her property would not be insured unless the premium was paid.
53. It is not essential to amend the Homeowner's title deed to incorporate the appointment of a Factor.
54. The Annual Maintenance Charge levied by the Factor was calculated in 2007 and is subject to an annual increase. There is a separate provision within the Management Agreement for calculating additional charges.
55. The draft Written Statement of Services made no provision for providing financial information to homeowners or repayment of homeowner's funds on the sale of their property.
56. The Factor did not lodge homeowners' funds in a separate bank account.
57. The draft Written Statement of Services did not deal with disputed debts.
58. The proposed late payment charges in the draft Written Statement of Services were not unreasonable.
59. The method of reporting outstanding debt at the Owners AGM or Owners meeting was acceptable.
60. The Factor receives a referral fee for arranging homeowners' insurance. This has not been disclosed to the Homeowner.
61. The draft Written Statement of Services did not in its section dealing with complaints provide a timescale for dealing with a homeowner's initial complaint.

Reasons for Decision

Section 1 of the Code

62. It was conceded by Mr Barrett on behalf of the Factor that there had been a breach of the Code in that the WSS had not been issued even in draft form until June 2019 when it ought to have been issued to Homeowners in November 2017. It was apparent to the Tribunal that the preparation of the WSS had been complicated by the lack of provision in homeowners' titles however that did not in the Tribunal's view permit the Factor to absolve its responsibility to prepare and issue a WSS timeously. The concern the Factor had to ensure that all homeowners would be bound to accept the Factor and be bound by its written terms could in the Tribunal's view be overcome with an appropriate Service Level Agreement. It would also be possible to bind future owners by making it a condition that owners bind singular successors on transfer or sale to accept the terms of the Service Level Agreement. In that way there would be no need for any amendment to homeowners' title deeds or the registration of a Deed of Conditions.

63. It was apparent and accepted by the Factor that the draft WSS was deficient in a number of areas and required amendment. In particular the sections dealing with the provision of a site plan, the Service Level Agreement, the number of properties contributing, repayment of owners' funds calculation of additional charges and timescales for responding to enquiries and complaints. The Tribunal acknowledge that it will take some time to finalise the WSS.

Section 2.1 of the Code

64. The Tribunal was satisfied that the correspondence sent by the Factor regarding insurance was at odds with the terms of the Management Agreement and was therefore misleading. It may well be that in light of advice from its brokers the Management Agreement requires amendment but that has not happened to date.

65. The information with regards to the amendment of homeowners' title deeds and the appointment of an alternative Factor as stated in the documents produced by the Homeowner was perhaps somewhat confusing but in the Tribunal's view fell just short of being false or misleading. The Tribunal was satisfied that although amendment of the homeowners' title deeds or the registration of a Deed of Conditions might well be the preferred option it would be possible for the Factor to achieve an acceptable outcome through an appropriate Service Level Agreement.

66. Given the Tribunal's decision in paragraph 65 above the Factor was in breach of this section of the Code.

Section 2.4 of the Code

67. It did appear to the Tribunal that the Factor's calculation of the Annual Maintenance Charge by including an overspend from previous years was flawed as it did not reflect the principle on which the AMC had been agreed with Homeowners in 2007 of a fixed charge plus RPI. Additional charges should have been calculated separately or the base figure ought to have been amended through agreement with homeowners.

Section 3 of the Code

68. The Tribunal was unable to conclude that there was a lack of clarity and transparency in the financial information provided to the Homeowner by the Factor. It did not have sufficient detailed information before it to draw such a conclusion. It was apparent however that as indicated above the AMC had been incorrectly calculated.
69. It was accepted by the Factor that the WSS had no provision for returning funds to a homeowner on the sale of a property. This was a breach of Section 3.2 of the Code.
70. It was accepted that homeowners' funds were not being kept in a separate fund and were therefore at risk if the Factor became insolvent. This was a clear breach of Section 3.5a. of the Code.

Section 4 of the Code

71. The Factor accepted that the WSS did not have a procedure for dealing with disputed debts and would require amendment. There was therefore a breach of Section 4.1 of the Code.
72. Any late payment charge imposed by the Factor should reflect the administrative cost involved and should not be penal. On the basis that the maximum charge imposed on a homeowner prior to instructing solicitors would be £100.00 this did not appear to the tribunal to be excessive. The Tribunal felt it was not the level of the original debt that was important but the work involved in corresponding and communicating with homeowners. The Tribunal did not consider there was a breach of Section 4.3 of the Code.
73. The Tribunal recognise that due to data protection legislation there are restrictions on the Factor as to the information that can be disclosed to Homeowners regarding other homeowners' debt issues. The frequency of reports to homeowners will vary according to the type of development but it is not uncommon for Factors to report debt issues at owners meetings and AGMs and the Tribunal was satisfied that in the current circumstances the procedures set out by the Factor were not in breach of Section 4.6 of the Code.

Section 5.9 of the Code

74. There is a requirement for the Factor to provide homeowners on request with clear details of the costs of public liability insurance and how their share is calculated, what the terms are and the name of the company providing the insurance cover. Whilst the division of cost may have been agreed with the Owners Committee that does not mean that the Factor can refuse to provide the information to an individual homeowner if requested to do so. It did therefore appear to the Tribunal that there was a breach of this section of the Code.

Section 6 of the Code

75. It was accepted that homeowners were able to report matters requiring repair, maintenance or attention and that a log was kept of such reports. What was missing from the WSS were timescales for completion of works and the making of job specific reports. It appeared that these were addressed in the Service Level Agreement (which was not produced) but as matters presently stood did not form part of the WSS and the Factor was therefore in breach of Section 6.1 of the Code.
76. It was accepted by the Homeowner that she could not direct the Tribunal to a specific instance of an alleged breach of Section 6.3 of the Code and therefore the Tribunal did not consider the Factor was in breach of this section of the Code.
77. Once again it was accepted that as matters stood the WSS was deficient in specifying any programme of planned cyclical maintenance but this was apparently addressed in the Service Level Agreement. As matters stood however it appeared to the Tribunal that there was a breach of Section 6.4 of the Code.
78. It did not appear to the Tribunal that there was any tendering process that had taken place to which the Homeowner had requested and been refused documentation. The tribunal therefore did not consider there had been a breach of Section 6.6 of the Code.
79. It did not appear from the evidence available to it that the Factor had received any commission from a contractor appointed by it and therefore there was no breach of Section 6.7 of the Code.
80. The Factor confirmed that it received a referral fee from an insurance company for referring homeowners to it and that payment was not disclosed to homeowners. Whilst therefore there may not have been a breach of Section 6.7 of the Code there was a breach of Section 5.3 of the Code but this did not form part of the Homeowner's complaint.
81. The Tribunal did not consider there was any evidence before it to support the Homeowners complaint that the Factor has failed to pursue a contractor for inadequate work or service. There was therefore no breach of Section 6.9 of the Code.

Section 7.1 of the Code

82. It was accepted by the Factor that the WSS was lacking in that it did not provide a timescale for dealing with a Homeowner's initial complaint and that amendment was required. The Tribunal was therefore satisfied that there was a breach of Section 7.1 of the Code.

Property Factors Duties

83. Whilst the Tribunal accepted that prior to taking the decision to Register as a property Factor there may have been some doubt in Mr Barrett's mind as to whether or not registration was necessary, the fact remains that upon registering and thereafter assuming the role of Factor there was an obligation in terms of the Code to provide the Homeowner with a WSS within a period of one year of initial registration. By failing to provide the WSS by 7 November 2017 the Factor was in breach of its duties. It ought to have known that whilst amendment of all the homeowners title deeds or the registration of a Deed of Conditions may have been a recommended option it was unlikely to find favour with all of the owners involved particularly if it would involve them in legal costs. The alternative solution of a service level agreement that could incorporate conditions to ensure that future owners would be bound to accept following a transfer or sale would in the Tribunal's view be appropriate. A delay of over three years without there still being a finalised WSS was simply not acceptable to the Tribunal. Whilst it may have been the Factor's wish to reach a consensus with the Owners Association over the terms of the WSS that was not an excuse for the delay. In the circumstances the Tribunal did not consider it appropriate that the Factor should be charging the Homeowner a management fee throughout a period when there should have been a WSS in place. The Tribunal was advised that the homeowner paid about £1000.00 per year to the Factor for her share of the property. The management fee element of that amounted to about 15%. The WSS should have been in place by November 2017. It is now some two years late. The Tribunal is therefore of the view that the homeowner should not have to pay the management fee element of the Annual Management Charge for the period since November 2017.
84. The Homeowner has asked the Tribunal to comment on the suggestion that only the Factor in its capacity as Landowner can appoint an alternative Factor. However, for the Tribunal to do so would in the Tribunal's view go beyond its remit as at present neither the Homeowner nor the Factor are proposing that the Factor be replaced and the Tribunal is unable to offer advice to a party.
85. The Tribunal did accept that as the calculation of the Annual Maintenance Charge was based on the figure agreed between the Factor and the Owners Association in 2007 plus RPI. Any additional charge to be levied would have to be dealt with by way of the procedure set out in the Management Agreement Regulations at Clause 1.4. There was no provision within Clause 1.3 of the Regulations to deal with either an overspend or an underspend in any year. The Tribunal was therefore satisfied that the Homeowner had been overcharged by about £47.00 on her last invoice from the Factor.
86. The Tribunal noted that some progress was being made by the Factor with the drafting of a Service Level Agreement and the preparation of the somewhat inadequate draft WSS. It was apparent that the Factor still had some way to go to complete what was required of it. It did appear however that there was a willingness on the part of the Factor to bring matters to a conclusion as soon as possible. Nevertheless, the Tribunal was of the view that given the numerous breaches of the Code and the failure to carry out its property factors duties it was necessary to make a Property Factor Enforcement Order. The Tribunal

also considered it appropriate to make a financial award to the Homeowner to reflect the Factor's breaches of its duties and the Code and the distress, worry and inconvenience caused to the Homeowner.

Proposed Property Factor Enforcement Order

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

Appeals

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

 Graham Harding Legal Member and Chair

29 December 2019 Date