Notice of proposal to make a Property Factor Enforcement Order made under Section 19(2)(a) of the Property Factors (Scotland) Act 2011 ("the Act") following upon a Decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under Section 17(1) of the Act

Chamber reference: HOHP/PF/16/1001

The Property: 26 Sharpe Place, Montrose DD10 9FH ('the property')

The Parties:

Michael Holm, Lornty Bank, Main Road, Hillside, Montrose DD10 9HT ("the homeowner")

Atholls Limited, incorporated under the Companies Acts in Scotland (SC324592) and having their Registered Office at Johnstone House, 52-54 Rose Street, Aberdeen AB10 1HA ("the property factors")

Tribunal Members – George Clark (Legal Member) and Helen Barclay (Ordinary Member)

This document should be read in conjunction with the Tribunal's Decision under Section 19(1)(a) of the Act of the same date.

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

"Within 14 days of the communication to the property factors of the PFEO, the property factors shall send to the homeowner a letter of apology for their failure to respond to the homeowner's e-mail to them of 17 October 2016 and shall pay to the homeowner the sum of £50 by way of compensation for the upset and inconvenience caused to him by the failure of the property factors to respond to his e-mail within prompt timescales."

Section 19 of the Act provides as follows:

"... (2) In any case where the tribunal proposes to make a property factor enforcement order, they must before doing so...

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

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

(3) If the tribunal are satisfied, after taking account of any representations make under subsection (2)(b), that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty, the committee must make a property factor enforcement order…"

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

Failure to comply with a property factor enforcement order may have serious consequences and may constitute an offence.

..... G Clark .....Legal Member/Chair Date...1 May 2017..

Decision of the First-tier Tribunal for Scotland Housing and Property Chamber issued under Section 19(1) of the Property Factors (Scotland) Act 2011 ("the Act") and The First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016, in an application made to the Tribunal under Section 17 of the Act

Chamber reference: HOHP/PF/16/1001

The Property: 26 Sharpe Place, Montrose DD10 9FH ('the property')

The Parties:

Michael Holm, Lornty Bank, Main Road, Hillside, Montrose DD10 9HT ("the homeowner")

Atholls Limited, incorporated under the Companies Acts in Scotland (SC324592) and having their Registered Office at Johnstone House, 52-54 Rose Street, Aberdeen AB10 1HA ("the property factors")

Tribunal Members – George Clark (Legal Member) and Helen Barclay (Ordinary Member)

Decision by the Housing and Property Chamber of the First-tier Tribunal for Scotland in an application under section 17 of the Property Factors (Scotland) Act 2011('the Act')

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in that they have failed to comply with Section 2.5 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.

The Tribunal proposes making a Property Factor Enforcement Order in respect of the failure by the property factors to comply with their duties under Section 14 of the Act.

The Decision is unanimous.

Introduction

In this decision, the Property Factors (Scotland) Act 2011 is referred to as "the Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code of Conduct" or "the Code"; the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 as "the 2012 Regulations"; the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations as "the 2016 Regulations"; the Homeowner Housing Panel as "HOHP"; and the Housing and Property Chamber of the First-tier Tribunal for Scotland as "the Tribunal".

The property factors became a Registered Property Factor on 7 December 2012 and their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to the application by the homeowner received on 24 January 2017 with supporting documentation, namely a letter from the property factors to the homeowner dated 4 July 2016, with which was enclosed a copy of their Written Statement of Services, a letter from the property factors to the homeowner dated 17 October 2016, responding to the homeowner's complaint of 7 October, a copy of a Final Notice from the property factors dated 17 November 2016, showing an amount due of £650.68, an e-mail from the homeowner to the property factor dated 17 October 2016, responding to their letter of the same date (which had been e-mailed to him earlier that day), a further e-mail from the homeowner to the property factor dated 30 November 2016, setting out the Sections of the Code of Conduct with which, according to the homeowner, the property factors had failed to comply, a letter from the property factors' solicitors to the homeowner dated 2 December 2016, with follow-up e-mails dated 5 December, the property factors' final response to the complaint, dated 20 January 2017 and the homeowner's letter to the Tribunal dated 22 January 2017, confirming that he had a written response from the Managing Director, but was not satisfied with the outcome, so wished to proceed with the application to the Tribunal. The property factors did not make any written representations to the Tribunal.

Summary of Written Representations

The following is a summary of the content of the homeowner's application to the Tribunal:-

The homeowner had written to the property factors' Managing Director on 30 December 2016, detailing the sections of the Code of Conduct with which they had not complied. These were:-

Section 1. The first communication the homeowner had received from the property factors had arrived 11 months after they had taken over the contract. This was well beyond the four weeks within which they were required to contact new clients. They had, he said "assumed" that they knew who all the owners were, but the homeowner

found this unacceptable and stated that the property factors' lack of due diligence had resulted in a complete absence of information being sent to him, including their Terms and Conditions, welcome pack with the Statement of Services and the important matter of a large accruing bill for factoring services.

Section 2.2. The homeowner had felt intimidated by the property factors' handling of his complaint. Rather than sending a reply within the correct timescales, he had been sent debt reminders and a letter from their solicitors, putting him on notice, with regard to his stated intention to report the property factors to their governing body, that any defamatory statements made about them might be actionable. The homeowner found this unfair and intimidating. He had never made any threats of reporting them, but had stated that if the matter could not be resolved, he would take it to HOHP.The homeowner had never made any defamatory remark about the property factors. Everything he had written and complained about was fact. The solicitors had made that statement without having any reason for doing so and he found the tone of the letter very aggressive.

Section 2.5. The homeowner felt that the property factors had had no regard to his complaint. Having gone through their complaints procedure via e-mail and finding that the lower tiers of the company were unable to deal with it, he had then been left to await a response from the Managing Director. In their complaints procedure, the property factors stated that if he was not happy with the initial response to his complaint, it would then be considered by the Managing Dirsctor, who would provide a final written response in writing, within 21 days of receipt. To date, he had not received a written reply from the Managing Director. Roughly 40 days after the homeowner had asked for his complaint to be referred to the Managing Director, he had received, instead of a letter, a debt collection letter. He had then telephoned the property factors and asked to speak to the Managing Director, Mr Walker. Mr Walker had called him back and, during the conversation, had told the homeowner that the company was too big to be checking the property register for Scotland as a means of finding out who the owners of properties were. He had also stated that they "assumed" they knew who owned the property and that it was the homeowner's problem that he did not know who the factors were. The homeowner had then asked if he could bring his solicitor into the call on a conference call, but this had been declined by Mr Watson, who had said he had raffle tickets to sell and if the homeowner had anything more to complain about, he should take the matter to HOHP. The homeowner stated that he had offered to pay the sums that had accrued since the property factors had first contacted him, but the property factors had said that they would also chase him for the amount outstanding from the period before they had contacted him. The homeowner felt that the property factors had shown no regard for the due process of the complaints procedure. In his view it was quite simple - he wanted the property factors to remove the part of their bill that had accrued during the time they had neglected to communicate with him.

Section 4.9. The homeowner's reasoning was the same as for his complaint under Sections 2.2 and 2.5. He felt intimidated by their handling of the complaint, sending him debt reminders and a solicitors' letter rather than replying appropriately to the complaint.

Section 7.2. The homeowner had never received a final response to his complaint, so had not been advised of his right to take the matter to HOHP.

The homeowner wanted the property factors to write off all but £440 of the outstanding debt and to credit his account with £500 by way of compensation for the time that he had spent in trying to have his complaint resolved.

The homeowner stated in the application that the property factors had failed to comply with Sections 1, 2.2, 2.5, 4.9 and 7.2 of the Code of Conduct.

The homeowner submitted with his application a number of items of supporting paperwork. These included a letter dated 2 December 2016 sent to the homeowner by the property factors' solicitors intimating that if the homeowner did not pay in full within 7 days the outstanding sum of £650.68, with interest thereon at 5% until payment and a deposit of £250 to the factoring float, the property factors would proceed with court proceedings and would be seeking in addition to the sum outstanding, the expenses of the action and the court rate of interest of 8%. In the letter the solicitors stated that the e-mail exchanges between the parties "seem to point to a case of you transferring your issues with your former partner onto Atholls who, throughout the whole matter, have acted in the utmost good faith. You have threatened to report them to their governing body...and you are put on notice that any defamatory allegations made about them may be actionable."

The supporting documentation also included the homeowner's e-mailed reply of 5 December 2016, in which he stressed that his reason for taking the matter to HOHP was that the property factors had not gone through their complaints procedure. He stated that he found the tone of their letter extremely stressful and that he felt threatened by it. The solicitors for the property factors responded later that day to the effect that they regarded the homeowner's e-mail "as a further delaying tactic. The sum is overdue and payable. We are not involved in any complaints procedure nor are we prepared to await the outcome of that. Unless payment is received by us by the end of this week proceedings will follow as previously advised."

The homeowner attached to the application a copy of a letter he had received from the property factors dated 20 January 2017. It was the response of their Managing Director, Mr Walker, to the homeowner's letter of complaint dated 30 December 2016 which, it said, had been received by recorded delivery on 6 January 2017.

Mr Walker said that he had reviewed the notes and also the e-mails and correspondence between the parties and he responded by reference to the various sections of the Code of Conduct, as follows:-

Section 1. When the property factors had been appointed to take over the management of Lochside Court, Sharpe Place, Montrose with effect from 17 August 2015, the incumbent factors had refused to provide a list of proprietors' names and addresses either to them or to the owners' association, citing data protection regulations. The members of the owners' association who had previously visited all the properties on several occasions to obtain details to enable them to form the association provided the property factors with information detailing the owner occupier of Flat 26 as Ms Kathryn Fenton. That information had been accepted by the property factors in good faith, as they had no reason to consider that there might be discrepancies. All the relevant correspondence issued to proprietors had been sent to Ms Fenton at the property on 12 August 2015. This included the welcome letter, welcome pack and agreed budget. The property factors did not, therefore, agree that they had failed in their duty to provide accurate information within the required timeframes. The fact that the homeowner was not resident in the property was unknown to them at the time and Ms Fenton had to their knowledge made no reference either to them or to the owners' association to her being a joint owner of the property. In the circumstances, they had had no reason to carry out any further investigation into the ownership of the property and it was natural to expect that a joint owner would pass on any relevant information to the other joint owner. The homeowner and/or Ms Fenton would also have received correspondence from the previous factors, with a final account and return of the deposit those factors held, so Mr Walker concluded that it was difficult to accept that neither the homeowner nor Ms Fenton was aware of the changes and the communications issued in relation to the property.

Section 2.2. The Managing Director strongly refuted the allegation that the property factors had been in any way abusive or threatening, going so far as to say that the property management team had been very amenable and sympathetic to the homeowner's predicament and had offered a solution via a payment plan to spread the cost.The homeowner had advised that he was unwilling to pay for anything prior to May 2016 and the property factors had advised him correctly that this was not acceptable. He stated that both Ms Fenton and the homeowner were jointly and/or individually liable and would be pursued legally for the recovery of any outstanding factoring debts. They had even offered to waive the the deposit of £250, provided the account was settled in full and brought up to date. The property factors had a duty of care and a responsibility to all the other proprietors to pursue non-payment of communal expenditure and factoring charges as referred to in the Ded of Conditions.

Mr Walker said that the property factors endeavoured to treat all clients with dignity and respect. He was sorry if the homeowner felt intimidated, as that was certainly not the intention, and there was nothing intimidating or out of the ordinary contained within the reminders about the outstanding account.He also saw no issues with the letter issued by their legal representative and the subsequent exchanges.

Section 2.5. Mr Walker stated that, having spent a considerable amount of time reviewing all of the information available including records relating to telephone calls, e-mails and correspondence, he was of the opinion that the homeowner's complaint had from the beginning been correctly dealt with and handled. He accepted that the homeowner had not received a response from the managing director until now, but that was because the homeowner had not followed the complaints procedure correctly. The property factors had stated in their letter of 17 October 2016, in line with their complaints procedure, that if the homeowner was unhappy with the response to his initial complaint, he had to address his complaint in writing, setting out the basis of his complaint and confirming that he should receive a written response within 21 days. The property factors had received no such written response and, in the absence of such a response, one calendar month later, on 17 November 2016, a final notice for £658.68 was issued.In a telephone conversation with Mr Walker on 21 November 2016, the homeowner had confirmed he had received both the e-mailed and posted versions of the letter of 17 October, despite having told a member of staff in a telephone call earlier that day that he had had no response to his e-mail of 3 October and that, if he did not receive a call back by the end of that business day he would report the property factors to HOHP. He had failed to respond to the letter of 17 October, so did not receive a response from the managing director. This letter (20 January 2017) was the managing director's response to the homeowner's formal letter of complaint which had been received on 6 January, so was within the 21 day response period set out in the complaints procedure.

Section 4.9. Mr Walker stressed that the correspondence that the homeowner had received both from the property factors and their legal representative had not been threatening or abusive and was in line with the normal procedures for the recovery of outstanding debts employed by all commercially run companies.

Section 7.2. Mr Walker said that the property factors had followed the complaints procedure as set out in the information provided to the homeowner. In the letter they had sent on 17 October 2016, they had clearly stated that if the homeowner was unhappy with or disagreed with the content of the letter, he could, as per their complaints procedure, write to them detailing the reasons why. The homeowner had not responded in writing, but rather had phoned their offices on 21 November and advised that he was still awaiting a response to an e-mail he had sent to the property factors on 3 October and if he did not receive a call back by the end of that business day, he would be reporting them to HOHP. After some discussion, the homeowner had said that he had to end the call, but that he would call back later . He called back shortly thereafter and requested during that conversation a 3-way conversation with his solicitor. Mr Walker had refused that, as it did not form part of their complaints procedure, but had offered a 4-way conference call the following day which had to include the property factors' legal representative. With regard to ending the second

call, Mr Walker had had a previous appointment to attend as he had advised the homeowner during both telephone conversations.

Mr Walker then pointed out that, in his e-mail of 3 October 2016, the homeowner had said that he had had no communication from his ex-partner (Ms Fenton) for three years regarding the flat, while she was living there. She had told him at the end of April that she was moving out and she had left a considerable amount of unpaid mortgage payments for him to deal with. It had only been at the beginning of July 2016 that he had found out that she had left an outstanding factoring bill. Mr Walker said that it would seem that the situation had come about due to the breakdown of the homeowner's relationship and the lack of communication between the homeowner and his ex-partner, rather than the property factors not fulfilling their duties correctly and repeated again that as joint owners both the homeowner and Ms Fenton were jointly and individually liable for all management costs. He therefore expected the account to be settled in full within one month, failing which the property factors would pursue recovery from both the homeowner and Ms Fenton if she could be traced.

Mr Walker concluded by confirming this was his final decision on the matter and provided the address of the Tribunal, should the homeowner still be of the opinion that the property factors had somehow failed in their duties.

THE HEARING

A hearing took place at Montrose Public Library, 214 High Street, Montrose DD10 8PH on the morning of 31 March 2017. The homeowner was present at the hearing. The property factors were represented at the hearing by Jacqueline Mair, Property Manager and one of their Directors, by Scott Denniston, Property Manager and by Alistair Walker, their managing Director and Senior Surveyor. Ann MacDonald, an Ordinary Member of the Tribunal attended the hearing as an Appraiser and the Clerk to the Tribunal was Shauna Corr.

Summary of Oral Evidence

The chairman told the parties that they could assume that the Tribunal members had read and were completely familiar with all of the written submissions and the documents which accompanied them. He then invited the homeowner to address the Tribunal with reference to his complaints under each Section of the Code of Conduct. The wording of the relevant portions of each Section of the Code included in the application is set out below, followed by a summary of the oral evidence given by the parties in respect of that Section.

Section 1. "You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner...You must provide the written statement..to any new homeowners within four weeks of agreeing to provide services to them."

The homeowner told the Tribunal that he had phoned the property factors when he received their bill in July 2016, to tell them that Ms Fenton was responsible for the debt. Prior to that, he had had no knowledge of their appointment and had never received their Written Statement of Services. In his view, the property factors should have carried out checks at the Land Register to ascertain the identity of homeowners when they took on the factoring and should not have relied on information given by another resident. Even if they had not done this at the time, they could and should have carried out that simple check when it became apparent that the person to whom the bills were being sent was not paying them or communicating with them.

The property factors stated that when the list of owner-occupiers/owner-landlords was handed over by the Owners' Association that had been formed, they had had no reason to think it might not be accurate. They understood that Ms Fenton had confirmed to the Owners' Association at that time that she was the owner of the property and that she had attended the meeting at which the committee of the Association was appointed.The property factors had picked up on the arrears at the second round of 6-monthly billing and their Finance team had said there had been no reponse to the first bill, which had been sent on 3 March 2016, or to the reminders sent on 28 March, 3 May and 30 May. At this point, they had checked the Landlord Registration system and discovered that the homeowner had registered as a landlord on 29 April 2016. This was the first time they had heard of Mr Holm. They had, accordingly, written to him in July at the address given on the Register.

The property factors told the Tribunal that it was quite normal to start with a list of owners provided by a residents' association and it would only be when the association did not know who owned a particular property that they would have to make further enquiries. Ms Fenton had said nothing to the Owners' Association about being a co-owner and, even if she had, they would have communicated with the co-owners of a property at the property address. It would have cost £20 plus VAT to obtain a copy title record from Register House.

Section 2.2. "You must not communicate with homeowners in any way which is abusive or intimidating, or which threatens them (apart from reasonable indication that you may take legal action)."

The homeowner confirmed that this element of the complaint related to the letter of 2 December 2016 that he had received from the property factors' solicitors, Ledingham Chalmers LLP. The content of the letter and its impact on the homeowner have already been set out in the summary above of the homeowner's written

representations to the Tribunal. The property factors told the Tribunal that the letter had been sent as they felt there was deadlock between the parties and that they would not have seen the letter before it went out.They had not suggested there had been any defamatory comments made by the homeowner. The homeowner had said that if the property factors did not let him off with the arrears, he would report them to HOHP. The property factors regarded this as threatening and that might explain the wording used by their solicitors.The statement in the letter that they were not prepared to enter into further debate referred to the non-payment of arrears. They had reached the point where they had had correspondence and phone calls and had offered a payment plan and had offered to waive the £250 deposit, but the homeowner simply refused to pay. By law, it was a joint and several liability.

Section 2.5. "You must respond to enquiries and complaints received by letter or email within prompt timescales...and keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement."

The homeowner confirmed to the Tribunal that his complaint under this Section related to his e-mail to the property factors of 17 October 2016 and that there was no requirement in the property factors' complaints procedures to send a letter by registered post to the managing director. He had already detailed his complaint and was of the view that his e-mail of 17 October 2016 made it clear that he was not satisfied with the response and would not be paying anything towards the accrued sum until the matter had either been resolved or reviewed by HOHP.

The property factors responded that the e-mail did not detail the complaint, so they had expected a further letter. When that did not arrive within a calendar month, they sent a payment reminder. In response to a question from the homeowner as to whether the property factors should have sent a further e-mail asking the homeowner to clarify whether he remained unhappy with the outcome, they repeated that in order for them to facilitate that, the homeowner would have had to detail why he was unhappy.

There was a discussion about the use of the words "resolved or reviewed by the Homeowner housing panel" in the homeowner's e-mail of 17 October 2016. The Property factors told the Tribunal that they understood both steps to refer to HOHP, and that the homeowner had said that if they did not comply with his wishes, he would go to the HOHP. The homeowner, however, said that his intended meaning was clear, namely that matters would either be "resolved" by the property factors or "reviewed" by HOHP.

Section 4.9. "When contacting debtors you, or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action".

The homeowner confirmed to the Tribunal that his grounds for complaint under this Section were the same as those relating to Section 2.2 of the Code of Conduct. He told the Tribunal that originally he was living in the property, but he then moved out and put a tenant in. When the tenant moved out, Ms Fenton moved in. He stated in his written representation that he had been aware of meetings of the owners of the flats, when various options were discussed, including a possible new factor or the owners taking on the factoring burden amongst themselves, but nothing had been settled upon by the time he left. The previous factors had his address, but he had not received their final bill, which must have been sent to Ms Fenton at the property. He had had no communication from them, the homeowners' association or the new factor and, as far as he was aware, his ex-partner was still paying the bills to the previous factor while she was in the property.

The homeowner also told the Tribunal that he had received another bill from the property factors and that he understood they were not supposed to do that whilst the case was being considered by the Tribunal. The property factors responded that they had merely sent out the normal 6-monthly factoring bill and that they were not aware they were not supposed to do that.

Section 7.2. "When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to [the Tribunal]."

The homeowner told the Tribunal that, whilst the property factors' complaints procedure says that homeowners should write if they are not happy with the response to their complaint, it does not say that homeowners must write to the managing director with full details.

Mr Walker said that he had not seen the homeowner's e-mail of 17 October 2016 at the time, but he had seen it before he responded on 20 January 2017 to the homeowner's letter received on 6 January, and he did not regard the e-mail as constituting a complaint. The homeowner required to provide detail in writing in order to allow it to be escalated to the level of the managing director. He emphasised that the question of recovery of outstanding debts was quite separate from the homeowner's complaint. Mr Walker's view was that the homeowner was saying in his telephone conversation on 21 November 2016 that it was a case of "do as I want, or else I go to HOHP". The homeowner denied that anything in that telephone call was threatening. It had been a cordial call, but they had been going round and round in circles.

Closing Remarks

The homeowner concluded by telling the Tribunal that he had found himself tied into a contract he knew nothing about and, if the property factors had taken the trouble to

find out about co-owners at the beginning of the contract and had asked Ms Fenton, she would have given them his home address.

The property factors stated in closing remarks that Ms Fenton had never disclosed that the property was in joint ownership. They believed all along that they were dealing with the owner, and a huge amount of responsibility sat with her for her apparent failure to communicate with the homeowner. The letting agents would also have known that there was a factor in place. The property factors had offered a payment plan and to waive the deposit, but their factoring bills had to be paid. They were a small independent firm, factoring approximately 2000 properties and had never encountered this situation before.

The parties then left the hearing and the Tribunal members considered the evidence that they had heard, along with the written representations and other documentation before them.

The Tribunal makes the following findings of fact:

- The homeowner is an owner of the property.
- The property forms part of a development of flatted dwellinghouses.
- The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors' duties arise from a Written Statement of Services, a copy of which has been provided to the Tribunal. It includes a Complaints Procedure.
- The date from which the property factors' duties arose is 1 November 2012, the date on which the Act came into force.
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 7 December 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under section 14 of the Act.
- The homeowner made an application to The Homeowner Housing Panel ("HOHP") received by HOHP on 30 November 2016 under Section 17(1) of the Act.
- The jurisdiction of HOHP was transferred to the Housing and Property Chamber of the First-tier Tribunal for Scotland with effect from 1 December 2016.

- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 3 February 2017, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 1 of the Code of Conduct. The Tribunal held, on the balance of probabilities, that the Written Statement of Services had been sent to and received by Ms Fenton. She was a co-owner and, whilst the property factors had not been aware of this fact, they could not be held responsible for her failure to contact them to let them know that the factoring bills were the joint responsibility of her and Mr Holm.It was not reasonable to expect property factors to search the Land Register against every property that they took on and they were entitled to rely on the information provided by the Owners' Association until they were advised of or became aware of Mr Holm's interest as a co-owner. Property factors are not obliged in terms of the Act to make such enquiries at the Land Register and, even if they had done so, the Tribunal accepted the property factors' evidence that correspondence to the homeowner would then have been sent to the property, as they would have had no other address for him . The Tribunal held that when they did become aware of the homeowner as part of their debt recovery procedures, the property factors took appropriate and timeous steps to contact him.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.2 of the Code of Conduct. The Tribunal held that the letter of 2 December 2016 from Ledingham Chalmers LLP related primarily to debt recovery and not to the ongoing complaint that the homeowner had with the property factors regarding their failure to correspond with him. The Tribunal accepted the evidence given by the property factors that the precise terms of that letter had not been agreed with them in advance and were of the view that the solicitors' choice of words was unwise, viewed in the context of the matter as a whole, but held that the communication was not abusive and did not threaten the homeowner, apart from giving reasonable indication that the property factors might take legal action. The solicitors were aware that the homeowner had indicated his intention to refer the matter to HOHP and they were entitled to warn him against making any remarks in his application that defamed their clients.

For the same reasons, the Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 4.9 of the Code of Conduct. The Tribunal accepted that the Debt Recovery Process set out in the Written Statement of Services had reached the stage where it had been passed to an external agency, namely Ledingham Chalmers LLP, for collection and that the

statement in their letter of 2 Dcember 2016 that the property factors were "not prepared to enter into any further debate about this issue" and that in the event of inaction on the part of the homeowner, proceedings would follow, related to debt recovery. The letter dealt also with what both parties regarded as a separate matter, namely the indication given by the homeowner that he might apply to HOHP, but the primary content of the letter related to the unpaid factoring charges and the question of the homeowner's joint and several liability.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 2.5 of the Code of Conduct. The property factors' Complaints Procedure states "If our response does not provide the satisfaction you require, we would respectfully request that you provide us with written confirmation detailing the reasons where we have failed to resolve the complaint.The complaint will then be considered by the Managing Director,who will provide a final response in writing, within 21 days of receipt". The Tribunal accepted that the homeowner's e-mail of 17 October 2016 did not set out fully and explicitly his reasons for not being satisfied with the response to his complaint, but the terms of that e-mail clearly indicated that he was not satisfied with the reponse and the view of the Tribunal was that the property factors should at the very least have sought clarity in order to satisfy themselves as to whether it was to be escalated. It was clear from the terms of the e-mail that the homeowner expected a response, but he did not even receive an acknowledgement and accordingly, the Tribunal held that the property factors had failed to respond to the homeowner's e-mail of 17 October 2016.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 7.2 of the Code of Conduct. The Tribunal was satisfied that, whilst the property factors should have responded to the homeowner's e-mail of 17 October 2016 and should perhaps have regarded it as requiring escalation in terms of their Complaints Process, the final decision on the complaint had been confirmed to the homeowner by the Managing Director on 20 January 2017 and that letter had provided details of how the homeowner might apply to the Tribunal.

Property Factor Enforcement Order

The Tribunal proposes to make a Property Factor Enforcement Order, as detailed in the accompanying Section 19(2) Notice.

Appeals

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.

G Clark

Signature of Legal Chair ..... Date 1 May 2017