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

Chamber reference: HOHP/PF/16/0161

The Property: Flat G/03, 19 Brachelston Street, Greenock PA16 9AE ('the property')

The Parties:

Richard Bozzelli, 32 Arden Street, Greenock PA15 3AB ("the homeowner")

Morison Walker Property Management Limited, incorporated under the Companies Acts in Scotland (SC142763) and having a place of business at 23 St Patrick Street, Greenock PA16 8NB ("the property factors")

Tribunal Members – George Clark (Legal Member) and David Hughes Hallett (Ordinary Member)

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

The Tribunal has jurisdiction to deal with the application.

The property factors have failed to comply with their duties under Section 14 of the Property Factors (Scotland) Act 2011 ("the Act") in that they have failed to comply with Sections 1 and 4.8 of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors and have failed to carry out the property factor's duties in terms of Section 17(5)(a) of the Act.

The Tribunal proposes making a Property Factor Enforcement Order in respect of the failure by the property factors to comply with their duties under Sections 14 and 17 of the Act.

The Decision is unanimous.

Introduction

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

Throughout this Decision, references are made to the addresses of flats within the building of which the Property forms part. In some cases, the references are G/1, G/2 and G/3, whilst in others, they are 0/1, 0/2 and 0/3 or G/01, G/02 and G/03. These all refer to the ground floor flats in the building and should be regarded as mutually interchangeable, so, for example, G/1, G/01 and 0/1 are the same property.

The property factors became a Registered Property Factor on 1 November 2012 and their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

The Tribunal had available to it and gave consideration to (1) the application by the homeowner received on 3 November 2016 with supporting documentation, namely a covering letter, a Charge served on the homeowner on 2 August 2016 by Kirk & Co, Sheriff Officers, a letter from the homeowner to the property factors dated 3 August 2016, the property factors' reply dated 1 September 2016, a letter from the homeowner to the property factors dated 17 October 2016, an e-mail from the property factors to the homeowner dated 20 October 2016, responding to e-mails sent by the homeowner on 10 and 11 October, the final decision letter by the property factors dated 21 October 2016, copy invoices and statements sent to the homeowner on 10 October 2016, and a copy of the property factors' Written Statement of Services (2) the property factors' written representations dated 17 January 2017, including, as appendices, a handwritten diagram of the tenement, showing owners' names beside each of the flats, an Extract from the Property Section of the Land Register entry for the property, a letter to the property factors from E Neil, bearing their received stamp on 12 January 2017, copies of Contact Details forms in respect of two of the ground floor flats, a copy factoring statement dated 31 January 2016, and a copy of an e-mail from the property factors to the homeowner dated 22 October 2015, to which were attached copies of letters sent to the homeowner at Flat G/1,19 Brachelston Street, dated 21 July, 10 September, 28 September and 11 December 2015 and 29 February 2016, letters dated 22 and 24 March 2016, addressed to him at Flat G/3, 19 Brachelston Street, letters dated 3 May, 9 June and 28 July 2016, addressed to him at Flat G/1, 19 Brachelston Street and a letter dated 13 December 2016, addressed to him at 32 Arden Road, Greenock and (3) further written representations by the homeowner sent by letter dated 22 January 2017, to which were attached a copy of a Residential Property Owners Renewal Schedule issued by Liverpool Victoria, showing the Risk address as 0/3, 19 Brachelston Street, a copy bill dated 27 March 2016 from Scottish Gas, addressed to the homeowner at 0/3, 19 Brachelston Street, and a letter from

Inverclyde Council to the homeowner dated 9 September 2013 regarding Council Tax in respect of Subject Address G03, 19 Brachelston Street.

Summary of Written Representations

(1) By the Homeowner

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

The property factors had been appointed by the residents at 19 Brachelston Street in October 2014. The homeowner owns and rents out Flat G/03 of the tenement.

The homeowner had not received any correspondence from the property factors or their Written Statement of Services prior to receiving a sheriff officer's letter on 2 August 2016. He discovered from that letter that the property factors had taken a decree against him for £838.45. As soon as he received the letter, he contacted the property factors and explained that he had not received any earlier correspondence. A lady called Megan at the property factors had said that she had initially had the wrong flat number for him. The homeowner agreed to pay their bills, as he knew what they were for and why work had been carried out. The property factors should then have sent out copies of the bills, together with their Written Statement of Services and their complaints procedure, but they had not done so. The homeowner had also explained the situation to the sheriff officers and then received an e-mail from them, saying they were not taking it any further. He had delivered a letter to the property factors explaining this on 3 August 2016, but had not received a reply until 7 October 2016 (although their letter was dated 1 September 2016).

In their reply, the property factors said that they had delivered the Written Statement of Services to the wrong address. The had also sent a recorded delivery letter on 28 October 2014 that was returned. They said that they had then delivered the letter to the homeowner's tenant, but, the homeowner commented, there was no tenant in the property at that time. The property factors had then said that it had been delivered to the flat, not to the tenant, but the homeowner said that there had been no mail in the flat when the cleaning company had cleared it out.

The homeowner had received the bill on 10 October 2016. Prior to that, the property factors had just billed him, without giving any breakdown. It now appeared he was being charged additional costs and penalties, but objected to these when the fault lay with the property factors for sending letters to the wrong address. He had sent them a letter by recorded delivery, saying that they should have sent him a Written Statement of Services before they took over and should have sent out their debt recovery and complaints procedures. On the day after the property factors received this letter, they sent out the bill and refused to remove the additional charges.

The homeowner had asked for details of how many owners had voted for and how many against their appointment, but had not received this information. The property

factors had admitted making mistakes and in their latest e-mail of 20 October 2016, said that the owner of another of the ground flats had told them that letters had been addressed by the property factor to her at Flat G1, when she was in fact Flat G2. They had been sending correspondence to the homeowner at Flat G2, so amended their records to show the homeowner as being in Flat G1, which was also wrong. In that letter, the property factors had said that the homeowner was still liable for all costs and had threatened to arrest his earnings. He had found the tone of that e-mail intimidating.

The homeowner had paid the £838.45, but did not agree with paying the additional charges.

In his letter of 17 October, 2016, the homeowner set out the Sections of the Code of Conduct with which he said the property factors had failed to comply. These were:-

Section 1. They had not provided him with their Written Statement of Services.

Section 1.1a.A.a. They had not set out details of the core services they would provide.

Section 1.1a.D,l, m and n. They had not provided details of their in-house complaints procedure, timescales within which they would respond to enquiries and complaints received by letter or e-mail and their procedures and timescales for responses when dealing with telephone enquiries.

Section 1.1a.E.o. The homeowner did not know what service the property factors were providing and , therefore, whether they should declare any financial or other interests.

Section 2.1. The property factors had knowingly sent mail that was wrongly addressed, including the sheriff officer's letter. They said they had delivered a letter to the tenant of the property, which was untrue.

Section 2.4. The property factors had not consulted with the group of homeowners and sought their written approval. The homeowner had not agreed to any work being carried out and had been unaware of the property factors' appointment.

Section 4. The property factors had not sent the homeowner a bill for 2 years and had not given him notice of debt recovery proceedings prior to sending out the sheriff officers. This was in breach of Sections 4.5, 4.6, and 4.7 of the Code. They had also failed to comply with Section 4.8 by taking legal action without taking reasonable steps to resolve the matter and without giving notice of their intention. The homeowner had not had any correspondence as it had all been sent to the wrong address and he had still not been sent the Written Statement of Services.

Section 7. The property factors had not told the homeowner about any complaints procedure they had.

The homeowner stated in his application that his complaint also related to a failure to carry out the Property Factor's Duties under Section 17 of the Act, by relying on address information given to them by a third party and by sending all his mail to the wrong address.

The property factors had replied by e-mail on 20 October 2016, after they had received his letter of the same date. They were replying to his e-mails of 10 and 11 October. They had confirmed that they had originally had the homeowner's flat position as 0/2 and that a copy of the Written Statement of Services along with the float invoice had been sent to him at that address. It had been returned by Royal Mail and a further copy had been hand delivered by the appointed Property Inspector at the time. On 7 November 2014, Mrs Neil, who also lived on the ground floor, came in to the office to pay her float and had informed the staff that her flat was G/2, not G/1. As the initial correspondence to the homeowner had been returned by Royal Mail, the property factors had changed the homeowner's address on their computer system to G/1. After that change, they had not had any correspondence returned by Royal Mail, so they had no reason to believe the homeowner was not receiving it.They had also sent an e-mail to the homeowner, informing him of their position as factors, and that had not bounced back as undelivered.

The property factors added that, whilst the copy of the Written Statement of Services that was delivered to the Property had not necessarily been handed to a tenant, the homeowner should have received it upon checking the property before the current tenant moved in. The property factors attached to their e-mail of 20 October the Written Statement of Services and all other information that was included in their initial correspondence. They apologised for the fact that it had not been included in their letter to the homeowner of 1 September, reminded the homeowner that regardless of the flat position that he felt was incorrect, he was still liable for all costs detailed within the Charge and advised that if payment was not received in full by 28 October 2016, they would proceed with further action by way of an earnings arrestment.

On 21 October 2016, the property factors wrote to the homeowner. The letter was signed by M.Florence Gallacher, Property Manager and Director.They apologised for their failure to send the Written Statement of Services with their letter of 1 September, but confirmed their understanding that it had now been e-mailed to him. The original copy had been hand delivered to the Property on 3 November 2014 (there was a tenant's name on the door) and the second copy had been e-mailed to the homeowner on 22 October 2015. Accounts had been sent on a quarterly basis and, with the exception of the original letter, nothing had been returned by Royal Mail. As the accounts had not been paid, they contacted the owners, who provided an e-mail address that they had used in the past for the homeowner. The property factors had then, on 22 October 2015, e-mailed the homeowner with the original letter, Written Statement of Services and copy accounts from 1 November 2014 to 31 July 2015. The homeowner had failed to respond to that e-mail.

The property factors stated that they had been appointed by the majority of owners in line with the title deeds. It was not, they said, part of their remit to trace the whereabouts of owners. It was the responsibility of owners to ensure the appointed factor had the correct details and, as the property had been self-factored prior to their appointment, the homeowner should have been in touch with the other owners regarding his liability and provided them with an alternative address or contact details.They noted that the homeowner had made no attempt to make any payments towards the outstanding debt and said that, as they had decree, they intended to instruct a wages arrestment for the full amount. They attached a copy of their complaints procedure and concluded by saying that if the homeowner was not happy with their handling of his complaint, he had the right to take it to the HOHP (now the Tribunal).

The homeowner's final written representations were made in a letter dated 22 January 2017. He was responding to the written representations of the property factors dated 17 January and, for ease of understanding, it is appropriate to summarise the property factors' comments first.

(2) by the Property Factors

The written representations by the property factors are contained in their letter to the Tribunal dated 17 January 2017. They said that they had no record of having received a form dated 31 October 2016 outlining the property owner's complaints, so had been unable to acknowledge it or to respond to resolve the complaints. They thought it strange that the homeowner had not contacted them to ensure they had received it and that they would be responding in due course.They attached a copy of the form and questioned whether it had ever been sent to them as, if not, it would seem that the proper procedure had not been followed.

The property factors then stated that, until October 2014, the owners had self-factored, under the management of one of the owner-occupiers, Mr Alain Ndengwe. In October 2014, he had visited their office to ask if they would take over the factoring as he was having difficulty receiving payment from one of the owners. They had advised him that they would be happy to act and he had left with copies of their Written Statement of Services to circulate to the other owners. He had then obtained the agreement of the majority of owners as required in the title deeds and the property factors had accepted appointment with effect from 1 November 2014. They attached as part of their written representations a copy of a letter from Mr Ndengwe of 13 January 2017, in which he verified that the homeowner had been informed of the appointment of the property factors and that he had verbally agreed to go ahead with the appointment. He also confirmed that he had received 6 verbal acceptances, including that of the homeowner who, he said, owned Flat 0/2. He added that the homeowner had been kept informed throughout the duration of the process.

The property factors had sent out a notification and Written Statement of Services to all owners in line with addresses provided by Mr Ndengwe. There were 3 flats on each level and they were numbered in accordance with a diagram, which they included with their written representations. The property factors did not say who prepared the diagram. The diagram indicates that the owner of flat 0/2 is the homeowner.They also attached a copy of the Property Section of the homeowner's Land Certificate, noting that his flat was the middle house on the ground floor, which in their opinion would be classed as 0/2.They had addressed the homeowner's letter to him at 0/2, and when it was returned to them, one of their staff hand delivered the letter on 4 November 2014 to the middle flat, as the other 2 owners had their names on the doors. The occupant of the property they had as 0/1 then contacted them to advise she was not 0/1, but was in fact Flat 0/2. The property factors included a copy of a letter from Mrs Elaine Neil, bearing their "Received" stamp on 12 January 2017. In that letter, Mrs Neil confirmed that she had owned and lived at Flat 0/2 for 25 years and that it was registered as that on the Electoral Roll and Council Tax records, as well as being the address shown on her utility bills and bank statements. The property factors said in their written representations that this did not seem right to them and pointed out that in her letter, Mrs Neil said that the homeowner's tenants had told her they were Flat 0/2. They also included a Contact Details form from a Mr Boyd, who occupied the other flat on the ground floor, which indicated that he was Flat 0/3 and stated that since none of the other letters to the homeowner had been returned, they had assumed he must own Flat 0/1. They had sent all correspondence to him at that address apart from one letter in February 2016, which was sent to Flat 0/3 and was returned to them. They pointed out that with the exception of the initial letter sent to the homeowner at Flat 0/2 and the June 2016 letter to Flat 0/3, all correspondence to the homeowner had been delivered. It seemed strange to them that the flat numbering for the other floors seemed to be acceptable to the Post Office, as did the Flat 0/1 address for the homeowner, despite his assertion that he is Flat 0/3.

By October 2015, having heard nothing from the homeowner, the property factors had contacted Mr Ndengwe, who gave them an e-mail address that he had used to contact the homeowner, and the property factor sent the homeowner an e-mail on 22 October 2015, attaching all correspondence over the previous 12 months. They did not receive any response, but the e-mail was not returned as undelivered and the e-mail address was the one that the homeowner is still using.They thought it strange that this e-mail had not been received by the homeowner and they included a copy of it with their written representations.

Up until that point, the property factors had not applied any additional charges to the account as detailed in their Written Statement of Services, but, having received no response to their written or e-mail correspondence, they had been left with little option but to seek to obtain a decree against the homeowner in the hope that it would elicit a response. Following decree, on 3 August 2016, the sheriff officer

served a warrant at 32 Arden Road, which he hoped might be the homeowner's home address. It was only at this point that the homeowner had made contact, firstly with the sheriff officer and then with the property factors, by letter dated 3 August 2016, which they received in their office on 16 August 2016. They replied to this letter on 1 September, but noted that the homeowner had said that he did not receive it until 7 October. They could only assume that the delay was due to his absence on business as he had stated in the past that he worked away from home. In his reply, the homeowner had stated that when they had hand delivered the Written Statement of Services in November 2014, his flat was unoccupied. It would therefore follow that when he entered the flat to show a prospective tenant or to check that all was well, the Written Statement of Services would have been behind the door along with any other mail.

The property factors had responded to the homeowner on 21 October 2016 which they felt explained their position quite fully and covered many of the points made in their written submission.

In summarising their position, the property factors also stressed that the homeowner had been aware that Mr Ndengwe had been factoring the property and that Mr Ndengwe had contacted the homeowner regarding the proposed change, which he agreed to, but that it was strange that over the following 22 months, the homeowner had not enquired of any of the other owners as to what was happening with regard to property maintenance as he would not have received an account for some time. They added that their Written Statement of Services states that they will send all correspondence to the property address unless advised otherwise. It was not part of their duties to pursue absentee landlords as part of their normal services as to do so would be both time-consuming and costly and it would be unfair to the majority of owners if they included this within their normal charging structure.

The Written Statement of Services also included Communication Arrangements, Declaration of Interest, Services Provided and how to end the Management Agreement. Other than the copies provided to Mr Ndengwe, they had sent 4 copies of the Written Statement of Services to the homeowner. Since their appointment, there had been no repairs which exceeded the threshold of £400, over which they were required to seek approval, and Invoices sent quarterly to the homeowner at Flat 0/1 had not been returned. A copy of their Complaints Procedure had been sent to the homeowner on 21 October 2016.

Finally, the property factors noted that, since making payment in August 2016, the homeowner had not paid any further accounts, despite these being sent to his home address, so that he owed the amounts included in the accounts for April, July and October 2016.

(3) Further Response by the Homeowner

The homeowner's further representations are contained in a letter to the tribunal dated 22 January 2017. He pointed out that the letter of 31 October 2016 had been sent to both parties. The homeowner had paid the bill in full and had no problem paying what was due, but his problem was paying for charges for the letters and costs for court and sheriff officers, when the property factors had sent letters to the wrong flat and had admitted a catalogue of errors. His flat had been registered as G/03 with Inverclyde Council since before he had bought it in 2001. He appended a copy letter dated 9 September 2013 from the Council, sent to his home address, but relating in the heading to "G03 19 Brachelston Road". The utilities bills were also addressed to G/03.

The homeowner contended that the written statement by Mr Ndengwe that he had been made aware of and verbally agreed to the factor being appointed, was not correct. Mr Ndengwe had spoken to him about another owner not contributing to bills, but did not tell him that the property factors had been appointed. Mr Ndengwe had also stated in his letter that the homeowner's flat was 0/2, but the homeowner attached evidence which he said related to Mr Ndengwe having carried out a background check on one of the homeowner's tenants in August 2014, which showed the property address as Flat 0/3 and that Mr Ndengwe had made a mistake in telling the property factors that the homeowner's property was Flat 0/2. He also attached a copy bill dated 27 March 2016 from Scottish Gas, addressed to the homeowner at Flat 0/3.

The property factors had said in their written representations that they had sent copies of the Written Statement of Services to all owners and that this had been sent to Flat 0/2. The homeowner stated that the reason it had not been delivered was because Mrs Neil had stated in her letter to the property factors that it was her flat that was 0/2.

The diagram of the building showing flat numbers was clearly wrong if it had Mrs Neil as Flat 0/1, when she had said she was Flat 0/2. If, as was the case, the diagram showed the first flat entering the close was Mr Boyd's, then the homeowner's flat, then Mrs Neil's flat, the diagram was totally wrong. Mr Boyd's Contact Details Form stated he was Flat 0/3, but the homeowner had produced evidence from Inverclyde Council and from utilities providers that he, the homeowner, was the owner of Flat 0/3. He also pointed out that the factoring bill dated 31 January 2016, which the property factors had included with their written representations had been sent to Flat 0/3, but bore to relate to Flat 0/1. He also referred to a letter from the property factors, addressed to him at Flat G/3, which had been returned by Royal Mail, yet in their e-mail of 20 October 2016, the property factors had stated that they had changed the homeowner's address from G/2 to G/1 because of the mistake pointed out by Mrs Neil in relation to her flat. The envelope regarding this letter had been

included in the property factors' written representations. This showed a catalogue of mistakes.

The property factors had questioned the homeowner's statement that he had not received their e-mail of 22 October 2015. He had checked his e-mail and wondered if it had gone to his Spam folder. He had not replied to it, because he had not received it.

Finally, the homeowner referred to the fact that the first 5 letters sent by the property factors had been sent to Flat G/1, then letters of 22 March and 24 March 2016 had been sent to Flat G/3, but then, letters of 3 May, 9 June and 28 July 2016 had again been addressed to him at Flat G/1. His question was, how could the property factors keep a correct record of the amount he owed when they had been billing him at 3 different addresses? They had, therefore, given wrong information in their written representations when they said they had assumed he must be Flat 0/1 and had sent all correspondence to that address with the exception of one letter in February 2016 which was sent to Flat 0/3 and was returned. The homeowner added that his name is not on the door of the property and this might explain why a letter had been returned, and he could not rely on his tenants keeping and handing over mail that came through the letter box addressed to him.

THE HEARING

A hearing took place at Wellington House, 134-136 Wellington Street, Glasgow G2 2XL on the morning of 12 April 2017. The homeowner was present at the hearing. The property factors were represented at the hearing by Mrs Florence Gallacher, their Property Manager and one of their Directors and by Gordon MacPhail, one of their Directors. The Clerk to the Tribunal was Abigail Spooner.

Summary of Oral Evidence

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

Section 1. "You must provide each homeowner with a written statement setting out, in a simple and transparent way, the terms and service delivery standards of the arrangement in place between you and the homeowner...You

must provide the written statement..to any new homeowners within four weeks of agreeing to provide services to them."

The homeowner directed the Tribunal to his written submissions and told the Tribunal that, from the outset, correspondence had been sent by the property factors to the wrong address. He had never received the Written Statement of Services and even the address in the sheriff officer's Charge was wrong.

The property factors stated that Mr Ndengwe had approached them and had been given 9 copies of the Written Statement of Services to distribute. He had then come back to them to say that 6 of the 9 owners had agreed to their appointment.Once appointed, they posted out the Written Statement of Services to each owner. 8 of them had arrived, but one had been returned. Mrs Neil had then told them that she was Flat 0/2, not 0/1, and they had, therefore, assumed that the homeowner must be 0/1.

The property factors told the Tribunal that one letter to the homeowner had been hand delivered, but that they had not sent any letters which required to be "signed for". One letter, dated 31 January 2016, addressed to Flat G/3 had come back undelivered. They also confirmed that the introductory letter of 28 October 2015 had not been hand delivered after it had been returned by Royal Mail.

The homeowner reminded the Tribunal that the property factors had said a letter had been delivered to his tenant, but, when he had said it was vacant, she had then told him it had been delivered to the flat. The homeowner felt that the property factors could have checked the Scottish Landlord Register or the Electoral Roll. It was a simple search.

The property factors responded that it had been the sheriff officers who had found out the homeowner's home address. Mr Ndengwe had provided the property factors with an e-mail address. The homeowner accepted that the e-mail address was correct, but was insistent that he had not received the e-mail of 22 October 2016 and again wondered if it had been filtered as Spam. The property factors emphasised to the Tribunal that the onus was on homeowners to give them alternative addresses for correspondence, if they did not want it to go to the factored property.

Turning to Mr Ndengwe's letter of 13 January 2017, the homeowner told the Tribunal that they had spoken about appointing a factor, but he had not been given a name and Mr Ndengwe had not told him that anyone had been approached to provide the service.

The property factors referred to the bills of January, April, July and October 2015 and January 2016 and expressed surprise that the homeowner had not thought to contact anyone to ask who was paying for stair lighting and repairs. As a responsible landlord, he should have tried to find out what was happening about these running costs. The homeowner responded that the tenants had told him they had received

bills for stair lighting and grass cutting, which they had paid and for which he reimbursed them.

The property factors could not explain why the letter of 3 May 2016 had been sent to Flat 0/1 and apologised for their error. They accepted that their letter of 28 July 2016 had also been wrongly addressed.

The homeowner questioned how the property factors could keep track of who was paying what, when letters to him kept being sent to the wrong address. The property factors advised the Tribunal that each flat in the building had its own unique reference number. They accepted that their employee had initially told the homeowner that a letter had been given to his tenant, but when she then checked with their Property Inspector, she had been told that the name "T.Munro" was on the door and the Inspector had put it through the letter box.

Section 2.1. "You must not provide information that is misleading or false".

The homeowner's complaint under this Section was that he had been told by an employee of the property factor that a letter with a copy of the Written Statement of Services had been delivered to his tenant but, when he advised her that the property had been vacant at the time, she had then altered her account, to say it had been put through the letter box of the Property.The property factors accepted that the initial information had been incorrect, but explained that it was the result of her misunderstanding the content of a file note made by the Property Inspector who had delivered the letter.

Section 2.4. "You must have a procedure in place 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)".

The property factors told the Tribunal that they had delegated authority up to £400 for the building. For work beyond that cost threshold, they needed to obtain estimates and consents.

Sections 4.5, 4.6, 4.7 and 4.8 all relate to Debt Recovery and include a requirement to have systems in place to ensure the regular monitoring of payments due from homeowners, a requirement to issue timely reminders of any amounts outstanding and a requirement not to take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of their intention.

The homeowner's issue here was the fact that he had never received the bills or the reminders, his first indication of the situation being the service of the Charge by

sheriff officers. A simple search of the Register of Landlords would have given the property factors his home address.

Section 7. "It is a requirement of Section 1 (Written statement of services) of this Code that you provide homeowners with a copy of your in-house complaints procedure and how they make an application to the [Tribunal]".

The homeowner told the Tribunal that this complaint related again to the failure to provide him with a copy of the Written Statement of Services. The property factors said that they had acted in good faith based on Contact Details supplied by Mr Boyd, who had said that his flat was Flat 0/3.

Closing Remarks

The homeowner told the Tribunal that it was his view that he should be refunded the charges demanded in the letters he had not answered, because the letters had been sent to the wrong address. He would also like to have the court fees refunded, as it should not have been necessary to incur these costs. The property factors responded that they had a process of debt recovery that they had followed and that the sheriff had been content with it.

The homeowner concluded by saying that factoring companies should not be able to instruct sheriff officers to find and serve notices on homeowners without first checking the Landlord Register and other public records.

The property factors said that they had tried all they could to ensure that documentation went to the right person and the right address, based on the information that they had. They had obtained the homeowner's e-mail address, but it appeared that it had not worked. Given that the homeowner was aware that there was at least discussion about appointing a factor, he did not think to find out why he was not being billed for stair lighting electricity and repairs. When they obtained the correct address for the homeowner's flat, they changed their records, and accounts went to the right address, but the homeowner, in August 2016, had still only paid the bills for the period to 31 January 2016. He had not contacted them to say he could not pay or wanted to discuss payment terms. It had only been when the property factors told the Tribunal that bills were still outstanding, that he had paid up. The homeowner responded that he did not agree with the accounts, so he did not pay them earlier. It had not been until 16 October 2016 that he had received the outstanding bills and he had paid them shortly afterwards.

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

The Tribunal makes the following findings of fact:

- The homeowner is the owner of the property.
- The property forms part of a block of 9 flatted dwellinghouses.
- The property factors, in the course of their business, manage the common parts of the development of which the Property forms part. The property factors, therefore, fall within the definition of "property factor" set out in Section 2 (1)(a) of the Property Factors (Scotland) Act 2011 ("the Act").
- The property factors' duties arise from a Written Statement of Services, a copy of which has been provided to the Tribunal. It includes a Complaints Procedure.
- The date from which the property factors' duties arose is 1 November 2012, the date on which the Act came into force.
- The property factors were under a duty to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors from the date of their registration as a Property Factor.
- The date of Registration of the property factors was 1 November 2012.
- The homeowner has notified the property factors in writing as to why he considers that the property factors have failed to carry out their duties arising under Sections 14 and 17 of the Act.
- The homeowner made an application to The Homeowner Housing Panel ("HOHP") received by HOHP on 3 November 2016 under Section 17(1) of the Act.
- The jurisdiction of HOHP was transferred to the Housing and Property Chamber of the First-tier Tribunal for Scotland with effect from 1 December 2016.
- The concerns set out in the application have not been addressed to the homeowner's satisfaction.
- On 21 December 2016, the Housing and Property Chamber intimated to the parties a decision by the President of the Chamber to refer the application to a tribunal for determination.

Reasons for the Decision

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 1 of the Code of Conduct and also his complaint under Section 17(1) of the Act that they had failed to carry out the property factor's duties as defined in Section 17(5) of the Act .The Tribunal noted that Section 17(4) of the Act states that a failure to carry out a property factor's duties includes references to a failure to carry them out to a reasonable standard. This entire complaint centred on the fact that the property factors had not sent the Written Statement of Services to the correct address, because their records were inaccurate. It was the view of the Tribunal that property factors must take all reasonable steps to

ensure they have accurate records of homeowners. In this case, they knew at an early stage from the contact they had from Mrs Neil that they had the wrong flat reference for her and they appear to have simply assumed that this error would be corrected by "swapping" her address with that of the homeowner. They do not seem to have considered the possibility that they had the wrong references for all 3 ground floor flats. They had a situation where one owner, whose property was rented, was not responding to correspondence, and they were already aware of an error in the information provided by Mr Ndengwe. This should have alerted them to the possibility that there might be further errors, particularly as they did not have the benefit of handover records from a previous factoring agent

The Tribunal would not expect property factors as a matter of course to carry out extensive checks to verify information given to them when they begin factoring a tenement or a development, but where, as in this case, it becomes clear that the information they have been given is inaccurate, they should at least carry out a simple further check of public records, such as the Landlord Register or Council Tax records. Had the property factors done that in this case, they would immediately have ascertained the home address of the homeowner. The tribunal accepted that this might not have been their normal practice, but these were unusual circumstances, in which they were aware that at least some of the information they had been given regarding the ground floor flats was wrong. The Tribunal was also concerned that the property factors had not apparently considered sending a letter and requiring it to be "signed for". The fact that a letter is delivered to an address does not mean it is received by the addressee and, in the case of an apparently rented property where previous correspondence has gone unanswered, property factors should not assume that letters addressed to the homeowner will be passed on by the tenant. Tenants often deal only with letting agents and might assume that letters arriving with another person's name on them relate to a previous tenant and they might not mark them "not known at this address" and put them back in a post box.

The Tribunal was also particularly concerned that, having eventually sent a number of letters to the homeowner at the correct flat address in March 2016, the property factors then sent letters on 3 May, 9 June and 28 July 2016, all to the previous, incorrect, address that they had used.

The Tribunal accepted that there was conflicting evidence in relation to the property factor's e-mail to the homeowner of 22 October 2016. There appeared to be no doubting the fact that it had been sent and the Tribunal accepted the evidence of the property factors that they did not receive a "bounce back" intimation, but the homeowner was adamant that he had not received it. The Tribunal noted that a number of substantial documents were attached to it and that it was possible that they had been too large for the e-mail to be successfully delivered, so was unable to hold that, on the balance of probabilities, it had been received by the homeowner.

The property factors had told the homeowner that a letter, with a copy of the Written Statement of Services, had been delivered to the Property by their Property Inspector. They had originally told him it had been delivered to his tenant, but told the Tribunal that it should in any event have been behind the door of the Property. The Homeowner said that there had been no mail behind the door when his agents cleared and cleaned the flat. The Tribunal was unable on the basis of the evidence presented, to determine which version of events to prefer.

The finding of the Tribunal was that the property factors had failed to comply with Section 1 of the Code of Conduct, in that they had failed to provide the homeowner with their Written Statement of Services within four weeks of agreeing to provide services to him and that they had failed to carry out the property factor's duties in terms of Section 17(5)(a) of the Act.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.1 of the Code of Conduct. The Tribunal accepted that the original statement made to the homeowner by the employee of the property factors that a copy of the Written Statement of Services had been delivered to his tenant was incorrect, but accepted that it was based on her understanding of a file note made by the Property Inspector. On checking further, she had ascertained that he had said that it had been put through the letter box and she intimated this to the homeowner.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Section 2.4 of the Code of Conduct. The Tribunal noted that the Written Statement of Services did, as the Section requires, contain a procedure for consulting with the group of homeowners and seeking their written approval before providing work or services which would incur charges or fees in addition to those relating to the core service. The tribunal also noted that the property factors had stated in evidence that they had not had to consult the homeowners to date, as there had been no repairs which had cost implications beyond the threshold of £400 stated in the Written Statement of Services.

The Tribunal did not uphold the homeowner's complaint that the property factors had failed to comply with Sections 4.5, 4.6 and 4.7 of the Code of Conduct. In relation to Section 4.5, the Tribunal accepted that the property factors had in place systems to ensure the regular monitoring of payments due from homeowners and that they issued timely reminders to inform homeowners of any amounts outstanding. This was evidenced by the numerous reminder letters they had sent to the homeowner, albeit they had been sent to the incorrect address. There was no evidence to suggest the property factors had failed to comply with Sections 4.6 or 4.7 of the Code of Conduct.

The Tribunal upheld the homeowner's complaint that the property factors had failed to comply with Section 4.8 of the Code of Conduct. This Section states that property factors must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of their intention. The Tribunal's finding was that the property factors did not have correct contact details for the homeowner and, knowing that their letters were not eliciting any response from him and that the information they had held in respect of Mrs Neil's flat was incorrect, they failed to take reasonable steps such as consulting the Landlord Register, to ascertain the homeowner's address and give him notice of their intention to take legal action against him.

Property Factor Enforcement Order

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

The Tribunal noted that, in his application and in evidence, the homeowner had stated that he wanted costs related to the court action refunded to him, but also that the property factors had stated in evidence that the factoring bills had been sent to the homeowner at his home address in October 2016, but that he had not paid them until January 2017. The Tribunal was of the view that it would be speculation on its part to conclude that, had he received them timeously, the homeowner would have paid all the earlier factoring bills as and when they fell due and that court action would have been unnecessary to recover the debt. The homeowner accepted that he was aware of the possibility of the appointment of a property factor, but does not appear to have contacted other owners to enquire about progress, or about payment of ongoing bills formerly paid by his tenants. Accordingly, the Tribunal was not prepared to order that the court costs be reimbursed to the homeowner, although the property factors might wish to consider whether, in the light of the Tribunal's findings against them, refunding those costs or setting them off against future factoring bills might be appropriate. The Tribunal did, however, recognise that the homeowner had suffered distress and inconvenience as a result of the property factors' failings, in that the matter had reached the stage of a court decree and enforcement by a sheriff officer without the homeowner having had the opportunity to take steps to avoid it by settling the factors' bills. The Tribunal decided, therefore, that the property factors should pay compensation of £100 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.

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