Housing and Property Chamber
First-tier Tribunal for Scotland

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

Property Factors (Scotland) Act 2011 ("the Act")

Statement of reasons for a decision in terms of the First-tier Tribunal for Scotland, Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 ("the regulations")

Chamber Ref: FTS/HPC/PF/20/1983

Re.: Flat 34, Morningside View,14 Maxwell Street, Edinburgh, EH10 5HU ("the property")

The Parties: -

Mr James Whyte, Flat 34, Morningside View,14 Maxwell Street, Edinburgh, EH10 5HU **("the homeowner")**

First Port Property Services Scotland, Troon House, 3rd Floor, 199 St Vincent Street, Glasgow, G2 5QD **("the property factor")**

Tribunal Members: - Simone Sweeney (Legal Member) Elizabeth Dickson (Ordinary Member)

Decision of the Tribunal

The Tribunal unanimously determined that the property factor has not complied with sections **1 C e, 2.1 and 2.5** of the Code of Conduct for Property Factors ("the Code") as required by section 14 (5) of the Act and has failed to comply with the Property Factor's duties as required by section 17 (1) (a) of the Act.

The Tribunal finds no failure by the property factor to comply with sections 1.1 Aa, 1 B d, 2.2, 2.4, preamble to section 3, 4.1, 4.4, 4.6, 4.7, 5.3, 5.6, 5.7, 6.3, 6.6, 6.7, 6.8 and 7 of the Code.

In terms of section 19(1) (b) of the Act the Tribunal proposes to make a Property Factor Enforcement Order ("PFEO") and gives notice of that proposal and allow parties to make representations in terms of section 19 (2) of the Act.

Background

1. By application dated 14th September 2020, the homeowner applied to the Tribunal for a determination on whether the property factor had complied with sections 1.1 aA, 1 Bd, 1 Ce, 2.1, 2.2, 2.4, 2.5, preamble to section, 3, and sections, 4.1, 4.4, 4.6, 4.7, 5.3, 5.6, 5.7, 6.3, 6.6, 6.7, 6.8 and 7 of the Code. The homeowner also alleged that the property factor had failed to comply with the Property Factor's duties at section 17 (1) (a) of the Act.
2. A notice of acceptance of the application was issued on 12th November 2020 by a legal member of the Tribunal under Rule 9 of the regulations.
3. Attached to the homeowner's application was a document with the heading, *'Additional Information Section 7 Form C.'* This provided greater detail of the complaints against the property factor. Also, copy letters, emails, deed of conditions, accounts information and associated documentation was produced by the homeowner.
4. A written response to the application together with an inventory of productions was received from the property factor under cover of email dated 16th December 2020.
5. Parties lodged further papers and submissions. The property factor lodged further submissions and an inventory of productions on 8th March 2021. The homeowner lodged further submissions and additional information by emails dated, 18th February 2021 and 7th June 2021.
6. Further sundry procedure followed. Reference is made to the Tribunal's directions. A hearing was assigned for 11th March 2021. In the course of that hearing on 11th March 2021, the homeowner requested that the Tribunal determine his application

on the basis of his written submissions. This was opposed by the property factor. Therefore a further hearing was assigned to take place on 18th June 2021.

7. By email dated 15th June 2021, the property factor withdrew opposition and agreed to the application being determined, without a hearing.

8. The email from the property factor provided, insofar as is relevant,

> *"I refer to the above noted hearing that is due to take place on Friday 18 June, 2021 at 10.00 a.m. and have to advise that unfortunately Mr Roger Bodden, who would have been representing us at the oral hearing, has now left the company. On that basis, and with the case only being three days away, I would suggest that rather than having an oral hearing, that we rely on our written representation that was issued to the First- tier Tribunal."*

9. The parties being in agreement that the application be determined without a hearing of evidence, the Tribunal proceeded on the basis of the homeowner's original application dated 14th September 2020, the response of the property factor dated 16th December 2020 and productions lodged by each party.

10. The Tribunal is grateful to parties for the obvious hard work which has been expended on their respective documentation. The Tribunal has met to consider the application on two occasions. Parties' submissions have provided assistance to the Tribunal in reaching its decision. No disrespect is intended to parties by the content of these documents not being set out at length in this decision. However this is an extraordinarily challenging application, both in terms of its length and the way in which it is presented. To enable parties to present their arguments in a more focused manner, the Tribunal attempted to address any potential confusion at various stages of procedure but this was refused by parties. This determination reflects parties submissions as accurately, as possible.

Written statement of services

11. The homeowner alleged that the property factor had failed to comply with sections 1 Aa and 1 Bd of the Code which provide:-

> **Section 1 Aa of the Code**

"The written statement should set out:-

A. Authority to Act

a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group."

Section 1 Bd of the Code

"B. Services Provided

d. the types of services and w which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified:"

12. The homeowner alleged that the statement of services issued by the property factor failed to provide the property factor's authority to act or any details on the delegated authority which would be appropriate in most developments such as Morningside View.

13. A copy of the property factor's written statement of services was within the Tribunal's papers. At page 2 of the document it provided,

> *"Our Authority to Act…will vary from Development to Development and will either be: Operating as Managing Agents in line with your Deed of Conditions and current legislation. Appointment by the house builder or developer, with the level of delegated authority provided within the Title Deed of Conditions. Appointment by a decision of the owners, with a level of delegated authority provided within a signed Management service Agreement."*

14. In respect of section 1 B d of the Code, the homeowner alleged that the property factor had failed to provide details of services outside the core service in the written statement.

15. The written statement of services at page 1 provided a schedule of the core management services. At page 2 of the document, there was detail of *"Additional Management Services available."* A list followed which included, apportionment at the time of sale, extraordinary work supervision and services of a surveyor or project

manager and administration of major works, planned maintenance and grant applications. The document, insofar as is relevant, provided, *"The following services are additional to our standard management service and for which additional fees may be due."*

16. The homeowner alleged that the owners are charged an, *"accounts administration fee."* He claimed that this fee did not appear on the written statement of services and should be included in the document under the heading, *"Additional Management Services available."*

Response of the property factor

17. By way of response, the property factor denied any failure to comply with section 1.1 Aa of the Code. It was explained that the property factor was appointed by the builders McCarthy and Stone in 1997.

18. The property factor denied any failure to comply with section 1 B d of the Code and submitted that the homeowner had provided no evidence of a failure.

Fire Maintenance and door security systems

19. Mr Whyte had become a homeowner around 14th May 2018. The property is a flat within a development built around mid 1990s. The homeowner advised that, at the time he took ownership of his property, fire maintenance and door security systems were provided at the development by a company called Total Concept Services at a cost of approximately £300 per annum. The homeowner alleged that the property factor entered into a new contract for these services with an alternative company, Open View. He later came to understand that the agreement was reached in June 2018. The cost increased to £2,500 per annum.

20. The homeowner's complaint about this matter was divided into six parts:

(i) that the property factor had not consulted with homeowners on major works;

(ii) that the property factor had not followed a tender process;

(iii) that the property factor had failed to produce evidence of copy tender documentation notwithstanding his requests since February 2020.

(iv) whether the increase in costs represented value for owners.

(v) that the property factor had made statements which were false and misleading and

(vi) that the property factor had failed to disclose a possible financial interest or benefit which existed between Open View and the property factor.

21. The homeowner submitted that the property factor had not consulted with homeowners in advance of appointing Open View. He submitted that the property factor had a duty to do so in terms of the deed of conditions as the service provided by Open View was, *"major works."* Reference was made to the deed of conditions, Section FIFTH, Common Parts, which was within the papers before the Tribunal. Insofar as is relevant, this provided,

> *"…in respect of Major Work, the Factor shall, before instructing the same, report the matter to the Proprietors and such work shall be undertaken only if it is authorised by a majority of the Proprietors."*

22. The homeowner had expressed his concerns with the property factor. Within the papers attached to his application were copy letters of complaint to the property factor dated, 12th June and 23rd July 2020. Both letters included reference to this issue.

23. By way of response, the property factor advised the homeowner that the new contract was an all-inclusive one which represented good value as, given the age of the development, repairs were required more frequently.

24. The homeowner felt that there was no need for the service provider to be changed. No complaints had been made against Total Concept Services as far as he understood and he was not convinced that the new contract provided value for money to owners.

25. The homeowner alleged that the property factor failed to follow a proper tender process in advance of the Open View appointment and by failing to do so, the property factor had breached its own statement of service. For the requirements of the written statement of service to be met, the property factor must obtain quotes from a number of contractors and service providers before proceeding with a major

contract such as fire maintenance and door security systems and that this process had not been followed.

26. A copy of the written statement of services was produced. At page 1 of the document, it provides a schedule of standard core management services. Under the heading, *"repairs and maintenance"* the document provides that property factor will obtain,

> *"competitive quotations from a number of contractors and, where appropriate, seeking the authority of the owners before proceeding with larger works and services."*

27. The reason for the homeowner believing that a proper tender process had not been followed was that he had sought evidence of the tender process from the property factor but he alleged that this was never produced.

28. Copy emails between the parties from February and March 2020 were produced. The homeowner submitted that these provided evidence of his requests for tender documentation. Email dated, 6th February 2020, insofar as is relevant, provided:-

> *"Following the recent First Port statement that they had put the Fire System Maintenance and the Door and Emergency Systems out to an independent re-tender process and it had been found that the Open View had offered the best value for money and were thus awarded the contract…send me…in accordance with the Code of Conduct…Section 6, Para. 6.3 and Para 6.6, the full documentation for the re-tendering process which took place."*

29. A similar request was made by the homeowner by email dated 17th March 2020. The emails were acknowledged by the property factor. The homeowner submitted that tendering documentation was never produced. He alleged that in not producing same, the property factor had failed to comply with sections 6.3 and 6.6 of the Code which provide:-

> "**Section 6.3 of the Code**

On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.

Section 6.6 of the Code

If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge, in advance."

30. Further, it was alleged that the failure to respond to the homeowner's requests of 6th February and 17th March 2020 showed a failure to comply with section 2.5 of the Code which provides:-

Section 2.5 of the Code

"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."

31. The emails were before the Tribunal together with the email responses from the property factor dated 7th February 2020 and 17th March 2020.

32. The written statement of services was produced. Under the heading, *"Correspondence and email"* it provides:-

"We will endeavour to issue a formal written response within 5 working days of receipt of any formal correspondence from you, (excluding public and statutory holidays). If we are unable to fully respond within this timescale you will receive an acknowledgement of your communication and an indication of when you can expect a full reply."

33. The homeowner conceded that he had received a document from the property factor in the course of the complaints procedure. The document (produced within the papers of both parties) had been attached to a letter from the property factor dated 10th July 2020. In that letter the property factor suggested that the document would explain the tender process which had been undertaken by an independent third party. The document had the heading, *'Open View – Fire, emergency call and security system tender.'* The document had no date. It purported to be,

> *"a summary of the tender and assessment exercise for the service, maintenance, repair and emergency reactive call out for; Fire and Emergency Systems…Emergency Call and Security Systems."*

34. In his document, *'Additional Information Section 7 Form C'* attached to his application, the homeowner submitted that the tender document failed to provide any meaningful information about the relevant tendering process, that there was no information to show that OpenView was the most competitive on price compared to other companies, that there was no information about the scope or remit of the tender.

35. Moreover he disputed the suggestion that the property factor had undertaken a tender process which was independent. In his document, *'Additional information Section 7 Form C,'* the homeowner alleged that the property factor had misled owners by,

> *"continuing to maintain that it had tendered independently for the contracts, a breach of Section 2.1 of the Code."*

36. **Section 2.1 of the Code** provides:-

> *"You must not provide information which is misleading or false."*

37. In advance of a meeting of owners in July 2018, the property factor issued owners with a budget pack for the forthcoming year, 2018/19. The documentation together with the covering letter were produced. The letter of 10th July 2018 was produced ("the stage one complaint letter"). Insofar as is relevant, it provided,

"…at the forthcoming Budget Meeting…we shall, also, discuss future works and possible changes relating to fire prevention and door entry systems."

38. It was alleged that this statement was misleading because information about the budget (attached to the letter of 10th July and produced) revealed that the change had already taken place when the contract was awarded to OpenView the previous month.

39. Moreover the homeowner alleged that a further statement within the attached documentation to the stage one complaint letter was false and misleading. In particular, he highlighted a paragraph on page three of the documents attached to the letter with the heading, *"Fire Systems Maintenance."* The paragraph, insofar as is relevant, provided,

"This is the cost of the system maintenance contract which has recently be (sic) re-tendered and awarded to Open View…Whilst the budget has increased from £670 to £1,783 per annum, it is worth noting that in the last 2 years we have spent approximately £2,400 in additional costs for emergency lights, call out charges and a fire extinguisher replacement. Consequently…this new inclusive contract would have proved to be more cost effective."

40. The homeowner referred to copy accounts for the years 2016/17 which indicated that replacement costs had totalled £89.88 and accounts for 2017/18 indicated that there had been no equipment replaced and therefore no costs. This, he argued, showed that the statement in the stage one complaint letter, "*this new inclusive contract would have proved to be more cost effective*" was false and misleading.

41. In relation to value, the homeowner explained that, at the time the new contract was agreed in June 2018, there was still three months left on the contract with Total Select. It was alleged that owners were charged an additional cost of £511.08 for the months of June, July and August 2018. Moreover that the cost to owners from the new contract equated to an increase of 1,147.96% between August 2018 and August 2019. The homeowner was not satisfied that the property factor was operating in the best interests of the owners.

42. The final issue in relation to this part of the complaint was the allegation that the property factor had failed to disclose a possible financial interest or benefit which existed between Open View and the property factor.

43. The homeowner claimed that the property factor's parent company was Knight Square Holdings Limited. He submitted that around the same time the property factor entered into the new contract with Open View, Knight Square Holdings Limited disposed of a loss making subsidiary to a third party for the sum of £452,000. The homeowner produced a copy of Knight Square Holdings Limited's accounts from 2018 to evidence same. He claimed that the subsidiary was purchased by Open View and that the contract was linked to other dealings between Open View and the property factor's parent group, Knight Square Holdings Limited.

44. The homeowner alleged that the property factor had failed to share this information with owners.

45. He alleged that there had been a failure to disclose a possible financial interest or benefit between Open View and the property factor's parent company Knight Square Holdings Limited. The homeowner submitted that the property factor had not provided clarity or transparency in financial matters by failing to disclose such an interest. This, he submitted, showed a failure to comply with section 3 and sections 6.7 and 6.8 of the Code.

46. The homeowner fails to specify which part of section 3 he alleges that the property factor has not complied. In the absence of any specification to the property factor, the Tribunal cannot make any determination of this complaint in respect of section 3.

47. With regards to sections 6.7 and 6.8 of the Code, these provide:-

Section 6.7 of the Code

"You must disclose to homeowners, in writing, any commission, fee, or other payment or benefit that you receive from a contractor appointed by you."

Section 6.8 of the Code

"You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed."

48. The homeowner alleged that the property factor had provided false information in its budget papers and accounts when describing the savings which would be achieved from the new inclusive contract with Open View. The homeowner alleged that in doing so, the property factor had failed to comply with section 2.1 of the Code and the preamble to section 3 of the Code which deals with financial obligations, which provide:

> **Section 2.1 of the Code**
>
> *"You must not provide information which is false or misleading."*
>
> **Preamble to section 3 of the Code**
>
> *"While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved."*

49. By way of resolution for these alleged failures, the homeowner listed five separate penalties which he wished to be applied, four of which included the return of monies to owners. In that respect it should be remembered that the homeowner does not represent the interests of others. The fifth was for the property factor to provide evidence to the homeowner, *"that the Open View contracts are reasonable and at normal commercial rates."*

Response of the property factor

50. The written submissions from the property factor of 16th December 2020 denied that there was any failure to comply with the Property Factor's duties or any of the sections of the Code referred to in relation to the renewed contract for fire maintenance and secure entry doors. The Tribunal takes into account all the property factor provides by way of response to this part of the complaint.

51. It was denied that the property factor had breached the requirements of the deed of conditions by not seeking the authority of the owners before agreeing services from

Open View. The property factor submitted that the appointment of contractors is a core service and does not constitute, "Major Works".

52. The statement of services (a copy of which was before the Tribunal) listed the core management services. Amongst other things, these included, arrangements for common repairs and maintenance, replacing and renewing contractors and service providers on behalf of owners and,

> *"obtaining competitive quotations from a number of contractors and, where appropriate, seeking the authority of the owners before proceeding with larger works and services."*

53. Moreover, clause EIGHTH of the deed of conditions provides the property factor with provision to manage the development, including appointment of contractors. Clause EIGHTH provides,

> *"(General Management and Administration) The Factor shall be responsible for the general management and administration of the Property as a sheltered housing scheme and without prejudice to the foregoing generality, will be responsible for the supervision of the House Manager and for arranging inter alia the repair, maintenance and renewal of the Common Parts, the cleaning, redecoration, heating and lighting of the Common Parts, the external cleaning of all windows in the Building, the insurance of the Property and the payment of rates, taxes, assessments and other outgoings in respect of the Property other than those exigible in respect of the Dwellinghouses."*

54. The property factor's position was that a tender process had been undertaken by independent consultants, that information had been provided to the homeowner of the tender process and that the homeowner had failed to provide any evidence to support his assertion that a proper independent tender process had not been followed.

55. It was explained that matters beyond just price were taken into account in the tender process. The property factor explained that price accounted for only 30% of the assessment criteria and the other 70% was a qualitative measure. It was argued that this had not been considered by the homeowner. Key changes were made to the

scope of the tender exercise, including a reduction in call out times for emergencies and the provision of an all-inclusive contract to cover the repair and replacement of critical assets as well as inspection and maintenance. The property factor submitted that a summary of the process had been shared with the homeowner and produced a copy of the document which they had issued to him.

56. The property factor denied having failed to provide the homeowner with information about the tender process. The property factor referred to the document, *'Open View – Fire, emergency call and security system tender.'* The property factor submitted that this had been provided to the homeowner in March 2020. The document was within the property factor's productions. It set out the scope of the tender exercise, that the term of the contract was three years, the process and detail of tender submissions, interviews and evaluation scores. The scores of three contractors were identified. The document provided that,

> *"The tender and assessment exercise concluded that the preferred bidder should be the Open View Group."*

57. The property factor explained that commercially sensitive information had been withheld as the Code permits. The document provides reasons for Open View's appointment, a detailed summary of the tender procedure and the outcome. An explanation had been provided to the homeowner in response to his request.

58. Therefore the property factor denied any failure to comply with the Property Factor's duties or any failure to comply with sections 2.5, 6.3 and 6.6 of the Code in this regard.

59. The property factor insisted that the contract with Open View provided value to owners. In relation to the figures quoted by the homeowner (an increase from £200.40 to £2,499.36, a rise of 1,147.96%) the property factor submitted that the homeowner fails to recognise the other costs within the accounts which relate to the repair and replacement of fire safety assets which were included in the *'all-inclusive'* contract with Open View. Relying on the same audit information as the homeowner, the property factor highlighted the cost of replacement emergency lights of £2,071.80 for the year 2017/18. The annual costs applied by Open View were reasonable, in the

property factor's submission, given the likelihood of continued failures of fire safety assets as the building ages. As the fire safety assets age and fail, the value of an all-inclusive contract increases. The property factor submitted that the majority of owners supported this approach.

60. The property factor denied having made statements or acted in any way which was false or misleading. The Tribunal identified no specific response to the allegations about the content of the stage one complaint letter within the property factor's submissions. However the property factor denied the allegation that it had failed to tender independently. The property factor also denied the allegation that it had misled owners when describing the savings which would be made from the all-inclusive contract with Open View. The property factor denied any failure to comply with section 2.1 of the Code.

61. The property factor did not dispute that Knight Square Holdings Limited had sold a company to Open View. However it was rejected that the property factor had failed to disclose a possible financial interest or benefit which existed between Open View and the property factor. At page 7 of the property factor's written responses of 16th December 2020, they responded in the following terms,

> *"Mr Whyte, also fails to evidence that Open View was connected to Knight Square Holdings in any way. The only link is that they fairly won an independently run tender to provide services to the customers of First Port, then purchased a subsidiary company from Knight Square in order to enhance their service order."*

62. The property factor denied any failure to comply with section 3, 6.7 or 6.8 of the Code in this regard. It was alleged that the homeowner's allegation was without specification. No evidence had been produced to support the homeowner's allegation that there any benefit existed or continued to exist between the property factor, Knight Square Holdings or any of its associated companies.

63. Finally the property factor referred to the deed of conditions which they argued provided the property factor with authority to instruct inspection and maintenance of the fire detection system, without prior discussion with owners.

64. In response to the homeowner's request for the property factor to provide evidence to the homeowner, *"that the Open View contracts are reasonable and at normal commercial rates"* the property factor insisted that the homeowner is already in receipt of evidence that the Open View contract is reasonable and at normal commercial rates. No evidence has been produced by the homeowner to support the contrary.

Insurance cover

65. The next part of the homeowner's complaint concerned arrangements for insurance cover at the property. The homeowner alleged that the property factor had failed to follow the process set out in its own written statement of services.

66. The written statement of services, insofar as is relevant, provided that the property factor would place,

> *"insurance cover through an independent insurance broker for cover such as Buildings, Public liability…Summaries of cover, including specific policy details are available to view on Your Property Online or are available on request. We shall publish any fees or commission received from an independent Broker, with whom we place insurance. We will notify you in writing as appropriate where we have placed your insurance."*

67. In his application, the homeowner alleged that the property factor had failed to use an independent broker. Rather, the property factor had used a broker which the homeowner claimed was a member of the First Group of companies, namely, First Port Insurance Services.

68. The homeowner had made enquiries with the property factor and requested evidence that competitive quotes had been recovered prior to the annual insurance being renewed. The homeowner included copy emails between parties from 11th July 2019 to 24th February 2020.

69. In the email of 11th July 2019 the homeowner requested, *"copies of the tendering documents for the Insurance for the 2019/20 budget"* to enable him to understand why the current insurer (Ecclesiastical) had been appointed.

70. The email was acknowledged by the property factor on 15th July 2019 who advised that the relevant information had been requested from, *"head of First Port Insurance services."* Having never received the requested information from the property factor, reminders were issued by the homeowner on 19th December 2019 and 5th February 2020.

71. The property factor sent an email to the homeowner dated 7th February 2020. The email insofar as is relevant provided,

> *"The full tendering exercise is completed every 3 years – last done in 2018 and due again in 2021. Apologies for our error on due dates."*

72. The homeowner alleged that there had been an increase in the brokerage fees between 2014 and 2017 which the property factor had failed to disclose to owners. These dates precede the date on which the homeowner took ownership at the property. The Tribunal reject this part of the homeowner's complaint. The Tribunal has no jurisdiction to determine this complaint.

73. The homeowner alleged that the property factor had failed to show him how or why the current insurer had been appointed, that this was a breach of section 5.6 of the Code, which provides:-

> **Section 5.6 of the Code**
>
> *"On request, you must be able to show how and why you appointed the insurance provider, including any cases where you decided not to obtain multiple quotes."*

74. The homeowner alleged that the failure to provide the insurance documentation was a failure to comply with section 5.7 of the Code which provides:-

> **Section 5.7 of the Code**
>
> *"If applicable, documentation relating to any tendering or selection process (excluding any commercially sensitive information) should be available for inspection, free of charge, by homeowners on request. If a paper or electronic copy is requested, you may make a reasonable charge for providing this, subject to notifying the homeowner of this charge in advance."*

75. The failure to provide the information requested on 11th July 2019, then advising, seven months later, that the evidence was unavailable as competitive quotes were undertaken on a three year basis was misleading. The homeowner alleged that this demonstrated a failure to comply with section 2.1 of the Code.

76. Moreover the information that the evidence was unavailable as competitive quotes were undertaken on a three year basis was, in the opinion of the homeowner, contrary to previous emails, letters and information provided by the property factor. The homeowner failed to direct the Tribunal to any specific evidence to support this allegation.

77. This contradiction, he argued demonstrated a failure to comply with section 5.3 of the Code which provides:-

> **Section 5.3 of the Code**
>
> *"You must disclose to homeowners, in writing, any commission, administration fee, rebate or other payment or benefit you receive from the company providing insurance cover and any financial or other interest that you have with the insurance provider. You must also disclose any other charge you make for providing the insurance."*

78. In his application, the homeowner failed to direct the Tribunal to any evidence of any commission or benefit received by the property factor.

79. Finally, in respect of insurance, the homeowner alleged that the budget pack received from the property factor in July 2019 showed an increase of 5 % in the insurance budget. The only explanation provided was that the increase had been recommended by the broker. The homeowner alleged that the broker would receive an increase in commission. No evidence was put before the Tribunal to support this statement. The homeowner alleged that the failure to provide an explanation of the increase in the insurance budget showed a failure to comply with sections 2 and 3 of the Code. No specification was provided as to which parts of these sections the Tribunal was to determine. In light of the lack of specification and lack of fair notice to the property factor, the Tribunal rejects this part of the complaint.

Response of the property factor

80. The Tribunal takes into account all the property factor provides by way of response to this part of the complaint within their written submissions.

81. In particular the Tribunal notes that the property factor admitted that the insurance broker whose services they had used was First Port Insurance Services, a subsidiary of Knight Square Holdings Limited, fully independent and a separate legal entity from the property factor. Also, that the insurance is placed on a bespoke and comprehensive policy designed with the owners in mind and no money is made by the property factor by placing a policy with the broker. A commission is paid to the broker and this was disclosed to the homeowner in the property factor's stage one complaint letter.

82. There being no receipt of any money or commission from placing the insurance with the broker, the property factor had nothing to disclose to the homeowner in terms of section 5.3 of the Code and therefore there was no failure to comply.

83. It was submitted that no tender exercise is undertaken for insurance by the property factor. Any tender exercise is undertaken by the broker. Against that background the property factor rejected any allegation that it had failed to comply with sections 5.6 or 5.7 of the Code as the insurance provider was selected by the broker and the property factor had no tender documentation to disclose.

Common Area Electricity

84. The homeowner alleged that the cost for common electricity at the development was higher than he believed it ought to be, that this was a direct result of the property factor configuring and controlling the electricity system and using a supplier which did not provide a competitive rate.

85. The electricity supplier was EDF. The homeowner had requested from the property factor evidence that competitive quotes had been taken before the energy contract was renewed. He had not received the information. The homeowner submitted that he understood that the property factor employed an energy consultant which invited companies to tender for the electricity contract. The homeowner considered that it should not prove difficult for the property factor to produce the evidence requested against that background. Copy emails were provided within the homeowner's

inventory. An email from the homeowner dated 24th May referred to the electricity supply by EDF and requested,

> *" a copy of the information on which the year 2020 budget was based and the comparable tariff and standing charges from suppliers which are available for the 2021 budget."*

The email was copied and pasted onto a document which displayed further email communications. There was no evidence of any response from the property factor to the email.

86. The homeowner alleged that the property factor had failed to take competitive quotes and keep under review the long term use of the electricity supplier. He invited the Tribunal to find the property factor to have breached their written statement of services and to be, *"in breach of their common law duties as Agent (not acting with the same care and prudence as they would in their own affairs."*

Response of the Property Factor

87. It was explained that the electricity meter was installed by the developer, the property factor did not configure the system and the meter could only be changed with extensive civil engineering works.

88. The property factor submitted that it does not carry out a tender exercise for electricity. Rather, an appointed energy consultant, Energycentric undertook this role. Any information arising from the tender exercise was not for the property factor to provide. The information belonged to the energy consultant. An explanation of the tender exercise was provided within the written submissions.

89. The property factor denied any failure to comply with section 2.5 of the Code on the basis that the requests for information around the tender for the common electricity provision were made repeatedly and there was no requirement on the property factor to produce the requested information.

90. By engaging a specialist energy consultant, the property factor submitted that it had exceeded its common law duties as agent.

91. The property factor denied any failure to comply with the written statement of service and submitted that the homeowner had failed to show any evidence to support this allegation.

Financial and accounting procedures

92. In his application, the homeowner expressed his concern about the financial and accounting procedures adopted by the property factor which he described as, *"unnecessarily complicated, contain errors, discrepancies and are therefore misleading."* The homeowner provided examples to illustrate this statement (common area electricity, development manager's salary, management fee, bank accounts and changes to house manager's role).

93. In his example of the common area electricity the homeowner alleged that the property factor was charging owners more than the amount invoiced by the utility provider. Reference was made to invoices between 2014 and 2019. For the reasons hereinbefore referred to, the Tribunal will not determine any allegations arising before 14th May 2018, the date on which the homeowner took ownership of the property. The homeowner fails to specify how he says he was charged more for this period. Moreover he alleges that this demonstrates a failure to comply with sections 2 and 3 of the Code but provides no specification of which parts of these sections are alleged to have been breached and to be determined. For all these reasons, the Tribunal rejects this part of the complaint.

94. The homeowner referred to the budget pack received from the property factor in 2019 within which it was reported that the development manager's salary would increase by 4% on the previous year's salary of £15,811.12. This was an error. The correct amount the manager had been paid for this period (2018/19) was £16,763.42. The error was described by the homeowner as a, *'misleading statement.'*

95. It was alleged that the property factor had failed to comply with section 1 C e of the Code in respect of the written statement of services. The homeowner alleged that the written statement of services fails to set out how the management fee is charged, structured or reviewed as required by section 1 C e of the Code, which provides:-

Section 1 C e of the Code

"The written statement should set out:

1 C e. the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee."

96. The written statement contains a schedule of core management services which includes a list of services provided by the property factor under the heading, *'Accounts.'* The homeowner assumed that core management services would include administering the accounts at the development.

97. However the homeowner claimed that the owners were charged a separate accounts administration fee of approximately £4,500 per annum.

98. The written statement includes a heading *"Additional management services available"* but this section includes no reference to accounts administration. The homeowner insisted that no additional management services have been sought or provided.

99. Having sought clarity from the property factor on how the management fee is structured and what the accounts administration fee covers, he was provided with a document from the property factor attached to their stage one complaint letter called, *"Management Fee Explained."* A copy of that document was produced by the homeowner and the Tribunal had regard to that.

100. The homeowner submitted that the document did not form part of the written statement of services. He remained unclear on how the management and accounts administration fees are charged.

101. The homeowner claimed that he had requested copy bank accounts from the property factor for the period 2014 to 2020. Having analysed that information, he identified discrepancies which he claims to have amounted to £7,500 per annum. The homeowner's complaint in this regard appears to be his dissatisfaction with the property factor's response in their stage one complaint letter which he describes as, *"unhelpful and disingenuous."* On page 15 of his complaint, the homeowner alleges that this constitutes "breaches of Section 2's requirements for consultation and good communication." The homeowner has not specified with which part of section 2 of the Code he says the property factor has failed to comply or how this shows a failure

to comply with the Property Factor's duties. The Tribunal rejects this part of the complaint on the basis of lack of specification and fair notice to the property factor.

102. Finally, in relation to financial and accounting procedures, the homeowner alleged that the property factor had made changes to the house manager's role without any explanation to owners. He invited the Tribunal to consider these changes against the commitments of an earlier property factor which provided that the house manager's role, responsibilities and duties should be clearly defined. The homeowner submitted that the house manager had recently been referred to as, *"Trainer"* and, *"Mental Health Aider"* and that her salary had increased by 5.7%. Moreover other staff costs had increased at the development as had the house manager's telephone bills. The homeowner alleged that changes to the house manager's role related to additional duties which he alleged to be undertaken out-with the development. The homeowner had requested from the property factor a copy of the manager's role and responsibilities. The response (produced) was not what he considered to be consistent with the commitments of the earlier property factor *("Peverel")* and afforded him no explanation of the changes to the role. He invited the Tribunal to accept that these were unexplained changes and increased costs to owners which, *"have been made in breach of Section 3 of the Code."* The homeowner has failed to specify which part of section 3 he claims to have been breached. The homeowner's allegations of any failure by the property factor to comply with an arrangement from an earlier property manager is not within the jurisdiction of this Tribunal.

Property Factor's response

103. By way of response the property factor's written submissions of 16th December 2020 on this part of the complaint are all taken into account by the Tribunal. In particular, the submissions that much of the homeowner's complaint pre-dates him taking ownership of the property which should not be considered by the Tribunal; that no evidence has been produced by the homeowner that the property factor has failed to comply with sections 2 and 3 of the Code (which are denied) and that the agreement of the earlier property factor (Peverel) is superseded by the property factor's written statement of services.

104. On the part of the complaint regarding the management fee not complying with section 1 C e of the Code the property factor denied any failure. It was explained that the at the time the development was built, McCarthy and Stone was clear that the factoring fee should be demonstrated in the accounts as 70 % management fee and 30% accounts administration fee. The overall fee has been demonstrated in this way for over 30 years.

105. The property factor submitted that the figures provided by the homeowner around salary and other costs were incorrect and unsupported by evidence, that the references to the changes in the development manager's job description reflected the investment which the property factor had placed in development and learning of staff, that the request for a job description had been complied with, that the handbook requested did not exist and that any salary review is an internal matter which did not require to be shared with the homeowner .

Debt recovery

106. The homeowner alleged that the property factor had failed to comply with sections 4.1, 4.6 and 4.7 of the Code which place the following obligations on the property factor:-

Section 4.1 of the Code

"You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts."

Section 4.6 of the Code

"You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation)."

Section 4.7 of the Code

"You must be able to demonstrate that you have taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging those remaining homeowners if they are jointly liable for such costs."

107. Two examples were provided by the homeowner as to why he said the property factor had failed to comply with each of these sections of the Code. The first example concerned a debt connected to the late owner of a flat at the development whom the homeowner claimed to have deceased in 2013. In February 2019, the homeowner received a copy of the audited accounts for the year ending 31st August 2018. An entry of £10,085.20 was included against the item, *"Service Charge Debtors."* It was explained that the owner had left the property to visit family abroad in 2009 and never returned. A service charge payment was due and never paid. The property factor continued to apply the service charge payments at six monthly intervals which were never paid. Accordingly the debt accrued.

108. The homeowner met with an officer of the property factor on 11th July 2019. He expressed his concern at the lack of action taken to recover the debt. In his application the homeowner claimed that documentation provided to him by the property factor on 20th December 2019 revealed,

"no recovery action taken during the six-year period between the first debt being established on 1 March 2012 and 12 November 2018, and First Port have provided no evidence to indicate what action, if any, they have taken during that period."

The documents referred to form productions, page numbers 83- 87 of the homeowner's inventory.

109. The homeowner alleged that the property factor failed to recover a death certificate from the USA which might have enabled proceedings against the estate of the debtor in Scotland. He, himself, had recovered information from the Ancestry website which confirmed the date and place of death of the owner of the said flat.

110. In April 2020 the homeowner requested a copy of a Notice of Potential Liability which he understood to have been lodged in December 2019. The request was refused by email dated 15th April 2020 due to restrictions arising from GDPR.

111. The homeowner alleged that a Notice of Potential Liability is a, *"matter of public record and not therefore for concern under the GDPR."*

112. Finally, in July 2020 the homeowner requested an update on the Statement of Account. He assumed that there would have been two further unpaid Service Charge demands since the accounts information provided to him in 2019. By emails dated 27th July 2019 at 5:22 pm and 8:09 pm, the property factor responded in the same way, *"we have nothing new to report on the development debt situation."*

113. The homeowner alleged this response was evidence that the property factor was,

> *"not only refusing to keep me updated as an individual owner about the size and extent of the debt, but it also appears to be failing to update the Owners' Association Committee on the debt position."*

114. The homeowner invited the Tribunal to find that the property factor had failed to follow its own credit control procedures by not sending letters to the owner of the said flat and commencing litigation procedures from 2012. For the reasons referred to above, this Tribunal will focus on any allegations against the property factor from the date the homeowner became the owner of the property which is 14th May 2018. The Tribunal has no jurisdiction to determine matters preceding that date.

115. The homeowner alleges that the property factor has failed to comply with section 2 of the code by,

> *"providing false and misleading information regarding the size of the debt; by calculating incorrectly the amount of the debt and the correct interest to be applied, and by failing to follow their own credit control procedures correctly."*

116. By way of illustration, the homeowner, again, refers to matters arising from the debt due by the said flat from 2012. The homeowner claimed that it was impossible to reconcile the information provided in the statement of account with the figures stated in the annual accounts for the previous seven years. He had produced a table which he had created on the basis of the information available to him in the audited accounts. The table was within the Tribunal's papers. The homeowner highlighted inaccuracies which he claimed to exist. He alleged that contractual

interest had not been applied which the deed of conditions stipulates should be applied to debts at 5 % per annum above the base lending rate.

117. The homeowner alleged that his table demonstrated that the property factor had failed to prepare accounts free from, *"material misstatements, whether due to fraud or error."*

118. Finally the homeowner alleged that the information above showed that the property factor had failed to comply with section 3 of the Code, specifically,

> *"1. Protection of homeowners' funds 2. Clarity and transparency in all accounting procedures 3. Ability to make a clear distinction between homeowners' funds and a property factor's funds."*

Response of the property factor

119. Again, the Tribunal takes into account all that is provided by the property factor in its written response to this section of the complaint. In particular, the Tribunal notes the property factor's response that it complies with the requirements of section 4 of the Code, to keep owners informed of any debt recovery problems which could have implications for them by providing annual accounts. The property factor denied any breach by failing to disclose to the homeowner the debt owed at the time the homeowner purchased his property, that the homeowner's solicitor should have made enquiries and that the property factor advised the vendor's solicitor in April 2018 that, *"there are no charges which have been deemed as irrecoverable at the current time, however, irrecoverable debt could be chargeable in the future."*

120. The property factor claimed to have worked closely with the Homeowners' Association Committee to address the debt situation at the development. The property factor had been unable to source a death certificate because this was only open to family members, tracing agents had been engaged in 2015 and 2018, a family member identified and a letter issued, investigations undertaken with Edinburgh Sheriff Court and the bank .

121. The property factor insisted that it had followed all credit control procedures. The property factor highlighted that any challenge of its approach to debt recovery before 14th May 2018 was not within the jurisdiction of the Tribunal.

122. In relation to the table prepared by the homeowner and the allegations of inconsistencies and inaccuracies in preparation of accounts, this was disputed by the property factor. It was submitted that the homeowner had failed to take into account that the service charge debt figure represents an accumulation of all service charge debtors at the development and not only the debt owed by the said flat. Neither had the homeowner taken into account administration or legal costs attaching to the debtors' accounts.

123. The property factor admitted that the interest due had not been applied to this debtor's account but adding interest would have made no difference to recovering the principal sum.

124. The property factor produced a copy of their complaints procedure (page A36 in their inventory) as evidence that they had complied with section 4.1 of the Code, and submitted that they had exceeded their procedure by undertaking tracing work overseas.

125. The property factor denied any failure to comply with section 4.6 of the Code as the homeowner has received correspondence from the property factor of the debt recovery problems in relation to the flat within the development.

126. The property factor denied any failure to comply with section 4.7 of the Code as no charge has been made to the owners.

127. The property factor insisted that the amount of debt which had been shared with the homeowner was accurate and that a decision had been taken not to apply interest. Therefore no information had been provided by the property factor which was false or misleading and such allegations were denied.

128. Finally it was denied that there had been any failure to comply with section 3 of the Code. The property factor submitted that there was no evidence that the homeowners' funds had not been protected, or that the matter of development debt has not been clear and transparent in accounting procedures and there had been no suggestion that homeowners and property factor's funds are not distinctly separate.

Failure to consult/good communications

129. The homeowner alleged that the property factor had failed to comply with section 2 of the Code in its communications and failure to consult with owners. The homeowner provided examples of meetings where requests of owners were refused, failure to provide information and to consult with owners and adopting, *"a dismissive and intimidating"* tone in certain communications with owners.

130. An example provided was the complaint around the Fire Maintenance and Door Entry systems, referred to above. Reference was made, again, to the property factor's letter of 10th July 2018 with the budget pack for the following year and specifically to the term of the letter which provided, *"We shall also discuss future works and possible changes relating to fire prevention and door entry systems."* The homeowner alleged that this was, *"disingenuous and misleading as the contracts had been awarded more than a year earlier."*

131. Whilst no specification is provided, the Tribunal understand from the word, *"misleading"* that the homeowner is alleging a failure on the part of the property factor to comply with section 2.1 of the Code.

132. Another example was in connection with communications between the homeowner and the property factor's officers between 2019 and 2020 about the budget for the development. At no point had any of the officers made the homeowner aware of the changes that had taken place to the contract for fire maintenance and door security systems.

133. Also, at a meeting of owners and the property factor in July 2019, a manager representing the property factor was,

> *"unprepared and/or unwilling to answer owners' questions…she informed owners that a proxy ballot would be taken …and the result posted on the notice board. A number of owners protested and asked to discuss the various issues… the requests were refused…"*

The homeowner alleged that this demonstrated that the property factor had no intention of consulting with owners about the Open View contracts or on any other concerns of owners. The result was that owners were asked to vote on an issue which they had been denied an opportunity to understand.

134. The homeowner alleged that there was a failure on the part of the property factor to comply with section 2 of the Code by failing to consult with owners.

135. Whilst no specification is provided, the Tribunal understand from the reference to a failure to consult that the homeowner is alleging a failure to comply with section 2.4 of the Code which provides:-

Section 2.4 of the Code

"You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core service. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies)."

136. The homeowner claimed that the property factor had not provided clarity, transparency and good communications by failing to explain to owners any variation between the current level of expenditure and the budget for the following year.

137. Examples of a dismissive, *"intimidating"* and *"bullying"* tone by the property factor in communications were alleged by the homeowner.

138. Again, whilst no specification is provided, the Tribunal understand from the reference to a failure to consult that the homeowner is alleging a failure to comply with section 2.2 of the Code which provides:-

Section 2.2 of the Code

"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)."

139. By way of example, the homeowner cited the property factor's response to his request for a copy of the Notice of Potential Liability, dated 15th April 2020 (referred to, above). The property factor responded to the request in the following terms,

"As you are already aware, due to the GDPR, we are restricted in what information we can share with you and for the same reasons we are not in a position to send you a

copy of the NOPL on any property we may have lodged one against at Morningside View…We trust you will finally accept the restrictions we have to work within regarding the GDPR and desist from requesting information again and again that we are unable to supply or share."

140. An example of communication described as, *"bullying"* was the stage one complaint response letter from the property factor to the homeowner of 10th July 2020.

141. The homeowner had complained about the lack of consultation at the budget meeting on 23rd July 2019 and the meeting having been brought to an end. The property factor replied, insofar as is relevant, in the following terms,

"It is…disappointing when small groups of owners present become disruptive to the point where it becomes impossible to continue."

142. The homeowner did not know to whom the property factor was referring but considered the response to be a *"thinly veiled accusation"* against owners. He found the tone bullying and dismissive.

Property Factor's response

143. Again, the Tribunal takes into account all that is provided by way of response from the property factor in all representations produced.

144. In relation to the letter of 10th July 2018 being, *"disingenuous and misleading,"* this was denied by the property factor. The letter made no reference to the Open View contract. The property factor submitted that the sentence, *"We shall also discuss future works and possible changes relating to fire prevention and door entry systems"* relates to legislative changes arising from the Housing (Scotland)Act 1987 (Tolerable Standard) (Extension of Criteria) Order 2019 and the requirement for an upgrade of the fire detection system and a long standing discussion about automating the door entry system.

145. It was submitted that discussions with homeowners on all contracts, whether new or existing were welcomed. However the homeowner and others, *"refused to engage in a civilised manner with those holding the meeting"* and the budget meeting of

25th July 2019 required to be closed to avoid disruption, therefore preventing any discussions to take place. In any event, the property factor submitted that there was no requirement on the part of the property factor to consult with owners on the contract with Open View.

146. The property factor submitted that an explanation of the variations between the current level of expenditure and the budget for the following year is provided to owners in the budget pack. It was not possible for this to be provided orally on 25th July 2019 for the reasons, above. In any event there is no requirement to explain matters, in person.

147. Any allegations of intimidating or bullying conduct (section 2.4 of the Code) were denied by the property factor. Referring to the homeowner's request for a copy of a Notice of Potential liability, the property factor defended the response to provide a firm response in the circumstances.

Section 4.4 of the Code

148. In his application, at section, *"7. Complaint Details,"* the homeowner has indicated, in the box provided, that his complaint against the property factor includes a failure to comply with section 4.4 of the Code. Within the papers produced and the additional information provided by the homeowner, the Tribunal identifies no further reference to this section of the Code. There is no response to the allegation within the property factor's response. In the absence of any specification, detail, or evidence to support this allegation the Tribunal finds no evidence of any failure to comply with section 4.4 of the Code by the property factor.

Section 7 of the Code

149. In his application, at section, *"7. Complaint Details,"* the homeowner has indicated, by way of a tick in the box provided, that his complaint against the property factor includes a failure to comply with section 7 of the Code (*"Complaints resolution").* The property factor provides no response to the allegation within its written submissions. The Tribunal has been provided with no specification, detail, or evidence to support this allegation. In the absence of same, the Tribunal finds no evidence of any failure to comply with section 7 of the Code by the property factor.

Findings in fact

150. That Mr Whyte became a homeowner of the property around 14th May 2018.

151. That the property is a flat within a development built by McCarthy and Stone in the mid 1990s.

152. That the property factor had provided property management services at the development throughout the period the homeowner has owned his property.

153. That the homeowner received a copy of the property factor's written statement of services.

154. That the written statement of services provides details of the property factor's authority to act on behalf of homeowners as appointment by the house builder or developer, with the level of delegated authority provided within the Title Deed of Conditions.

155. That the written statement of services provides details of the types of services and works which may be required in the overall maintenance of the land in addition to the core service and for which there may be additional charges.

156. That by letter dated 10th July 2018 the homeowner was invited to a meeting of owners on 25th July 2018.

157. That the letter of 10th July 2018 enclosed a budget pack for owners.

158. That the budget pack identified that Open View would provide services for fire maintenance and door security systems.

159. That services for fire maintenance and door security systems at the development were provided by Total Concept services in May 2018.

160. That services for fire maintenance and door security systems at the development were provided by Open View in June 2018.

161. That a tender process was undertaken by an independent company instructed by the property factor.

162. That following that tender process, Open View was appointed in June 2018.

163. That information arising from that tender process belonged to the independent company instructed to undertake the process.

164. That the homeowner requested information about tender process on 6th February 2020 and 17th March 2020.

165. That the property factor provided the homeowner with an acknowledgement to each of these emails on 7th February and 17th March 2020.

166. That the property factor provided the homeowner with a summary of the tender in March 2020.

167. That the tender summary provided by the property factor identified the term of the contract as a period of three years.

168. That it is a matter of agreement between parties that the contract provided by Open View was a cost of £2,499.36 per annum.

169. That "*Major Works"* is defined in the deed of conditions as any works which is *"estimated by the Factor to exceed Five thousand two hundred Pounds."*

170. That the Open View contract would cost owners £7,498.08 over a three year period.

171. That the Open View contract is Major Works as defined within the deed of conditions.

172. That clause FIFTH of the deed of conditions requires the property factor to have the authority of the majority of owners prior to instructing Major Works.

173. That the property factor did not seek nor have the authority of the majority of owners prior to instructing Open View to provide services to the development.

174. That appointment of contractors is a core service in terms of the written statement of service.

175. That the property is in a development which is approximately twenty years old.

176. That many of the critical assets at the development will require replacement or renewal in the near future.

177. That Open View provided an all-inclusive contract to provide services which covered repair and replacement of critical assets at the development.

178. That the property factor instructed a broker to arrange insurance cover on its behalf.

179. That the broker appointed to arrange insurance cover was First Port Insurance Services Limited.

180. That First Port Insurance Services Limited is an independent insurance broker.

181. That any insurance documentation belonged to the broker, First Port Insurance Services Limited.

182. That energy consultant, Energycentric, arranges the appointment of utilities at the development.

183. That the homeowner requested information from the property factor by email dated 24th May 2020 in connection with the electricity supply.

184. That the property factor failed to respond to the email of 24th May 2020.

185. That any information arising from the tender process for electricity provision rested with the energy consultant and not the property factor.

186. That, the homeowner received a charge for *"accounts administration"* on an annual basis.

187. That the written statement of services provided no explanation of the *"accounts administration"* fee.

188. That, in response to the homeowner's query about how the management and accounts administration fees are charged, the property factor provided the homeowner with a document attached to their stage one complaint letter.

189. That the intention of the document was to provide the homeowner with an understanding of how the fees are charged.

190. That, at the time of his application, the homeowner remained unclear on how the fees are charged.

191. That neither the stage one complaint letter nor the document attached provided the homeowner with a clear understanding of how the management or accounts administration fees were charged.

192. That, as at 27th July 2020, the property factor had no information to provide to the homeowner on the development debt situation.

193. That the property factor's email of 27th July 2020 was directed to the homeowner and not to the Owners' Association Committee.

194. That a debt accrued from a flat at the development from unpaid service charges from 2009.

195. That the property factor failed to apply interest at the rate of 5% above the base lending rate to the account for the said flat.

196. That the failure to apply interest to the account did not impact on the ability of the property factor to recover the principal sum.

197. That the property factor has a clear written procedure for debt recovery.

198. That the homeowner received copy annual accounts from the property factor in February 2019 which brought to his attention a debt at the development.

199. That the homeowner entered into communications with the property factor about this debt and was provided with information, often at his request, in connection with this debt.

200. That there has been no charge to remaining homeowners for the unpaid charges arising from the said flat.

201. That the homeowner understood that the contract with Open View was to be discussed at the budget meeting on 25th July 2018.

202. That the letter of 10th July 2018 made no reference to Open View.

203. That the property factor was referring to the possible upgrade of the fire detection system and existing issues around the door entry system.

204. That the property factor chose not to proceed with the meeting of 25th July 2018 due to disruption.

205. That the reasons provided by the property factor in the email of 15th April 2020 to refuse the request of the homeowner for a copy Notice of Potential Liability over any other property at the development were reasonable.

Reasons for decision

206. The written statement of services document provided details of the property factor's authority to act on behalf of homeowners as appointment by the house builder or developer, with the level of delegated authority provided within the Title Deed of Conditions which satisfies the requirements of section 1.1 Aa of the code. Accordingly there is no failure on the part of the property factor.

207. The written statement of services provides details of the types of services and works which may be required in the overall maintenance of the land in addition to the core service and for which there may be additional charges as required by section 1 B d of the Code. Accordingly there is no failure on the part of the property factor.

208. Parties agreed that the homeowner received a charge for *"accounts administration"* on an annual basis and that there was no explanation for this charge within the written statement of services. Rather the property factor provided the homeowner with separate document, *"Management Fee Explained"* to provide an explanation. The property factor submitted that the management fee and accounts administration fee combine to form their fee. This is not clear from the written statement of services. The fact that an additional document requires to be issued to provide owners with an understanding of the management fees, indicates that the written statement of services fails to provide the way in which the management fee is structured, as required by section 1 C e of the Code. The Tribunal is not satisfied that the property factor has complied with section 1 C e of the Code, therefore.

209. It was a matter of agreement between parties that the contract provided by Open View was a cost of £2,499.36 per annum. The tender summary document issued by the property factor confirmed that the contract was over a three year period. "*Major Works"* is defined in the deed of conditions as any works which is, *"estimated by the Factor to exceed Five thousand two hundred Pounds."* Even if it is accepted that the new contract included additional services, the cost to owners of the

Open View contract was, £2,499.36 per annum over a three year period which equates to, £7,498.08. The Tribunal is satisfied that the Open View contract fell within the definition of, *"Major Works"* within the deed of conditions and that the property factor ought to have estimated that the contract would, "*exceed Five thousand two hundred Pounds."* Moreover, clause FIFTH of the deed of conditions requires the property factor to have the authority of the majority of owners prior to instructing, *"Major Works."* The evidence before the Tribunal is that the property factor did not seek nor have the authority of the majority of owners prior to instructing Open View on the basis that it did not need to do so as it did not consider this contract to be, *"Major Works."* Having failed to estimate that the contract would exceed £5,200 and having failed to seek the authority of owners prior to agreeing the contract with Open View, as required by the property factor when arranging, *"Major Works,"* the Tribunal determines that the property factor has failed to comply with the Property Factor's duties in this regard.

210. The Tribunal is not satisfied that the homeowner has shown that there is evidence of the property factor having been misleading, false, lacking clarity and transparency by suggesting that the new inclusive contract would bring savings to owners. There was no dispute that the property is over 20 years old which means that repairs will be required more frequently and many of the systems will require upgrading or replacement. The Tribunal accepts the evidence of the property factor that Open View provided an all-inclusive contract which covered repair and replacement of critical assets. The homeowner provides no evidence that the contract with Open View would not bring savings against this background. The Tribunal does not accept that the homeowner has demonstrated a failure on the part of the property factor to comply with section 2.1 in this regard or the preamble to section 3, therefore.

211. The Tribunal accepts that the property factor instructed an independent company to carry out the tender process which brought about the appointment of Open View. The homeowner made requests of the property factor for information in relation to the tender process on 6th February and 17th March 2020. Responses were issued by the property factor on 7th February and 17th March, respectively. The

homeowner alleges that the property factor failed to respond and alleges a failure to comply with section 2.5 of the Code. Section 2.5 of the Code requires a response to enquiries, *"within prompt timescales."* The Tribunal is satisfied that the response times of the property factor to the emails of 7th February and 17th March were prompt. Accordingly, the Tribunal is satisfied that the property factor has complied with section 2.5 of the Code in this regard.

212. The evidence before the Tribunal reveals that the property factor instructed an independent insurance broker to arrange insurance cover for the development. The evidence before the Tribunal demonstrates that First Port Insurance Services Limited is a separate legal entity to the property factor. The Tribunal is satisfied that the property factor has complied with the terms of the written statement of services which permits the property factor to arrange insurance cover through an independent broker. No evidence has been produced which shows any commission, fee, payment or benefit was received by the property factor from arranging insurance cover at the development. Therefore the Tribunal is not satisfied that the property factor has failed to comply with section 5.3 of the Code.

213. It is accepted that the homeowner requested information about how and why the insurance provider was appointed. Such information belonged to the insurance broker, not the property factor. The Code does not apply to the insurance broker. The Tribunal is not satisfied that there is any failure on the part of the property factor to comply with sections 5.6 and 5.7 of the Code.

214. The tender information which the homeowner requested was not for the property factor to provide as it was information belonging to a third party. Notwithstanding that, the property factor assisted the homeowner by providing him with information about the tender process in March 2020. On that basis the Tribunal is not satisfied that there is any failure on the part of the property factor to comply with sections 6.3 or 6.6 of the Code. The homeowner provides no evidence to show no tender procedure was undertaken. There is no failure on the part of the property factor to follow its written statement of services as far as tendering is concerned as the property factor did not carry out a tender procedure.

215. There is no evidence before the Tribunal which shows that the property factor received any commission, fee, payment or benefit from Open View following its appointment and which ought to have been disclosed to owners. The Tribunal determines that there is no failure on the part of the property factor to comply with sections 6.7 or 6.8 of the Code.

216. The homeowner requested information in connection with the common electricity supply from the property factor by email dated 24th May 2020. Section 2.5 of the Code requires the property factor to respond to complaints and enquiries within prompt timescales. There was no evidence within either parties' inventories of any response to the homeowner's email of 24th May 2020 from the property factor. In the absence of same, the Tribunal is not satisfied that the property factor has complied with section 2.5 of the Code.

217. The property factor instructs an energy consultant, Energycentric to arrange the provision of utilities at the development. There was no information for the property factor to provide to the homeowner. The homeowner knew that the tender exercise was undertaken by an energy consultant as he referred to this within his application. As the property factor did not hold the requested information, the Tribunal find no failure in their duties for not providing it to the homeowner.

218. There was no evidence before the Tribunal to support the allegations that the property factor had failed to take competitive quotes when arranging the electricity provider and failed to keep under review the long term use of the electricity supplier. There was no specification of which part of the written statement of services had been breached or how the property factor had failed to comply with the written statement of services. Neither was there any evidence of how or specification of why the homeowner alleged that the property factor was, "*in breach of their common law duties as Agent (not acting with the same care and prudence as they would in their own affairs."* Accordingly, the Tribunal finds no failure on the part of the property factor in respect of this part of the homeowner's complaint.

219. The letter of 10th July 2018 refers to, *"future works and possible changes relating to fire prevention and door entry systems."* The Tribunal takes into account that there is no

mention of Open View in the letter and that the property factor was referring to the possible upgrade of the fire detection system and existing issues around the door entry system. However in the absence of any qualification or explanation, it was entirely understandable that the reader may not interpret the sentence in this way and take a different meaning, which is what occurred. Perhaps the misunderstanding would have been explained had the meeting on 25th July 2018 proceeded, as planned. The Tribunal can see how the homeowner would find the letter misleading in the circumstances. Therefore the Tribunal determines that the property factor has failed to comply with section 2.1 of the Code.

220. The homeowner alleges that the responses of 27th July 2020 from the property factor demonstrate a failure to keep the homeowner and the Owners' Association Committee updated on the level of debt at the development. There is no evidence before the Tribunal to suggest that information was deliberately withheld by the property factor. Rather, the only information before the Tribunal is that the property factor had no new information to provide to the homeowner.

221. A copy of the property factor's written complaints procedure was within its Inventory of Productions (appendix 3). It sets out, clearly, that there is a three stage complaints process. The first stages requires a homeowner to make a complaint in writing. If he is not satisfied with the response, he can request that the complaint is reviewed by a senior manager, stage two. Finally a homeowner can make an application to the Tribunal for an independent, external review of the complaint. In this case, the homeowner exhausted all three stages of the process. The process satisfied the requirements of section 4.1 of the Code and the Tribunal finds no failure on the part of the property factor to comply with section 4.1 of the Code.

222. Having become aware of the debt recovery problem of one of the flats from the accounts received in February 2019, the homeowner was in communication with the property factor about the matter on a number of occasions. In his own application the homeowner refers to communications in writing, to a meeting with an officer from the property factor in July 2019 and provided copy emails showing requests for information arising from his concerns on the matter. Therefore the Tribunal is satisfied that the homeowner was informed about the debt recovery

problem as required by section 4.6 of the Code. Accordingly, the Tribunal finds no failure on the part of the property factor to comply with section 4.6 of the Code.

223. The Tribunal is satisfied that the steps taken by the property factor to recover the debt of the flat at the development (as narrated at paragraph 120, above) were reasonable. Even if were accepted that the property factor had not taken reasonable steps to recover the unpaid charges at the said flat there is no evidence that there have been any charges to remaining homeowners for the debt arising from the said flat which is what is envisaged by section 4.7 of the Code. In the absence of same, the Tribunal finds no failure on the part of the property factor to have complied with this section of the Code.

224. The homeowner alleges that there has been a failure to comply with section 3 in insofar as not protecting homeowners' funds, providing clarity and transparency in accounting procedures and by suggesting that homeowners and property factor's funds are not distinctly separate. The homeowner has not demonstrated how the property factor has failed to protect homeowners' funds. There is a dispute between parties around the level of service charge debt and how this should have been arrived at and to whom the figures apply. Moreover the homeowner refers to matters which pre-date him becoming an owner in May 2018. The homeowner's allegations in respect of a section 3 breach are lacking in specification. The Tribunal is not satisfied that the homeowner has demonstrated a failure on the part of the property factor to comply with section 3 of the Code.

225. With regard to the property factor's email of 15th April 2020 where the request for a copy of the Notice of Potential Liability was refused, the Tribunal accepts the reasons for the refusal. The Tribunal understands the property factor discouraging the homeowner from making a further request given the prohibition on them to provide the information from GDPR restrictions. The Tribunal does not consider the tone of the email to be, *"intimidating"*. The Oxford English dictionary defines the word, "intimidating" as *"having a frightening, overawing or threatening effect."* The Tribunal is not satisfied that the tone of the email meets this definition. However it is regrettable that the author of the email used the phrase, "*again and again."* There is no evidence before the Tribunal that the request had been made

more than once. Even if that were the case, this phrase is unhelpful at best and provides a discourteous tone to the email. The Tribunal does not consider this to show any failure on the part of the property factor to comply with section 2.2 of the Code.

226. The homeowner may have disliked the content and tone of the property factor's stage one complaint response letter of 10th July 2020 but the reference to small groups of disruptive owners was not evidence of a *"bullying"* tone. The Oxford English dictionary defines the word, *"bullying"* as, *"seeking to harm, intimidate, or coerce someone perceived as vulnerable."* The Tribunal is not satisfied that the letter of 10th July 2020 meets this definition. Therefore the Tribunal finds no failure on the part of the property factor to comply with section 2.2 of the Code.

227. The Tribunal accepts the evidence of the property factor that a decision was taken not to proceed with the meeting on 25th July 2018 due to disruption. There is no evidence before the Tribunal that the property factor did not intend to consult with owners about the Open View contract. The evidence of the property factor is that there was no intention to discuss this contract with owners at the meeting, that the contract fell under the core service and the Tribunal accept this evidence for the reasons set out, above. In any event the contract with Open View had already been agreed in advance of the meeting. The Tribunal finds no failure on the part of the property factor to comply with section 2.4 in this regard.

Decision

228. In all of the circumstances narrated, the Tribunal finds that the property factor has failed in its duty to comply with sections 1 Ce, 2.1 and 2.5 of the Code and the property factor's duties as required by section 17 (1) (a) of the Act.

229. The Tribunal determine to issue a PFEO.

230. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the property factor and to allow parties to make representations to the Tribunal.

231. The Tribunal proposes to make the order in the following terms:

Within 28 days from the date of issue of this order, for the property factor to:-

- *provide to the homeowner payment of £500 by way of compensation for the failure to comply with sections 1 C e, 2.1 and 2.5 of the Code and Property Factor's duties as required by section 17 (1) (a) of the Act and in recognition of the time, preparation and inconvenience the homeowner has expended in having to bring this application.*
- *produce evidence of same to the Tribunal's administration.*

Appeals

232. 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 within 30 days of the date the decision was sent to them.

Legal Chair, at Glasgow on 5th September 2021