Housing and Property Chamber
First-tier Tribunal for Scotland

Decision on homeowner's applications:

Property Factors (Scotland) Act 2011 Section 19(1)(a)

Of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Case references : FTS/HPC/PF/18/2939, 2940, 2941

Re: Properties at –

147, 163, and 191 Greenrigg Road, Cumbernauld, G67 2QD ("the Properties")

The Parties :

Alex Walker, 147, 191, and 163 Greenrigg Road, Cumbernauld, G67 2QD ("Applicant")

(represented by Working Legally Ltd, 2/2, 11 Western Avenue, Rutherglen, South Lanarkshire G73 1LQ)

Apex Property Factor Ltd, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Sara Hesp - Ordinary (Surveyor) member

DECISION

1. The Tribunal having no jurisdiction to deal with the Applicant's complaints of the Respondents' failure to comply with section 14(5) of the Property Factors (Scotland) Act 2011 or failure to carry out property factor's duties as defined in section 17(5) of that Act, dismisses the applications.

Introduction

2. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the rules in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

3. On 31 October 2018, three applications were received by the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") from the Applicant's representative seeking decisions that the Respondents had failed to comply with the Property Factor Code of Conduct and other property factor's duties. The applications alleged breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, and 6.4 of the Code. They also alleged that the Respondents had breached their duties:

   (1) In not carrying out grass cutting;

   (2) In not cleaning internal common hallways and stairs;

   (3) In not carrying out repairs to stairs, hallways and the roof.

Findings of Fact

4. Having considered all the evidence, the Tribunal found the following facts to be established:-

   (a) The Properties are flats within the development of 68 dwellinghouses numbered 137 to 259 Greenrigg Road, Cumbernauld within a row of 7 blocks of flats from the 1980s

(numbered blocks 9 to 15). The Properties include common parts of the development.

(b) The development is situated on the south-east side of Greenrigg Road at the east of the neighbouring development. That neighbouring development consists of a row of 8 blocks of flats numbered 1 to 135 Greenrigg Road.

(c) The Properties are owned by Janice Leary. She is the wife of the Applicant.

(d) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 1 November 2012.

(e) The properties within the development are subject to a deed of conditions recorded in the General Register of Sasines on 25 June 1987 ("the Deed of Conditions").

(f) At the beginning of 2015 there were no factors in place for the development. Since August 2015 the Respondents have purported to act as factors for the developments. There has been no meeting of the homeowners in the development appointing the Respondents as factors for the development. There has been no vote of a majority of the homeowners in the development appointing the Respondents as factors. No factoring contracts or agreements have been entered into between the homeowners of the development and the Respondents.

(g) In or about September 2016 the Respondents issued a "Property Factoring Statement of Service" to owners of the development.

(h) On or about 28 September 2017 the Respondents issued invoices to homeowners in the developments seeking payment for cleaning, landscaping and litter-picking services allegedly carried out in August 2017.

(i) By letter dated 4 July 2018 Working Legal wrote to the Respondents on behalf of certain owners of properties at numbers 7, 13, 27, 29, 83, 85c, 99, 101, 109, 125, 131, 151, 185, 203, 207 and 209d,

Greenrigg Road in the development and the neighbouring development complaining of breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, 6.4 and 7 of the Code.

(j) Applications to the Tribunal on behalf of certain other owners in the development and neighbouring development were lodged on 15 August 2018.

(k) By letter dated 1 October 2018 Working Legal wrote to the Respondents on behalf of the owner of the Properties complaining of breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, 6.4 and 7 of the Code and breaches of other property factor's duties. There was no response to this letter.

(l) Applications to the Tribunal on behalf of the Applicant were lodged on 31 October 2018.

Procedure

5. The applications to the Tribunal sought in the first place an order declaring that the Respondents were not as a matter of law factors for the development. They also sought a determination of failure to comply with the Code and also with other property factor's duties. On or about 15 November 2018 a Convener with delegated power of the President of the Tribunal referred the applications to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's casework officer dated 23 November 2018 which also invited the parties to make written representations to the Tribunal and to lodge supporting documents known as productions.

6. The Applicant's representative lodged productions with the Tribunal on 20 December 2018, and on 10 January 2019. The Respondents lodged productions with the Tribunal on 18 December 2018 and on 3 January 2019 but the latter of these were lodged late and not relied on by the Responents. The Applicant's representatives lodged written

representations comprising (1) a skeleton argument; (2) a letter dated 29 November 2018 in response to the Tribunal's direction dated 20 November 2018; and (3) a letter dated 8 December 2018 in response to the Tribunal's direction dated 5 December 2018. The Respondents lodged written representations on 7 November 2018 and on 18 December 2018 (in a letter dated 14 December).

7. A hearing was fixed to take place at the Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT on 4 January 2019 at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by letters from the Tribunal's casework officer dated 22 November 2018. The applications were to be heard together with those for case references FTS/HPC/PF/18/2086-2100 and 2937.

8. The hearing took place on 4 January 2019 at 10 a.m. at the venue fixed for it. Mr James Collier of Working Legally appeared for the Applicant. Mr Neil Cowan appeared for the Respondents. The hearing was continued to the same venue and time on 11 February 2019 when it concluded.

Jurisdiction - Summary

9. Two matters arose at the outset. Both had the potential of excluding the jurisdiction (power) of the Tribunal to make the order sought in the applications. In other words if any of them excluded the jurisdiction of the Tribunal it could not consider the breaches of Code and property factor's duties alleged.

10. The first matter was that the Applicant was not the owner of the Properties. Rather they were owned by his wife Janice Leary. The second matter was that even if the owner had been the Applicant, there did not appear to be any factoring contract in place between him and the

Respondents. In that case it might be difficult to see how the Respondents could owe any duty to the Applicant or Ms Leary whether under the Code or as (another) property factor's duty.

Jurisdiction – Non-ownership of Property

11. The Tribunal can only consider applications from owners of land or buildings (heritable property). That is the effect of section 17(1) as read with section 10(5) of the 2011 Act. In this instance the owner of the Properties was Janice Leary, the wife of the Applicant. The fact that they are married is immaterial. The fact that Ms Leary authorised the Applicant to provide instruction "as the homeowner" to a representative is immaterial. She cannot make him a homeowner in that way. On any view the Applicant was not an owner of the Property.

12. In these circumstances the Tribunal lacked jurisdiction (power) to deal with the applications. For this reason the applications had to be rejected. Strictly speaking it was therefore not necessary to deal with the second matter. However given the importance of the second matter the Tribunal expressed its view on it.

Jurisdiction – Issue of Existence of Factoring Contract/Appointment

13. The key remedy sought in the applications was an order declaring that the Respondents have not been appointed as property factor. In other words it sought a binding declaration from the Tribunal that the Respondents were not the agents for the homeowners in the development.

14. The jurisdiction (power) of the Tribunal is set out in sections 17(1) and 19(1) and (3) and 20 of the 2011 Act. Section 17(1) gives it power to decide, on the application by a homeowner, whether a property factor has failed (a) to carry out property factor's duties; or (b) to ensure

compliance with the Code of Conduct. Section 19(1) gives it the power and section 19(3) the duty, to make a property factor enforcement order in the event that it finds any of those failures to have taken place. Section 20 specifies that such an order may require the factor to execute such action as the Tribunal considers necessary or to make payment which the Tribunal considers reasonable.

15. Property factors existed before the 2011 Act. As noted already a property factor is an agent of the owner or owners of property who manages the property on behalf of the owners. That relationship is one of contract in which the owners are the principals or clients of the factor who is their joint agent. Before the 2011 Act if there was no contract of agency with the homeowners there was no property factor. An example of this was in the case *Hanover (Scotland) Housing Association v. Reid* 2006 Scots Law Times 518 where it was found that there had been no valid appointment of the factor.

16. The aim of the 2011 Act was to provide a remedy to homeowners in respect of their property factors and to improve the service provided by such factors. This was reflected in the Policy Memorandum supporting the Bill which became the Act, which stated in paragraph 16:

> "This new form of alternative dispute resolution would enable a homeowner to apply in writing to the homeowner housing panel for a determination of whether *their* property factor had failed to comply with any term of the contract between the parties or with the statutory code of conduct." (Tribunal's emphasis).

That the Act was designed to deal with the relationship between homeowners and "their" accepted factors is emphasized further in paragraph 6 of the Policy Memorandum. In listing the mischiefs which the Act was to deal with, paragraph 6 refers to homeowners and "their"

factors and nowhere mentions disputes over appointment of factors such as that in the *Reid* case.

17. The Code underlines the purposes of the Act in its provisions. Almost of all of these deal with the nature of an existing relationship between a factor and his clients. The principal provision of the Code is the requirement that the factor provides the homeowner with a written statement of services. Such services can only be provided (legitimately) as part of a contract between the factor and homeowners. Absent a valid appointment no services would be due and no written statement would be appropriate.

18. If there were no definitions of "homeowner" or "property factor" in the 2011 Act it would be plain that without a contract of agency between homeowner and factor there could be no "property factor's duty" owed by the factor to the homeowner which could be adjudicated on by the tribunal under section 17(1)(a). Equally given that the Code of Conduct is intended to govern the conduct of a factor towards their client the homewoner, there could be no duty to comply with the Code of Conduct on which the tribunal could adjudicate under section 17(1)(b).

19. Do the definitions in the Act extend the jurisdiction of the tribunal under section 17(1) ? "Homeowner" is defined in section 10(5) of the Act. For that to be satisfied an owner must :

(a) own land (or other immoveable property) the common parts of which are "managed" by a "property factor" or

(b) own residential property neighbouring the land managed by the factor which neighbouring (factored) land is available for the owner's use.

All of that is entirely consistent with the requirement of a contract of agency between factor and owner. Nothing in section 10(5) appears to extend the jurisdiction to situations where there has been no contract between an owner and a person claiming to be the owner's factor.

20. The expression "property factor" was itself defined in section 2(1). That definition while differing in its precise wording from section 10(5) essentially mirrored it. It too was consistent with the requirement for the existence of a contract between the owner and the person who fell within the definition in section 2(1). Again there was no suggestion that the Scottish Parliament intended the jurisdiction of the tribunal to cover situations where there was no contract between the parties to the dispute.

21. Leaving aside any case law it appears plain that the jurisdiction in section 17(1) assumes the existence of a contract of agency between the applicant homeowner and the respondent factor at the time of the alleged failure. On the basis of that assumption the only question for a tribunal would be whether during the duration of a factor/homeowner contract there has been a breach of factor's duty or breach of the Code of Conduct.

22. It followed that the jurisdiction of the tribunal was not there to make a binding order on the issue of whether the contract of agency (factoring) did or did not exist. The jurisdiction to make such an order remained with the court. The words "property factor" in section 10(5) should be interpreted as meaning "property factor validly appointed on the owner's behalf" and in section 17(1) as "property factor validly appointed on the homeowner's behalf".

23. However there had been suggestions in previous cases that even in the absence of a contract of agency a tribunal had power to make an order against a person who was registered as a factor. The principal case was *FTS/HPC/PF/17/0023*. At Upper Tribunal the case name *McNaught v. Apex Property Factor Limited* was used. The case was unreported. It involved the current Respondents. It involved a nearby development.

24. In *McNaught* the applicant complained of breaches by the Respondents of sections 2.2, 2.5, 4.7, 4.8 and 4.9 of the Code. He did not complain of breach of property factor's duties. The breaches alleged were all based on the Respondents not having been appointed factors and despite their lack of appointment having sent invoices to the applicant demanding payment and disregarding his requests for confirmation of their authority to act as factors.

25. The First-tier Tribunal found that the Respondents did not have the authority of the homeowners or their residents' association to act as factors. Nevertheless the tribunal went on to find that there had been breaches of sections 2.2, 2.5, 4.8 and 4.9 of the Code and proposed an order requiring the Respondents to issue a credit note for the illicit invoices.

26. The Respondents sought permission to appeal to the Upper Tribunal on the basis that as the First-tier Tribunal had found that they were not factors the tribunal lacked jurisdiction to propose the order requiring the credit note.

27. The Upper Tribunal refused permission to appeal. In its refusal of permission the Upper Tribunal judge referred to the definition of "homeowner" in section 10(5) of the Act, stating, in paragraph [6] :

> "It is a necessary component of this definition that the homeowner's property be managed by a property factor. The provision contains no express requirement that the property factor who carries out that management should be validly appointed; to imply that condition would not be consistent with the legislative intention of setting minimum standards of practice for all registered property factors (section 14(1)). All that is required is that the property factor who is the subject of the complaint did in fact manage or maintain common property pertinent to the homeowner's property."

The mention of legislative intention appeared to be a reference back to paragraph [4] of the refusal where the Upper Tribunal judge stated that the obligation to comply with the Code applied to a property factor whether validly appointed or not because,

> "When the various breaches of the code identifed [sections 2.2, 2.5, 4.8 and 4.9] are considered it is apparent that no other interpretation would make sense. . . These duties are all aimed at setting minimum standards of practice for registered property factors generally (section 14(1))."

28. However the Upper Tribunal judge had not been given the information in the Policy Memorandum already noted. He was unaware of the assumption of the Scottish Parliament was that there would be a factor in place and that the tribunal (formerly committee) would decide disputes between such factors (validly appointed) and "their" clients, the homeowners.

29. In addition, the Upper Tribunal judge had not taken account of the provisions of the Code as a whole and the key duty in section 1 of the Code, namely to provide a written statement of services with details of the "arrangement in place" between homeowner and factor. It would be most odd if a registered factor who had not been validly appointed by homeowners should require to provide a statement of services. The supply of such a statement would be misleading for homeowners and potentially lead some of them thinking that the factor had been validly appointed when that was not the case. In turn it might lead to factors

being forced onto homeowners against their will. None of that can have been the intention of the Scottish Parliament in the 2011 Act.

30. It would also be odd if some parts of the Code were applicable to validly appointed registered factors only and other parts of the Code (e.g. sections 2.2, 2.5, 4.8 and 4.9) to all registered factors whether validly appointed or not. There was no suggestion within the Code that it was to be applied in that manner.

31. In these circumstances it appeared to the Tribunal that the Upper Tribunal had erred in its refusal of permission to appeal in *McNaught*. No doubt this was due to full argument not having been put to the judge. The decision of the Upper Tribunal in *McNaught* was given on an application for permission to appeal and without full submissions. In these circumstances the Tribunal did not consider it bound by the rationale in *McNaught*.

32. The other case was *FTS/HPC/PF/17/0285/0286-0287* another case involving the Respondents and the neighbouring development in Greenrigg Road. The property involved was 65 Greenrigg Road. In that case the applicants complained of breaches of sections 1A, 3.3, parts of section 4, 6.2 and 6.3 of the Code and breach of property factor's duties. It was decided on 8 February 2018.

33. In that case the first-tier tribunal found that the Respondents had not been appointed as factors in accordance with the Deed of Conditions which governed appointment. Nevertheless the tribunal went on to find that there had been various breaches of the Code and proposed a property factor enforcement order.

34. The issue of the lack of jurisdiction had not been focussed in that case and the points raised in the current case were not argued. In these circumstances that case did not assist the current Tribunal.

35. Returning to the current cases, Mr Collier submitted that despite the lack of appointment the Tribunal still had jurisdiction to make a determination of whether the Code had been complied with. In short he wished the Tribunal to declare that the Respondents were not property factors of the owners of the development but at the same time to determine that the Respondents had failed to comply with the Code and other property factor's duties.

36. The Tribunal found Mr Collier's submission inconsistent. On this branch of the submissions in the present case the Tribunal concluded that if it was established that the Respondents had not been validly appointed as factors for the Properties it had no jurisdiction to consider the breaches of the Code and property factor's duties alleged in the applications under section 17(1)(a) or (b) of the 2011 Act.

Factoring Contract/Appointment of Respondents for Properties

37. The Tribunal considered whether the Respondents had been validly appointed as factors for the Properties. It was accepted that there had been no factor in place at the beginning of 2015. It was also accepted tha there had been no residents' association in operation for the development.

38. The development consisted of more than one tenement. In that situation the default rules for the appointment of a factor were as set out in section 28 of the Title Conditions (Scotland) Act 2003 (2003 Act, s.31A). Section 28(1) provided that subject to certain other sections (which did not apply

in the present case) and, importantly, any provision made in community burdens, the owners of a majority of the units in a community could:

(a) appoint a person to be the "manager" of the community on such terms as they may specify;

(b) confer on such manager the right to exercise such of the owners' powers as they may specify (including maintenance powers);

(c) revoke or alter the manager's rights to exercise those powers; or

(d) dismiss the manager.

39. In the present case, however, there were provisions in community burdens which overrode the default rules. These were in the Deed of Conditions recorded in the General Register of Sasines on 25 June 1987. The development and community covered by the 1987 Deed of Conditions was the 68 dwellinghouses numbered 137 to 259 Greenrigg Road within 7 tenements (blocks 9 to 15). The Deed of Conditions provided :

> "6. . . . (1) there will be appointed a Factor who will be responsible for supervising the common repairs to and maintenance of the Property, the Curtilage and the Common Parts and apportioning the cost thereof amongst the proprietors in accordance with this Clause."
>
> "9.(1) On completion and sale of the last flatted Dwellinghouse the appointed Factor shall arrange the setting up of a Residents Association whereby the proprietor of each Dwellinghouse shall become a member of such an Association and the proprietor shall have only one vote in deciding matters of common interest to the entire block of flatted Dwellinghouses; such a Residents Association shall have no power in deciding the maintnenance and upkeep of the property without a majority consent from the proprietors of the sixty eight Dwellinghouses known as numbers 137 – 259 Greenrigg Road, Cumbernauld.
>
> 9.(2) Subject as aftermentioned the Residents Association may convene a general meeting of residents at not less than seven days

notice with a quorum no less than seven proprietors shall have power (i) to appoint a Factor . . ."

"9(4) The proprietors of any seven of the sixty eight Dwellinghouses shall have the power to call a meeting of the Residents Association to be held at such reasonably convenient time and place as the conveners of the meeting may determine and which time and place of meeting at least seven days' notice in writing shall be given . . . to the other proprietors. . . DECLARING THAT . . . all resolutions of the Residents Association will be passed by a majority of the votes cast and the resolution so passed will be binding upon all proprietors whether assenting or not.".

The question was whether the Respondents had been appointed in accordance with these provisions.

40. The Tribunal had the evidence of Aidan Henderson, owner of 209D Greenrigg Road in the form of a written statement (production 1j). In it he stated that he had started receiving letters, invoices and statements from the Respondents in 2015. The first correspondence that he had received was a form where the Respondents asked for confirmation of their acceptance as factor. He had signed this under the impression that they had already been lawfully appointed by the Residents' Association. If he had known that this had not been the case, he would not have signed it. The written statement was not challenged by the Respondents. The Tribunal accepted it as accurate.

41. The Tribunal heard evidence from Miss Leeann Semple, owner and occupier of 101 Greenrigg Road in the neighbouring development. Miss Semple spoke to there having been a meeting of residents of both developments at Greenrigg Road and the neighouring one at Millcroft. She confirmed the accuracy of the minutes of the meeting which had taken place at Carbrain Baptist Church (production 10). That had been about a year after the Respondents had initially claimed appointment

although she could not be sure of the date. She had received a copy of the minutes from Angie Inch. She noted that she was one of the persons who had agreed to provide assistance on the way forward.

42. For the Applicant, Mr Collier submitted that while the Residents' Association was inactive, given that the owners of each of the 68 units was by virtue of ownership a member of the Association there was nothing to prevent the owners of 7 units calling a general meeting at which a factor could be appointed. However this had not happened. Absent such appointment the Respondents had not been validly appointed as factors. The signature of some mandates by some homeowners was insufficient to allow the Respondents to be appointed factors for the whole community.

43. For the Respondents, Mr Cowan submitted that the Residents' Association did not exist when they had begun to act as factors for the Properties. He submitted that the Respondents had been approached by several homeowners with a request to become factors. He was unable to provide any evidence of this, however. He then submitted that the Respondents had written to all owners in Greenrigg Road asking if they would consider appointing the Respondents as factors. The letter (production 5b) dated 3 August 2015 was the letter that they had sent. He submitted that the Respondents had been appointed "close by close". If a close had 8 properties its proportion of the whole community was over 10% and it was therefore entitled to appoint its own factor. He accepted that there had not been any general meeting of residents of the community of 68 properties that he submitted had appointed the Respondents. He accepted that nothing in the deed of conditions allowed the Respondents to be appointed. Furthermore the Respondents were not relying on the procedures in the Tenements

(Scotland) Act 2004 (the other basis of appointment given in the Property Factoring Statement of Services).

44. The Tribunal accepted Mr Collier's submission in relation to the validity of the Respondents' appointment. There had been no residents' meeting either called or taken place at which the Respondents had been appointed. Indeed this was accepted by the Respondents. The Respondents' approach to assessing whether they had been appointed or not was fundamentally flawed. Each of the owners in the 68 unit community had bought their properties on the basis that they were part of a 68 unit community that could appoint a factor on their behalf in accordance with the provisions in the Deed of Conditions clauses 6, 9(1), 9(2) and 9(4). There was no legal basis for the owners to appoint a factor "close by close" or "tenement by tenement". That was excluded by the Deed of Conditions which treated 7 tenements as one community of properties. The appointment procedure in the Deed of Conditions had not been followed. That being the case no factoring contract had been created between the Respondents and the homeowners of the community in the 7 blocks covering 137 to 259 Greenrigg Road, Cumbernauld.

45. The Tribunal was surprised that the Respondents were claiming any basis for a valid appointment. A straightforward reading of the deed of conditions (which was publicly available) would have made it clear that (1) the community in question was 68 units; (2) under clause 9(4) any 7 owners could call a meeting of the residents' association (even if it was inoperative); (3) under clause 9(2) a meeting with a quorum of 7 was required to appoint the factor. Even if the Respondents had believed (erroneously) that the Residents Association could not be revived, then it was clear from the Deed of Conditions that the community comprised 68 units and under section 28 of the Title Conditions (Scotland) Act 2003

their appointment as factors required a majority of the owners of units in the community, something which they have never claimed to have obtained. The Tribunal deprecated the Respondents' "parachuting" of themelves onto the development as factors accompanied by the unwarranted sending of invoices to unsuspecting homeowners.

46. Given that the Respondents' lack of appointment and consequent lack of its jurisidction to consider the applications the Tribunal did not require to consider the alleged breaches. Nevertheless, given the detailed submissions and evidence that had been put to it, the Tribunal considered each alleged breach.

Section 1 of the Code

47. Section 1.1a A (a) of the Code provides,

> "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 written statement should set out . . . a statement of the basis of any authority you have to act on behalf of all the homeowners in the group."

48. Mr Collier submitted that the Respondents' written statement had not set out any basis of authority at all. All it said was they had been appointed,

> "in accordance with the provisions of the 'Title Deeds' for the Development or The Tenements (Scotland) Act 2004 as appropriate."

Furthermore, it had not been given within 4 weeks of any agreement of the Respondents to act. He led Miss Semple and Mr Ahmed (owners in the neighbouring development at Greenrigg) as witnesses whose evidence he submitted could apply to the Applicant's' development as well. Mr Cowan submitted that the written statement had been given in

August 2015. However he could produce no evidence in support of this. He did not put himself forward as a witness.

49. Miss Semple spoke to having received the undated written statement "Property Factoring Statement of Services" (enclosed with the Respondents' letter to Mr Collier dated 27 July 2018) ("the WSS") from the Respondents only after having received their "five thousand pound bill". She said that it had been after 1 September 2016 when according to her statement of account from the Respondents (production 13i) she had received two invoices totalling £ 4850. Under cross-examination she said that it was possible that she might have received the WSS in 2015 when she signed the mandate received from the Respondents as "so much was going on" at that time.

50. Mr Ahmed said that he was unable to say the exact date when he had received the WSS but that it was after he had met Mr Cowan and received the outstanding bill. He had asked Mr Cowan if anyone else had agreed to the Respondents to which Mr Cowan had replied "yes". On hearing this Mr Ahmed confirmed that he had paid £ 100 to the Respondents. He thought that he would probably have received the WSS around 21 October 2015 which is stated to be the date of payment in the Respondents Statement of Account of Mr Ahmed with them (production 13h). The meeting had been before that date. There was no cross-examination of Mr Ahmed whom the Tribunal found to be credible and reliable.

51. With regard to the WSS for the Applicant's development community, the Tribunal also took account of Mr Henderson's statement (production 1j) that he had received the WSS on or about 1 September 2016. This tended to corroborate Miss Semple's evidence. Given that it is accepted that the Respondents treated both developments as one, and Mr

Ahmed's receipt of the WSS followed his individual meeting with the Respondents, on a balance of probabilities the Tribunal accepted the evidence of Ms Semple and Mr Henderson as to the date when the WSS was sent to owners in both developments as a whole.

52. With regard to the date when the Respondents first provided services (even if unauthorised), the Tribunal took note of the dates of the Respondents' demands for payment to various homeowners. Thus Mr Ahmed's Statement of Account indicated the invoicing of him for £ 100 at the end of July 2015. The Respondents' list of work (production 5h) states that they cut grass and picked litter for the first time on 12 August 2015.

53. The Tribunal found that the WSS failed to comply with section 1 of the Code in three respects. Firstly it had been provided no earlier than September 2016 which was more than 4 weeks after the Respondents had, on their own initiative, started to provide services. Secondly, it had failed to give a transparent statement of their actual authority to act to homeowners. To merely state that the appointment is in accordance with the provisions of unspecified title deeds was too vague. It was not transparent. How was the homeowner meant to know which title deed ? It was not for the homeowner to be searching for the deed to justify the factor's authority. It was for the factor to be clear about the basis of their authority and to justify it. This vagueness was compounded by the reference to the Tenements (Scotland) Act 2004 as an alternative means of appointment, again without any reference to the actual process under that Act, such as the date of appointment. A factor is reasonably expected to know the basis of appointment. If a factor is unable to give these details, the factor should question whether it should be acting at all for the properties in question or seek to put the matter beyond doubt by following the proper process. Thirdly, there had been

no authority to act at all for the reasons given in relation to lack of jurisdiction.

Section 2.1 of the Code

54. Section 2.1 of the Code provides that a factor must not provide information which is misleading or false.

55. Mr Collier submitted that the statements in the WSS (a) as to the authority to act; and (b) that invoices would be sent monthly were misleading or false. Mr Cowan denied that was so. The Tribunal found that the statement in the Written Statement of Services as to the authority to act was false and misleading. In their submissions to the Tribunal the Respondents accepted that their authority was not to be found in the 2004 Act. They claimed that their authority to act was under the deed of conditions while stating that they were appointed "close by close". If the Respondents had read the deed of conditions it would have been plain that appointment was not done on a "close by close" basis and that a general meeting of the residents of the 68 unit community was required. On any view there was no justification for a "close by close" appointment if they were relying on the deed of conditions. The Tribunal found that the statement in the Written Statement as to invoices was a statement of future intent. It was not false and misleading in itself.

56. Mr Collier also submitted that the Respondents' invoice produced as number 14n contained false statements. This invoice was :

- No. 4948 dated 28 September 2017 for "Management Fee – Aug 2017" for £ 10.00 plus VAT for proportion "1/122"; for "Cleaning – Aug 2017"; for "Landscape/L pick – Aug 2017 1/122"

57. Mr Collier led Mr Ahmed as a witness to the alleged falsity of this invoice which was addressed to Ms Panaitescu, owner of No.151 Greenrigg

Road. Mr Ahmed said that as far as he was aware the Respondents had not carried out any work since 2015. For example while the Respondents had claimed to have removed rubbish, this had in fact been done by North Lanarkshire Council. He referred to various photographs which he had taken and had been produced by Mr Collier to the Tribunal. These photographs related to the communal carpark opposite block 1 (numbers 1 to 20 Greenrigg Road), the southern verge of the vehicle entry to Greenrigg Road, a plant bed near the garages facing the block with numbers 21 to 35 Greenrigg Road, the outside stairways leading to numbers 21 to 35 Greenrigg Road, and the internal stairwell of Mr Ahmed's flat which is 27 Greenrigg Road. He confirmed that the photographs had been taken on the dates shown on them which were in August and September 2017. Under cross-examination he reiterated that the invoices that he had received from the Respondents included charges for cleaning and litter picking but these did not bear a resemblance to the reality regarding cleaning and litter picking. The Tribunal found that in the neighbouring development and Mr Ahmed's stairwell the Respondents had not carried out these services in August and September 2017.

58. However the Tribunal was not presented with similar evidence for the non-performance of work charged in Ms Panaitescu's invoice. The photographic evidence from Mr Henderson related to a later period beginning in October 2017. The situation at the development in August and September may have looked different. Accordingly the Tribunal was unable to find that there were false and misleading statements in the invoice to Ms Panaistescu.

Section 2.2 of the Code

59. Section 2.2 of the Code provides,

"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).".

60. The Applicant's complaint was that he had felt threatened and intimidated by correspondence sent to him by the Respondents. This was :

- Circular letter to all homeowners dated 25 October 2017 (production 5q) stating :

  ". . . there appears to be a malicious minority who have their own agenda, which is not for the benefit of the majority of the Owners. You may have received correspondence from "Greenrigg and Millcroft Resident's Association"; we would comment as follows: - . . . 3. All correspondence received by us is completely anonymous; if you are aware of the identity of any of the participants we would appreciate this information, to enable us to instigate legal proceedings against them, to protect your position. 4. We have had a meeting with North Lanarkshire Council who indicated that the interference of this group could hinder any progress towards possible grant funding."

61. The Respondents' Mr Cowan submitted that there was nothing threatening or intimidating in this letter. There was no threat or intimidation in it. Nothing in it was intended as a threat.

62. The Tribunal took the view that the following aspects of the above correspondence were threatening and intimidating and did not constitute a reasonable indication of legal action:

Description in a circular letter to all homeowners of a group homeowners seeking to revive the Residents' Association as a "malicious minority" and seeking information as to their identity to raise (unspecified) legal proceedings against them – this general threat designed to pressurize one group of homeowners by setting the others into conflict against them was clearly threatening and intimidatory to those seeking to revive the Association. The Tribunal found this letter quite outrageous and tended

to show that the Respondents were not fit and proper to be property factors.

63. In all of this respect the Tribunal found that the Respondents had communicated in a way contrary to section 2.2 of the Code.

Section 2.4 of the Code

64. The Applicant complained that the Respondents had breached their duty under section 2.4 of the Code which provides, among other things,

> "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)"

65. Mr Collier submitted that the Respondents did not have such a procedure. They had not consulted prior to replacing the door entry at a cost per homeowner of £ 1197.81 plus VAT (productions 14m) or the repair to lights of £ 510.02 inclusive of VAT (production 14j). Nor had there been there any consultation with homeowners before obtaining the quotations (covering both developments) all dated 25 October 2016, for works from "Real Building Contractors" with total costs of £17745 plus VAT for grey paving slabs, £ 1500 plus VAT for replacement of doors to bins stores and securing of all doors; and £ 13500 plus VAT for removal of waste chute doors (productions 9a, 9b, 9c). Mr Collier doubted whether the VAT in the "Real Building Contractors" quotations would be payable in any event given that the the VAT registration number at the foot of the quotations lacked the necessary number of digits (production print-out from European Commission website).

66. Ms Semple gave evidence that she had not been contacted by the Respondents in relation to these items of expenditure before they were incurred. Mr Ahmed gave evidence that there had been no consultation with or agreement by homeowners. He had received the three "Real Building Contractors" quotations without any covering letter. There was no cross-examination on this and the Tribunal accepted this evidence.

67. Mr Cowan submitted that repair work such as that charged for or quoted for was not in the Respondents' core services. Therefore they required funds for such works. The work in the "Real Building Contractors" quotations had not been carried out. Mr Cowan did not point to any prior consultation procedure by the Respondents or any written approval having been obtained from homeowners.

68. The first question was whether the Respondents had a procedure to consult with homeowners in the 68 unit community. The removal of the waste chute doors was more than a repair. Thus it would have been outwith the core services and required consultation. Yet a quotation had been obtained (apparently) from "Real Building Contractors" without any prior consultation. Furthermore the invoice to Ms Panaitescu dated 1 September 2016 (production 14m), taken with Mr Cowan's submission that the work had not been carried out suggested that no consultation procedure was in place, whether or not activated by the Respondents. They simply asked homeowners to pay before even obtaining of the formal quotation. There was therefore clear non-compliance with section 2.4 of the Code in that respect.

69. The second question was whether other items of work (for which there had been no consultation or seeking of written approval from homeowners) involved work beyond the core service. Contrary to what

Mr Cowan submitted, arranging common repairs was stated as a core service in the Respondents' Property Factoring Statement of Services. In contrast, "improvements and adaptations" were not within the core services.

70. The Tribunal accepted Mr Cowan's submission that the work in the three quotations had not been carried out. Mr Collier did not claim that the work had been carried out. So far as the door entry and light repair work was concerned, it had not been established whether it was an adaptation or improvement rather than a repair. In those circumstances it had not been established that these were outwith the core services and that written approval was required before they were carried out. The Tribunal found no non-compliance with section 2.4 in that respect.

Section 3.3 of the Code

71. Section 3.3 of the Property Factor Code of Conduct provides,

> "You must provide . . . 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."

Mr Collier submitted that no breakdown of charges had been provided at all since the alleged appointment in 2015. The irregular issue of invoices did not amount to compliance with section 3.3. A homeowner had no overview of what the factor was doing and charging for over a fixed period of time. As an example the invoice to Mr Mustafa dated 3 September 2018 (production 14a) did not mention any cleaning even though cleaning works of the common areas such as stairwells was part of the core services. The invoice to Ms Panaitescu dated 1 September

2016 (production 14m) was the first invoice issued by the Respondents despite them having begun acting in August 2015. Furthermore it did not mention when the works charged for had taken place. Some of the charges on that invoice had in fact been withdrawn by the Respondents.

72. Mr Cowan submitted that the delay in issue had been caused by the Respondents' principal Mrs Bakhshaee-Davidson having suffered a serious spinal injury together with computer software problem. He submitted that the invoices sufficed to comply with section 3.3.

73. The Tribunal found that the invoices issued to homeowners failed to contain a detailed financial breakdown of charges. It was quite unclear how the figures in the invoices were reached. The fraction of overall cost being charged to a homeowner was unclear. The dates of the work charged for were not stated. The location of the works within a total of 7 blocks was not stated. The Respondents left homeowners in the dark as to an overview of all charges over a certain period. Transparency was lacking. In these circumstances the Tribunal found non-compliance with section 3.3.

Section 4.9 of the Code

74. Section 4.9 of the Code provides,

> "When contacting debtors, you or any third party acting on your behalf, must not act in an intimidating manner or threaten them (apart from reasonable indication that you may take legal action). Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position."

75. Mr Collier submitted that this had been breached for the same reasons as section 2.2. Mr Cowan opposed this submission on the same basis as for section 2.2. The Tribunal found that it had not been established that the homeowners who had been threatened were debtors of the Respondents. For that reason section 4.9 did not apply.

Section 6.3 of the Code

76. Section 6.3 provides,

> "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."

77. Mr Collier founded on requests made by Mr John Connor in his letters to the Respondents dated 4 November and 15 December both 2016 and an undated letter (productions 6a to 6c). The letter of 4 November complained about the Respondents not providing independent quotations from several companies for the works. This was repeated in the December letter and the undated letter, which may have been between the two dated letters. The undated letter stated that the Respondents had not replied and the December letter stated that the had visited the Respondents at their office but still not received the information. Mr Collier also submitted that Mr Ahmed had made a request for the reasons for appointment of contractors. However he accepted that he had no direct evidence of this.

78. Mr Cowan submitted that the "vast majority of work" including landscaping was done by the Respondents' "In-House staff". He had no submission to make in relation to Mr Connor's requests.

79. The Tribunal found that Mr Connor was in substance seeking to find out how the Respondents had appointed contractors. They had not responded and this amounted to non-compliance with section 6.3 of the Code.

Section 6.4 of the Code

80. Section 6.4 of the Code provides,

"If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works."

81. Mr Collier accepted that he had no evidence in support of this. In these circumstances the Tribunal found that there had been no non-compliance.

Property Factor's Duties

82. Mr Collier submitted that the Respondents had failed to carry out :

(a) Grass cutting,

(b) Cleaning of internal hallways and stairs;

(c) General repairs to stairs, hallways and roof.

He relied on the evidence of Mr Ahmed presented in relation to the neighbouring development at 1 to 135 Greenrigg Road. That had amounted to a failure to carry out the core services in the WSS which included "cyclical maintenance to communal areas of the Development" and "preserving the amenity of common or shared areas . . by means of instructing regular gardening, cleaning works, repair and maintenance of common areas.". It applied to the current development also. Mr Cowan submitted that the Respondents' operatives went onto the development every two weeks.

83. The Tribunal did not have sufficient evidence of non-performance of cleaning and maintenance for the outside aspects of the development in August and September 2017. It did however have the evidence of Mr Henderson's written statement (production 1j) that "work was not being carried out" supported with photographs from October 2017 and April 2018 (productions sent by Mr Henderson to Respondents by e-mail dated 9 April 2018 and copied by Mr Collier to Respondents with letter dated 4 July 2017). These indicated a level of tree leaves and litter accumulated to such an extent that it appeared unlikely that it would

have accumulated in under two weeks. In the circumstances, had it had jurisdiction, the Tribunal would have found that the Respondents had failed to carry out their property factor's duty to clean and maintain the outer common parts of the development. There was no evidence relating to the internal common areas of the development.

Expenses

84. At the end of the hearing Mr Collier requested the Tribunal to make an award of expenses in respect of the cost of him requiring to attend at the second day of the hearing. He submitted that this had been caused by the unreasonable behaviour of the Respondents at the first day when they requested time to make an oral response in connection with the alleged breaches of sections 3.3, 4.9, 6.3, 6.4 and 7.1 of the Code. He estimated the wasted cost at the rate of £ 7.83 per hour to cover the hearing on the second day (2 ¼ hours) plus the duration of travel from the Tribunals Centre to Rutherglen which was 50 minutes.

85. The Tribunal did not find that the request by the Respondents to make an oral response to the alleged breaches of the sections of Code was unreasonable behaviour. Whilst at the end of the first day Mr Collier had indicated that he did not wish to add to his written submissions on those sections of the Code that did not mean that it was unreasonable behaviour for the Respondents to wish to add or even consider adding oral representations to their written submissions on those sections at a continued hearing. The Tribunal refused the request for an order for payment of expenses.

Opportunity for Review, Representations and Rights of Appeal

86. The Applicant or Respondents may seek a review of and make representations to the First-tier Tribunal on this decision. Any request for a review or the making of such representations must be made in writing

to the Tribunal by no later than 14 days after the day when this decision was sent to the parties. It must state why a review is necessary.

87. The opportunity to make representations and to seek a review is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their request for a review and written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

88. **In the meantime and in any event, the Applicant or the Respondents may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission.**

89. **All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016. The seeking of a review and the making of representations does not suspend or otherwise affect this time limit.**

D Bartos

Signed . .Legal Member and Chairperson

.....8 April 2019.....Date