

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/18/0186

Flat 2/05, Anchor Mill, 7 Thread Street, Paisley, PA1 1JR ('the Property')

The Parties:

Gordon Ramsay, Flat 2/05, Anchor Mill, 7 Thread Street, Paisley, PA1 1JR ('the Homeowner')

Ross and Liddell, 60 St Enoch Square, Glasgow, G1 4AW ('the Factor')

Tribunal members:

Jacqui Taylor (Chairperson) and Elizabeth Dickson (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has failed to comply with sections 2.1, 3.3, 4.5, 4.6 and 4.7 of the Code of Conduct.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 1st November 2012.

2. By application dated 14th January 2018 the Homeowner applied to the First-tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also failing to carry out the Property Factor's duties.

- Section 2: Communication and Consultation.

Section 2.1

- Section 3: Financial Obligations.

Sections 3.3 and 3.6a

- Section 4: Debt Recovery.

Sections 4.5, 4.6 and 4.7

3. The application had been notified to the Factor.

4. By Minute of Decision by George Clark Convener of the First- tier Tribunal (Housing and Property Chamber), dated 2nd May 2018, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 26th January 2018 to 26th April 2018) to a Tribunal.

5. An oral hearing took place in respect of the application on 8th August 2018 at the Glasgow Tribunals Centre, Room 110, 20 York Street, Glasgow, G2 8GT.

The Homeowner appeared on his own behalf. The Factor was represented by Brian Fulton, a Director of Ross and Liddell, and their solicitor Michael Ritchie.

The Tribunal advised the parties that in terms of Rule 12 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 they were directing that this application would be heard together with Dr John- Paul O'Sullivan's application number **FTS/HPC/PF/18/0185 as they relate to the same development and the same property factor.**

As a preliminary matter the parties confirmed and agreed the following facts, which were accepted by the Tribunal:-

- The Homeowner purchased his Flat 2/05, Anchor Mill, 7 Thread Street, Paisley, PA1 1JR on 1st April 2008. The title of the Property is registered in the Land Register of Scotland under Title Number REN118193.
- The Factor has factored the Property since the development was built in 2004.
- The parties confirmed that the following details of the background of the application, contained in the Factor's written representations were agreed:

'The Background

Anchor Mill, Paisley is a development which currently comprises 60 residential units and commercial units. The commercial units are on the first floor with a separate ground floor entrance to that of the residential units. The residential units are on the second, third, and

fourth floors. The title for each proprietor in the development is subject to the terms of a Deed of Conditions granted by Persimmon Homes Limited, registered 12th November 2004. Each proprietor in the development has a liability to pay for the costs of electricity supplied to the common areas. Initially, the whole of the electricity supply for the common areas was apportioned on the basis that the proprietor of the commercial Marcus Dean, trading as Abbey Mill Business Centre, had a liability to pay 25 per cent of the cost of the electricity supply and the balance of the supply was then paid by the 60 residential co-proprietors on an equal basis. Marcus Dean, the proprietor of the commercial properties, challenged this interpretation. Reference is made to the opinion of Hugh Olson, Advocate, dated 21st December 2006, and in particular to page six thereof.

The terms of this opinion presented the Factor and the co-proprietors at Anchor Mill with a difficulty. There was only one electricity supply in to the building, which supplied the common areas. The terms of the opinion were such that the commercial owner, Marcus Dean, did not have a liability to pay for costs of the electricity supplied to the common parts, which were used exclusively by the residential proprietors. In order to enable the cost of the electricity supply to be apportioned amongst the proprietors, and in accordance with the opinion received, Marcus Dean, the commercial proprietor, installed check meters, which measured the supply of electricity to the commercial space for which he had an exclusive liability. In these circumstances, the balance of the electricity supplied to the common areas from the common supply was to be shared between the residential proprietors. These meters were installed in 2008. The charges for electricity supplied to the common areas has been charged to the co-proprietors based upon the terms of this opinion since 2008.

The meters installed were installed within the areas owned exclusively by the commercial proprietor. They were not installed in an area to which the Factor had access. Meter readings were provided to the Factor by the commercial owner and accounts for the electricity supply were apportioned between the proprietors based upon these meter readings. In 2017, it became apparent that meter readings previously supplied by Marcus Dean were incorrect. They had been understated by a factor of 10. The Factor has since this date been attempting to resolve the question of the underpayment by the commercial proprietor and the overpayment by the residential proprietors. The Factor has sought to reach agreement between the commercial proprietor and the residential proprietors as to what sum should be repaid to the residential proprietors. Parties have to date failed to reach agreement.'

At the outset of the Tribunal Jacqui Taylor, the chairperson of the Tribunal advised that the Factor can only be found liable for any breaches in the Code of Conduct in respect of those matters which arise after 1st October 2012 when the Property Factors (Scotland) Act 2011 came in to force. However, they can be found liable for failure to comply with property factors duties which occurred before 1st October 2012 if they were ongoing past 1st October 2012. The parties confirmed that they agreed with and accepted this position.

The parties representations and the Tribunal's decisions:

Section 2: Communication and Consultation.

2.1: 'The Factor must not provide information which is misleading or false.'

The Homeowner's written complaint.

The Factor has provided information which is both false and misleading in relation to historical energy charging in Anchor Mill. This includes Statements of Account issued to homeowners.

The Homeowner's oral representations.

The Factor has misled the Homeowner by charging him, and the other owners of the residential properties in the development, for the electricity consumed by the commercial owner.

Also, in connection with the Factor's production number 13 (Statement of Account for 2/5 Anchor Mill, Paisley dated 25th July 2018) the first line is incorrect as he was never given a credit of £1453.79. The credit was not detailed in the first account that he received from the Factor.

The Factor's written representations.

Ross & Liddell have provided invoicing on the basis of information provided by the Commercial owner in the same manner as they have provided information from a contractor, or other supplier. In this instance the information was provided from the commercial owners own property/ part of the building, to which Ross & Liddell had no access to. They invoiced owners in good faith based on information provided. They reject that they have failed to meet the terms of this section of the Code of Conduct.

The Factor's oral representations.

Michael Ritchie explained that production 13 was a summary statement that had been produced by the Factor for the purposes of the Tribunal, which explains why the details are different from the particular individual invoices issued to the Homeowner.

He emphasised that a decision was made in 2008 after discussions between the Residents Association and the owner of the commercial premises to find a mechanism for invoicing the individual owners of the development, including the owner of the commercial premises, that worked for everyone. The agreed mechanism was to charge the invoiced electricity to the owners of the residential properties. Readings were to be taken from the check meters installed in the commercial premises which would be used to invoice the commercial owner and the sums received from them would in turn be credited to the residential owners.

Brian Fulton advised that he has been involved with the development since 2005. As far as he was aware no document was sent to the individual owners advising them of the mechanism that had been agreed. He explained that residents' meetings took place monthly or six weekly and there has been ample opportunity for owners to question the mechanism that had been agreed.

In connection with the Factor's Written Statement of Services Brian Fulton acknowledged that the Appendix which would detail particular arrangements in relation to particular properties had not been exhibited to the Tribunal. He could not remember if it referred to the position regarding charging for the communal electricity supply.

The Tribunal's Decision.

The Tribunal accepted the Factor's evidence that the charging mechanism had been agreed with the Residents Association and the owner of the commercial premises in 2008. The Tribunal acknowledged that the 2008 charging arrangement for the communal electricity supply predated 1st October 2012, the date the Code of Conduct came into effect.

However from 1st October 2012 property factors were required to comply with the terms of the Code of Conduct. The Code of Conduct requires property factors to provide a written statement of services setting out in simple and transparent way the terms and service delivery standards of the arrangements in place between them and the homeowners.

The Tribunal consider the mechanism for charging the individual owners of the development for the communal electricity supply to be very unusual due to the fact that the individual homeowners were charged the whole of the communal electricity charges and then the Factor separately received a contribution from the commercial owner which was then apportioned between the residential owners and credited to their accounts.

The Factor did not provide any evidence to the effect that they had been clear and transparent with the residential homeowners regarding the charging arrangement. The written statement of services states *'An Appendix, where applicable, is attached to this schedule, providing information specific to your property and to you as our client, and should be read in conjunction with this document.'* No such Appendix has been produced. The Tribunal considered it to be misleading not to provide the owners with a clear explanation of the unusual charging process.

The invoices are not transparent in relation to the charging and refunding of the particular individual shares of the communal electricity supply.

An Example is the Invoices dated 15/5/2012 and 28/4/2014

Date	Description of Charge	Full Amount of Charge	Your share	Amount
18/1/12	Electricity Account	- 1808.56CR	1/60	-30.14CR
2/2/12 to 1/3/12	Scottish Hydro Electric Electricity Account	1538.88DB	1/60	25.65DB
2/3/12 to 1/4/12	Scottish Hydro Electric	1534.88DB	1/60	25.58
28/1/13-28/1/14	Scottish Gas Business Electricity account 28/1/13-28/1/14	£3107.21	1/60	-51.79
12/2/2013	Ross &Liddell Ltd Electricity Refund	-£3798.25	1/60	-£63.30

As the invoices are not clear and transparent the Tribunal consider them to be misleading as the Homeowner does not know who paid the credits or the period that they relate to. The commercial owner's liability for their share of the communal electricity account was wrongly and falsely calculated as there was an error made in the readings taken by the commercial owner from 2008- 2017. The incorrect and false details of the sums due by the commercial owner for their share of the communal electricity account was detailed in the quarterly invoices issued to the Homeowner from 2008 to 2017. The Factor was responsible for the payment of the communal electricity account and for charging the individual owners correctly. It is only reasonable that the Factor should have verified the meter readings taken by the commercial owner given the unusual arrangement that was in place, or made the residential owners fully aware of the process and the fact that the readings were

unverified. Consequently the fact that the commercial owner took the false meter readings did not excuse the Factor from providing the false information to the Homeowner. Accordingly the Tribunal determined that the Factor has failed to comply with section 2.1 of the Code of Conduct from 1st October 2012, for the reasons stated.

3.3: 'You must provide homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise) a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.'

The Homeowner's Written Complaint.

The Factor has failed to provide requested financial breakdown of charges made to residential owners in relation to electricity supply. Several reasonable requests have been made to the Factor both in writing, at their offices and in committee settings however all requests have fallen on deaf ears. The Factor has failed to provide supporting documentation in relation to historical electricity charging as requested.

The Homeowner's Oral representations.

The Homeowner explained that he was not provided with a breakdown of the communal electricity meter readings. He is appalled that the meter readings supplied by the commercial owner were not verified and that the Factor never read the commercial meters.

In connection with documents 3 and 4 of the Factor's second inventory of productions he does not believe that a true accounting has been provided. He suspects that some of the credits shown are credits from the electricity supply company as opposed to credits from the owner of the commercial premises.

The Factor's Written Representations.

The Factor has provided a breakdown of charges albeit that it's now subject of review due to the recognised error on the part of the commercial owners. The

Factor is not refusing to provide information. They will do so as part of the suggested negotiated settlement. This will take the form of details of agreed consumption over an agreed period of time and applicable charges and credit payments previously paid by the commercial owner and credit to flat owners. They reject that they have failed to meet the terms of this section of the Code of Conduct.

The Factor's Oral Representations.

Michael Ritchie advised that the required documentation has been provided. The Factor has provided the Homeowner with half yearly accounts. Examples have been produced with the Factor's productions, in particular, documents 3 and 4 of their second inventory of productions.

He accepted that there could have been better clarity. However he confirmed that the Factor has provided a separate list of all of the credits received from the commercial owner in document 8 of their second inventory of productions. These total £30,326.75. The total credits to the Homeowner amount to £492.56.

The Tribunal's Decision.

The Tribunal accepted that the Factor had provided the Homeowner with quarterly invoices which listed the charges made and credits received. However given the unusual arrangements regarding the communal electricity charges for the development insufficient details were provided. The credits in the invoices did not clarify if they were credits received from the electricity supply company or the commercial owner. The Homeowner was not able to verify the details from the information provided. Also the Factor had not provided the Homeowner with supporting electricity accounts to enable him to verify the details set out in the invoices.

Accordingly they determined that the Factor has failed to comply with section 3.3 of the Code of Conduct.

3.6a: 'In situations where a sinking or reserve fund is arranged as part of the service to homeowners, an interest- bearing account must be opened in the name of each separate group of homeowners.'

The Homeowner's Written Complaint.

In situations where a sinking fund or reserve fund is arranged as part of the service to homeowners, an interest bearing account must be opened in the name of each separate group of homeowners. The Factor has failed to do this despite repeated requests.

The Homeowner's Oral representations.

At the hearing the Homeowner explained that the Factor had advised that it was not practical for them to hold the sinking fund in a separate account. He referred the Tribunal to the second document in the Factor's first inventory of productions, which is a statement of account for the Anchor Mill Sinking Fund. At the bottom of the statement of account is a bank giro credit slip which has the same account details of the Factor's trading account.

The Factor's Written Representations.

Sinking Fund. The funds were held in a separate Global Client Account which attracted interest where interest fell due and was paid/credited to Anchor Mill. They reject that they have failed to meet this terms of this section of the Code of Conduct.

The Factor's Oral Representations.

Michael Ritchie explained that the sinking funds are held in a separate account. They are held in the Factor's client account. Within the client account they have a separate ledgers for all of the individual sinking funds.

The Tribunal's Decision:

The Tribunal accepted that the sinking fund is held in Factor's client account which complies with section 3.3 of the Code of Conduct.

4.5 : You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.

The Homeowner's Written complaint.

You must have systems in place to ensure regular monitoring of payments due from homeowners. You must issue timely reminders to inform individual homeowners of

any amounts outstanding. This regulation implies that factors must charge homeowners individually for costs which are owed by them. It is not appropriate to charge one group of homeowners with total electricity costs and subsequently seek to recoup costs due from the second commercial owner through nefarious means.

The Homeowner's Oral representations.

The Factor has not provided evidence that there was an agreement reached with the homeowners that they would pay for the commercial owner's commercial electricity charges.

He would expect the Factor to correctly charge the commercial owner for their share of the communal electricity charges and for the Factor to read the electricity meters that are located within the commercial premises.

He considers that the arrangement whereby the residential owners pay the whole communal electricity charge and a refund is obtained from the commercial owner on the basis of unverified meter readings to be unprofessional.

He acknowledged that the AGM minute of 27th October 2008 referred to meters having been installed. The Minute states:

'There remains an ongoing dispute on the method of calculation of the electricity consumption between flat owners, Ross & Liddell, and Marcus Dean, due to poor metering arrangements set up at the time of development of the building. I have tried to arrange meeting with Mr Dean/ his staff, on a number of occasions to resolve the matter; and agree an acceptable method of accounting. He has installed check meters, however, the metering arrangements require to be verified. This issue has not been resolved due to lack of a meeting, and I'm aware that this matter will need to be treated by me as a priority and brought to a satisfactory conclusion. I apologise to you that this matter has not been resolved before now, and assure you that I will bring the matter to a head ASAP.'

However he is concerned that the Factor has not evidenced an agreement as to who should pay the costs and who should read the meters.

The Factor's Written Representations.

Credit Control Procedures. - The Factor operate Credit Control Procedures and have successfully recovered debt in relation to co-proprietors as has been intimated in the past at AGM and committee meeting when required or appropriate. At this date there

is one debtor who is repaying debt. They do not intend to exercise a right to spread the debt between proprietors and do not require to report to proprietors on such a matter. The Commercial owner is not a debtor. They reject that they have failed to meet the terms of this section of the Code of Conduct.

The Factor's Oral Representations.

Michael Ritchie explained that the Homeowner is essentially asking the Factor to review a decision that had been agreed between the Residents Association and the Factor in 2008 to the effect that the communal electricity charge would be invoiced to the residential owners and the owner of the commercial premises would provide the Factor with communal electricity readings and pay the outstanding sums to the Factor which would in turn be credited to the residential owners. There is no requirement on the Factor to review or amend this decision.

The Tribunal's Decision.

The Tribunal accept that the Factor was implementing the decision reached in 2008. However no evidence was produced evidencing the agreement having been reached with the residents association, other than the invoices issued to the homeowners. Notwithstanding the fact that the Factor was implementing the 2008 agreement the Code of Conduct came into force on 1st October 2012. From that date the Factor was placed under an obligation to ensure that the 2008 agreement complied with the Code of Conduct.

The Factor had accepted the commercial owner's meter readings of the check meters that had been installed in the commercial premises. The Factor did not verify these readings until the error was found in 2017. Section 4.5 of the Code requires the Factor to have systems in place to ensure the regular monitoring of payments due from homeowners.

'Homeowner' is defined in section 10(5) in the property Factors (Scotland) Act 2011. Subsection (a) defines a homeowner as an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor.

The commercial owner's title has been produced to the Tribunal. It is Land Certificate Title Number REN119502. The Property Section of the Land Certificate defines the property as being the commercial unit on the ground and first floor at the Anchor Mill, 7 Thread Street, Paisley together with *inter alia* a right of property in common with

the other proprietors within the development in and to the common parts of the development. The other proprietors within the development are proprietors of residential properties. The common parts of the development are partly used for residential purposes and consequently the commercial owner falls within the definition of Homeowner for the purposes of the Code of Conduct.

Section 4.5 of the Code places the Factor under an obligation to have a system in place to ensure the regular monitoring of payments due from homeowners, including the commercial owner. The commercial owner was due to pay the Factor for their share of the communal electricity charges. The Factor did not have in place a system to ensure the regular monitoring of those payments. The Factor relied on the commercial owner supplying the Factor with unverified meter readings which they took from the check meters located within the commercial premises. In 2017 it became apparent that the meter readings had been incorrect by a factor of ten. In the circumstances the Tribunal determine that the Factor has failed to comply with section 4.5 of the Code of Conduct.

4.6: 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).

The Homeowner's Written complaint.

You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them. The Homeowner believes that the Factor has not yet notified the Anchor Mill homeowners about debts in relation to this issue.

The Homeowner's Oral representations.

The homeowners have compiled a spreadsheet detailing their estimation of the communal electricity charges due by the commercial owner. The spreadsheet has been produced to the Tribunal. The figures do not correspond with the figures provided by the Factor. He acknowledged that the commercial owner has paid £30,326.25 towards the electricity costs. However in his opinion this payment should be applied to the oldest debts first.

The Factor's Written Representations.

Keeping owners informed of any debt. The Factor has and had, no intention of spreading debt on a joint and several basis, because suitable arrangements are in place for the one debtor to repay their debt, there is no breach of the code. The Commercial owner is not a debtor. They reject that they have failed to meet the terms of this section of the Code of Conduct.

The Factor's Oral Representations.

Michael Ritchie explained that there were no debt recovery difficulties before 2017. The anomaly arose in 2017 when the error in the readings of the electricity meters in the commercial premises came to light. Between 2017 and July 2018 the Factor has been negotiating with the homeowners to find a resolution to the problem. The commercial owner was only prepared to reimburse the sums due since 2011 as he considered the earlier payments to have prescribed.

The agreement reached in 2008 had been implemented for over 8 years. The quarterly accounts sent to the homeowners reflected the 2008 agreement. Michael Ritchie accepted that there are no documents available to evidence the 2008 agreement but in his submission the agreement is evidenced by the quarterly invoices. The error in the meter readings was found in 2017 and the meter readings after that time are correct. The commercial owner has paid a total of £30326. As the Tribunal cannot consider breaches of the Code that predate 1st October 2012 he submitted that the Tribunal should disregard the payments of £5511 and £4067 being the sums due by the commercial owner that predate 1st October 2012. The sums due by the commercial owner after 1st October 2012 amount to £27902 and the commercial owner has already paid in excess of that amount to the Factor.

The Tribunal's Decision.

The Tribunal determined that the error in the commercial premises meter readings that occurred before the error was discovered in 2017 resulted in the commercial owner's account being in debit. There is a dispute between the commercial owner and the residents association as to the amount of the debit. This disputed debit does fall within the definition of a 'debt recovery problem' in section 4.6 of the Code. The

disputed debit does have implications for the homeowners of the development as there is a difference between what the residents association believe is due and what the commercial owner believes is due and this in turn affects the credits that are due to the residential homeowners within the development.

Consequently section 4.6 of the Code does place the Factor under an obligation to keep the homeowners informed of the position regarding the commercial owners account. The Factor has failed to advise the homeowners of the position and consequently they have failed to comply with section 4.6 of the Code.

4.7: 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.

The Homeowner's Written complaint.

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. This regulation is central to the dispute in this case. Have debts been correctly calculated and any reasonable steps taken to address unpaid debts?

The Homeowner's Oral representations.

The communal electricity charges should have been correctly calculated and equally divided among the residential owners and the commercial owner.

As this requirement was not followed it resulted in unpaid electricity charges due by the commercial owner.

The Factor's Written Representations.

The Factor has have taken reasonable steps to arrange a negotiated settlement between clients' i.e. flat owners and the Commercial owner. This takes willing parties to meet and agree terms between them. Is the Homeowner willing to reach a negotiated settlement to conclude the matter? The Commercial owner is. They reject that they have failed to meet the terms of this section of the Code of Conduct.

The Factor's Oral Representations.

Michael Ritchie explained that the debt due by the commercial owner arose as a result of the error in the meter readings in 2017. The debt came to light and the Factor has taken steps to recover the sums due. A payment of £15,844.74 was received from the commercial owner on 5th June 2018.

The Tribunal's Decision.

The Factor was placed under an obligation to comply with the Code of Conduct from 1st October 2012.

Section 4.7 of the Code requires the Factor to recover unpaid communal electricity charges firstly from the homeowners who are due to pay them before charging the other homeowners who are jointly and severally liable.

The Factor did not comply with this requirement. They first charged the residential homeowners for the portion of the communal electricity charges that was due by the commercial owner. Consequently the Tribunal determine that the Factor has failed to comply with section 4.7 of the Code of Conduct.

Alleged Breach of Property Factor Duties:

(a) Financial Obligations.

The Homeowner's Written complaint.

Knowingly charging the Homeowner for another owners electricity costs, not providing full transparency in relation to distribution of costs and alleged refunds from the commercial property owner despite repeated requests to do so. Not organising a separate sinking fund account as requested by the Owners Committee and the factor used a spreadsheet to identify monies derived from and dedicated to the use of owners such as the Homeowner in Anchor Mill.

The Homeowner's Oral representations.

The property factor's duties stem from the title deeds and the written statement of services.

If, as the Factor alleges, there was a verbal agreement between the Factor and the residents committee to change the way the charging for the communal electricity

account was handled why were all the owners not advised. It is his position that there was no such agreement.

The Factor's Written Representations.

Financial Obligations — They have endeavoured to finalise matters in relation to accounting for electricity metered via a single Landlords meter which meters both common and private electricity supplies, without separately billing from the energy supplier. This situation occurred due to the manner in which the developer set up the metering arrangements. Working with the commercial owner he supplied and fitted check meters at his expense to provide separation for accounting.

The Sinking Fund was held in the Factor's client account with client separation occurring thus individual property/clients records are held. Banks do not provide Property Management businesses with multiple accounts. The Factor could not have accommodated a request for separation.

The Factor's Oral Representations.

Michael Ritchie referred the Tribunal to paragraph 5.2.7 of the Deed of Conditions.

That paragraph means that any agreement reached by the residents committee is binding on the owners.

He also advised that he does not consider the Factor to be under any property factors duty over and above the obligations set out in the Code of Conduct.

The Tribunal's Decision:

The Tribunal do not consider that the property factor duties detailed in the Homeowners application are duties above and beyond the obligations contained in the Code of Conduct, which have already been considered.

(b) Debt Recovery.

The Homeowner's Written complaint.

As a result of overcharging there is an unknown amount of debt which has not been recovered from one of the co-owners in Anchor Mill whilst residential owners like the Homeowner were over charged. Multiple communications with Ross & Liddell as well as meetings at Ross and Liddell Offices in Paisley unfortunately failed to resolve these issues and Ross and Liddell fail to acknowledge and address this problem to

any reasonable extent. He further considers it entirely inappropriate for Ross and Liddell to pass these concerns onto what appears to be the responsible owner and ask him to reconcile the issue with other owners. Ross and Liddell have been paid by owners like the Homeowner to manage all costs appropriately with all owners individually.

The Homeowner's Oral representations.

The Homeowner had nothing further to add.

The Factor's Written Representations.

The Factor has robust credit control procedures in place and have recovered considerable sums of bad debt in relation to their time managing the building. At present there is one debtor who is being closely monitored and who is repaying debt. If the Homeowner is referring to the Commercial owner they hold, and have held, substantial funds on behalf of this owner to their credit for some time. The owner has offered to provide further funds in relation to a meter reading failure that occurred on the part of their staff and consequently the Factor does not consider that there is debt in these circumstances, or, a failure on the part of the Factor occurred in relation to Debt Recovery.

Ross & Liddell have always acted as agent acting on behalf of both flat owners and the commercial owner, consequently due to the poor metering arrangements left by the developer they have acted as an agent between parties. This has been far from ideal but necessary. If there is a dispute between parties relating to a monitory matter, as agents, they are unable to raise legal action for recovery in the eyes of the law. They have endeavoured to find a way to conclude the matter but success is dependent upon willing parties on both sides to agree a settlement. They have endeavoured to assist and have passed a proposal to the Homeowner from the commercial owner who has re calculated the correct consumption which brought out a settlement figure due to flat owners of £15,844.74. The Factor appreciates that the homeowner does not agree with the figure however a negotiated settlement is always possible with willing parties. Is the Homeowner willing to reach a negotiated settlement with the Commercial owner?

The Factor's Oral Representations.

The Factor had nothing further to add.

The Tribunal's Decision.

The Tribunal do not consider that the property factor duties detailed in the Homeowners application are duties above and beyond the obligations contained in the Code of Conduct, which have already been considered.

Closing Submissions

The Homeowner's closing submissions.

If the Tribunal uphold the Homeowner's application he would wish the Factor to apologise for mismanaging the charging of the communal electricity account. He would also wish financial compensation and he would wish the compensation to reflect the stress caused by the Factor's mismanagement.

The Factor's closing submissions.

Michael Ritchie referred the Tribunal to the case of Cumbernauld Housing Partnership Limited v Janice Davies (2015) CSIH 22. In that case it was found that the pursuers had the benefit of the presumption *omnia rite et solemnite acta praesumuntur*, which means that it is presumed that acts done have been done legally and regularly until their illegality or irregularity is proved. He submitted that in the context of the present application this means that even although no documents have been produced to demonstrate the agreement reached in 2008 the presumption *omnia rite et solemnite acta praesumuntur* means that the Factor is entitled to the presumption that the agreement reached in 2008 is legal and regular.

Decision and Property Factor Enforcement Order.

The Tribunal acknowledged that the Factor is entitled to the benefit of the presumption *omnia rite et solemnite acta praesumuntur* in relation to the 2008 agreement but determined that the presumption did not excuse the Factor from complying with the terms of the Code of Conduct after 1st October 2012.

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Sections 2.1, 3.3, 4.5, 4.6 and 4.7 of the Code of Conduct.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

'Ross & Liddell Limited are directed to pay the Homeowner £300 as compensation from their own funds and at no cost to the owners. The said sums to be paid within 28 days of the communication to them of the Property Factor Enforcement Order. Ross & Liddell Limited are directed to provide the Tribunal with evidence that the said sums have been paid within seven days of the payment being remitted to the Homeowner'

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.

J Taylor

Signed

Date: 27th August 2018

Chairperson