Housing and Property Chamber
First-tier Tribunal for Scotland

First-tier Tribunal for Scotland (Housing and Property Chamber)
Statement of Decision in respect of an application under Section 17 of the Property Factors (Scotland) 2011 ("the Act") and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016

Chamber Ref: FTS/HPC/PF/16/1009 and FTS/HPC/PF/17/0322

Property: Subjects at 12 The Stables, 38 Ferguslie Main Road, Paisley, PA1 2QT

The Parties:-

Mr D P , residing at 12 The Stables, 38 Ferguslie Main Road, Paisley, PA1 2QT ("the Homeowner")

and

Life Property Management Limited, having a place of business at Regent Court, 70 West Regent Street, Glasgow, G2 2QZ ("the Factor")

The Tribunal consisted of:-

Mr Andrew Cowan – Chairperson

Mr Mike Links – Ordinary Member (Surveyor)

Decision

The Tribunal determined that the Factor has failed to comply with certain duties arising from the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (hereinafter referred to as the **"The Code"**) and accordingly determined to make a Property Factor Enforcement Order.

Background

1. The Homeowner submitted an Application, dated 20 November 2016, to the Tribunal in which he averred that the Property Factor had failed to comply with various sections of the Code.

2. The Homeowner submitted a further application (dated 16 August 2017) to the Tribunal. The Factor lodged written submissions on 8 January 2018. The Homeowner responded with further written submissions dated 23 January 2018.

3. A case management hearing was convened by the Tribunal on 21 February 2018 in relation to the two applications.

4. The Tribunal issued Directions dated 22 February 2018. The terms of the Directions issued by the Tribunal were inter alia:-

    a. The Tribunal administration shall conjoin the two separate applications which have been lodged by the Homeowner.

    b. The Homeowner shall lodge with the Tribunal a revised and updated written submission in support of the conjoined application.

    c. The written submission lodged by the Homeowner shall consider each separate complaint the Homeowner has made by specific reference to the paragraph of the Code of Conduct which the Homeowner considers the Factor has breached.

    d. For each separate matter of complaint, the Homeowner shall provide a short narrative to explain why he considers the Factor has breached that particular part of the Code of Conduct.

    e. The Homeowner shall also make reference to the number of the production that he considers supports his complaint in relation to that particular part of the Code.

    f. The Homeowner shall, in relation to each part of his complaint, confirm to the Tribunal the nature and extent of any remedy which he seeks in the event that

the Tribunal accept that the Factor has breached the Code in relation to that particular matter.

5. The Homeowner lodged a revised and updated written submission with the Tribunal on 26 February 2018.

6. The Factor responded to the Homeowners revised submission in writing on 17 May 2018.

7. The Tribunal thereafter intimated a fresh hearing upon both parties for 7 June 2018.

8. At the hearing on 7 June 2018, the Tribunal determined that (due to the large number of complaints and productions, some of which were similar in nature) the Tribunal would consider the complaints under particular headings, to correlate with the Factor's specific duties, in terms of the Code. Both the Homeowner and the Factor accepted that the Tribunal should considered the complaints under the following specific headings:-

   (1) The Factor's authority to act.

   (2) The extent of the Factor's delegated authority

   (3) Issues in relation to the Block Common Insurance policy and the allocation of shares of the policy premium between owners

   (4) The Factor's Accounting processes

   (5) Debt Spreading between owners

   (6) Issue with Factoring Deposit or Float held by the Previous Factor

   (7) The Factor's approach to routine work

   (8) The Factor's approach to certain "Emergency" Works, and the costs in relation thereto, and

   (9) General issues in relation to communication between the parties

9. The Tribunal advised the parties that the Tribunal was bound to deal with the Homeowners complaints in terms of the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 and the Code. They drew parties' attention in particular to the provisions related to the overriding objective of the Tribunal to deal with the proceedings justly.

Parties were advised that the Tribunal would deal with matters in a manner that was proportionate to the complexity of the issues and the resources of the parties, that the Tribunal would seek informality and flexibility in dealing with matters and that the Tribunal would try to ensure that the parties were on an equal footing procedurally and able to participate fully in the proceedings. The Tribunal acknowledged the vast amount of productions and submissions and informed the Homeowner that he would be presented with reasonable time to ensure that all of his issues had been dealt with by the Tribunal. All parties acknowledged this information from the Tribunal.

10. The Tribunal issued further Directions on 13 June 2018 which required the Factor to submit a fully reconciled Factoring account for the period from 20th November 2011 to the date of the termination of their appointment in relation to the Homeowner's property.

11. The Factor provided these reconciled accounts to all parties on 13 July 2018, followed by an email submission by the Homeowner with his responses to the reconciled accounts on 16 July 2018.

12. The Tribunal thereafter issued further Directions dated 4 August 2018 for the Factor to respond to further comments and questions raised by the Tribunal (in a table that the Tribunal prepared relative to each consecutive year covered by the reconciled accounts) along with any other outstanding issues raised by the Homeowner.

13. The Factor provided their submissions to all parties on 12 September 2018, responding to both the Tribunal and Homeowner's queries. After which, a hearing was convened for 12 October 2018.

Hearing

14. The Tribunal convened for the final time on 12 October 2018 at 20 York St, Glasgow G2 8GT to consider both applications. The Homeowner was present at the hearing. The Property Factor

was represented at the hearing by Mr David Reid (Director of the Factor), Ms Jacqueline Borthwick (Finance Manager), and Mr Jason Miller (Estate Manager).

15. The Tribunal advised parties that the Tribunal's role was not to reconcile the Factor's accounts as to whether the Homeowner had been over or undercharged. The role of the Tribunal is to determine whether the Factor had complied with the Code of Conduct.

Preliminary point: Interpretation of Titles

16. The Homeowner highlighted that there was uncertainty surrounding the definition of the common parts at the development in which his property was situated at The Stables, 38 Ferguslie Main Road, Paisley ("the Development"). The Deed of Conditions over the development and the title pertaining to his individual property (containing this Deed of Conditions as a burden therein) were inconsistent. The Homeowner produced sight of his title (REN94577) to evidence these discrepancies:

    A. Clause Eleventh in REN94577 states "The Proprietors of the Flats shall possess a right of common property; with the Proprietors of each and every other Flat in the Building, in and to: the solum on which the Building is erected, the foundations, outside supporting walls (excluding any balcony pertaining to an individual Flat), gables, roof, roof space, roof gutters, down pipes, chimneys and chimney heads, any common television aerial and relative equipment and common television amplifier system, the common sewers, drain, soil and rain water pipes, water, gas, and other pipes, rhones, conductors, electric mains cables, wires and other transmitters or appurtenances thereof; so far as used in common, and generally all services which are the responsibility of statutory service undertakers or companies with regard to maintenance, and all other common and mutual parts and pertinents in and of the Building; and the following shall apply: (i) the Proprietors shall, in all time coming, maintain and uphold, jointly with the Proprietors of the other Flats and at their joint and equal expense, their respective outside walls and gables, internal load-bearing walls, foundations, grounds, damp course and solum (but (a) not the ground floor joists, which shall be the exclusive responsibility of the ground floor Proprietors), roof, roof space (including beams and trusses therein, but

excluding (a) the ceiling joists of the top floor Flats, which shall be the exclusive responsibility of the top Flat Proprietors, and (b) the roof space above the top floor Flats, which shall be property of the Flats directly below the same), roof vents, any chimneys, common aerials and satellite dishes, the cables and equipment associated with any common door-entry system (within and without the Flats), gutters, rhones, common drains, soil and rain water pipes, water, gas and other pipes, electricity mains or cables, wires or pipes, common internal and external lighting of the Building, and fittings and fixtures thereof, and all other subjects and appliances common to the Flats."

B. Clause Eleventh in the Deed of Conditions states: "The proprietors of the flats shall possess a right of common property with the each and every proprietor in the flats in the block of flats known as The Stables respectively (hereinafter called "the Building") which other dwellinghouses are hereinafter referred to as 'the other flats') in and to the solum of which the said building is erected, the foundations, outside supporting walls (excluding any balcony pertaining to any individual flat), gables, roof, roof space, roof gutters, down pipes, chimneys and chimney heads, any common television aerial and relative equipment and common television amplifier system, the common sewers, drain soil and rain water pipes, water, gas and other pipes, rhones, conductors, electric mains cables, wires and other transmitters or appurtances thereof so far as used in common and generally all services which are the responsibility of statutory service undertakers of companies with regard to maintenance and all other common and mutual parts and pertinents in and of the said building; (One) The proprietors shall in all time coming maintain and uphold jointly with the other proprietors of the flats in their respective Buildings at their joint equal expense, their respective outside walls and gables, internal load bearing walls, foundations, grounds, damp course and solum (but not the ground floor joists which shall be the exclusive responsibility of the ground floor flat proprietors and not the basement or underground areas which shall be the exclusive responsibility of the ground floor proprietors), roof, roof space including beams and trusses therein but excluding the ceiling joists of the top floor flats

which shall be the exclusive responsibility of the top flat proprietors and excluding the roof space above the top floor flats which shall be the property of the flats directly below the same, roof vents, chimneys if any, common aerials and satellite dishes and the cables and equipment associated with the common door entry system within and without the flats, gutters, rhones, common drains, soil and rain water pipes, water, gas and other pipes and electricity mains or cables, wires or pipes and common internal and external lighting of the said block and fittings and fixtures thereof and all other subjects and appliances common to the said flatted dwellinghouses in The Stables."

C. Clause Eleventh in his individual title contains a semi-colon prior to "so far as used in common" which he sought to argue changed the meaning of the Deed of Conditions to the effect that it applies to every common part; whereas the Deed of Conditions includes no such punctuation and therefore, he argued that it read to only apply to "...and others transmitters or appurtenances thereof so far as used in common...". He also noted that there was a difference in the spelling of "appurtenances" between the deeds.

D. Clause Eleventh in his individual title states that the common property encompasses "any chimneys"; however, the Deed of Conditions states "chimneys if any" – thereby, he submitted that if one was to follow the wording of his individual title that the chimneys at the development are not a common part. Following this point, he submitted any such work under the guise of a common charge for chimneys was incorrect thereby rendering the Homeowner not liable for any charge arising therefrom.

E. Clause Eleventh in his individual title also makes reference to the "The Proprietors shall, in all time coming maintain and uphold, jointly with the Proprietors of the other Flats and at their joint expense their respective outside walls and gables". Whereas, the Deed of Conditions makes reference to the obligation of maintenance "jointly with the other proprietors of the flats in their respective Buildings at their joint equal expense their respective outside walls and gables". The Homeowner submitted that the effect of the different wording in his title stated

that the walls were only common to each building, as opposed to the Development as a whole.

17. The Tribunal noted that there clearly were discrepancies between the two Deeds. The Tribunal does not have jurisdiction to amend title deeds. The role of the Tribunal is to determine the complaint lodged. In doing so the Tribunal are required to consider the terms of titles. The Tribunal took the view that any changes that had been made to the Deed of Conditions in its transposition to the individual Title sheet were stylistic and not substantive in their nature. Therefore, the Tribunal determined that that the common parts therefore should be those as set out in the Deed of Conditions: *"the solum of which the said building is erected, the foundations, outside supporting walls (excluding any balcony pertaining to any individual flat), gables, roof, roof space, roof gutters, down pipes, chimneys and chimney heads, any common television aerial and relative equipment and common television amplifier system, the common sewers, drain soil and rain water pipes, water, gas and other pipes, rhones, conductors, electric mains cables, wires and other transmitters or appurtances thereof so far as used in common and generally all services which are the responsibility of statutory service undertakers of companies with regard to maintenance and all other common and mutual parts and pertinents in and of the said building."*

18. Having reached this determination, the Tribunal proceeded to determine the other points within the Homeowner's complaints on the basis of the Deed of Condition's definition of the common parts.

The Factor's Authority to Act

19. Despite the suggestions in the Homeowner's submissions to the contrary, the Homeowner did not dispute that the Factor was correctly appointed to their role as Factor in 2011. As such, the Tribunal did not consider this point any further.

The Extent of the Factor's Delegated Authority

20. The Homeowner submitted that the Factor had breached the terms of the Deed of Conditions in relation to the level of delegated authority (that being, the value of works that can be carried out without prior proprietor approval) that had been set therein.

21. The Deed of Conditions sets out that the Factor could not instruct works over £250 without the prior authorisation of the owners at the Development. The Homeowner submitted that the Factor had been operating under the pretence that their delegated authority had been increased from £250.00 to £500.00 at a proprietors' meeting. The Homeowner also contended that, even before that purported increase of financial delegated authority, the Factor had been carrying out works above the £250.00 limit.

22. On 11th May 2017 at a meeting of owners the Factors had proposed an increase of their delegated authority from £250.00 (the level being set out in the Deed of Conditions) to £500.00. The Homeowner submitted that the proprietors' meeting was not quorate due to a non-owner, who did not have a valid proxy for the meeting, being present and voting.

23. The Deed of Conditions provides that the majority of owners can increase the amount of the delegated authority at a properly convened meeting which is quorate. A meeting will be quorate if at least 8 proprietors within the development are present, each having one vote each in relation to any decisions to which they would be liable for a share of the cost thereof. The majority of the proprietors present at the meeting shall have the power to order common or mutual operations and repairs, make any regulations necessary, to appoint a factor and fix their remuneration and the duration of their appointment, and to delegate powers to the Factor. The Deed of Conditions specifically provides that the factor shall have the delegated power to instruct works other than Major Works which is defined as works above £250 (or such other sum as agreed). Any works above the Major Works threshold requires to be agreed upon at a meeting by the Affected

Proprietors – which from the Deed of Conditions appears to mean those proprietors who are liable to pay for such works.

24. The Factor accepted that the meeting of 11th May 2017 was not quorate. The Factor confirmed that after that meeting they did not carry out any works over the £250 threshold. The Factor accepted in their evidence that they had instructed certain works beyond their delegated authority before that date. The Factor submitted that a yearly budget had been agreed with each proprietor, and that they accordingly had authority to instruct works which fell within the limits of that budget. The Factor further submitted as owners had paid invoices in relation to works which had exceeded the £250 threshold, those owners were implicitly accepting the Factor's authority.

25. The Factor sought to rely upon a previous decision of the Tribunal in support of their argument that a yearly budget could give authority to the Factor to instruct works above the financial limit set in the Deed of Conditions. The decision referred to was a case between between Life Property Management Limited (the same Factor as in the present case) and Mr Walid Al-Khames. The Factor considered that this previous decision of the Tribunal provided authority for the use of a budget for setting and agreeing the Factors financial authority to instruct works.

26. The Tribunal does not accept that the previous decision of the Tribunal in the case of Mr Al-Khames is of assistance on this point. The Decision in the Al-Khames case makes reference to a budget issued by the Property Factor but no Decision is made by the Tribunal as to whether that is, or is not, a competent method of ensuring that the Factor has appropriate authority to act. The Tribunal determined that each case has to be determined on its own facts and circumstances and in particular having regard to the terms of the titles of the Property. The titles for this Property are clear that the decision to increase the delegated authority of the Factors can only be made by the majority of owners at a properly convened meeting. No such meeting has taken place, the majority of the owners have not agreed to an increase in the level of the Factors delegated authority.

27. The Tribunal questioned the Factor further on their interpretation of the Deed of Conditions and applicable laws, and the Written Statement of Service, and determined that the method of using a

yearly budget which has not been ratified by the majority of owners at a meeting, was not compliant with the relevant sections of the Code of Conduct.

28. The Factor submitted two further arguments in respect of the Delegated Authority: namely that (1) the £250 limit was in reference to per property, not to the entire development; and (2) the £250 limit applied only to "major works", thereby excluding any core services from this rule.

29. The Tribunal noted that the £250 limit set out in the Deed of Conditions applied generally to the Development as a whole. The Factor stated that this was open to interpretation because that was an opinion as opposed to a fact. The Tribunal are satisfied that the £250 limit of authority is the entire extent of the Factors authority and should not be read as a reference to £250 for each property in the development. The Tribunal were further satisfied that there was no "limitation" or other interpretation of the how the £250 limit should be applied. In particular there was no evidence to support the Factors contention that the £250 limit should only apply to "major works".

30. The Tribunal had previously asked the Factor to evidence what works had been carried out over this £250 limit – of which, the Factor later produced a table containing those items (however, such table had followed the Factor's determination that core services were not included within the ambit of this £250 limit).

31. The Tribunal noted that the instances in which the Factor has exceeded this limit have only been by small amounts. The Factor stated that due to the items having costs close to this £250 limit, there would be a significant administrative burden on their operations if they had to seek authority for all works costing over £250 (noting that they would likely have to call a meeting several times a month in order to seek approval), and in many instances, the limit was exceeded without authorisation due to health and safety implications had the work not been done timeously. For example, the Factor referenced the instance of replacement of the car park lighting, which costs, albeit only slightly, exceeded the £250 limit – which, had they not been replaced timeously, would have caused serious health and safety implications.

32. The Tribunal have determined that the Factor requires to comply with the authority given to them by the owners at the development. In this case that authority stems from the terms of the Deed of Conditions. The Factor does not have authority to carry out works which exceed a cost of £250. If the Factor wishes to avoid any additional administrative burden then they would require to properly seek a review of the delegated authority in terms of the title deeds.

33. On the issue of Delegated Authority, the Tribunal found the Factor to have breached the Code of Conduct at section 1.1a (A) (b) because they exceeded the financial threshold that was set out in the Deed of Conditions and carried out these works without any prior authorisation of the owners. The Factor produced a statement of 13 invoices between 2013 and 2017 where the works exceeded this £250 threshold. The Tribunal is not able to determine the specific share of costs in each of these invoices that was due by the Homeowner.

Issues in Relation to the Block Common Insurance Policy and the Allocation of Shares of the Policy Premium Between Owners

34. The Homeowner submitted that the Factor had contravened section 5 of the Code of Conduct in respect of Insurance. The Homeowner's complaint surrounded the issue that the insurance policy contained the wrong number of flats and as such, the insurance charges were being wrongly apportioned. The Homeowner stated that he believes that the common insurance should be charged out as per the proportions of the floor space in terms of the Tenement Management Scheme contained within the Tenements (Scotland) Act 2004.

35. The Tribunal reviewed the Deed of Conditions and were unable to clearly determine the proportional shares of the common insurance policy premium for each property at the development. The Tribunal accordingly determined that the Tenement Management Scheme contained within Schedule 1 of Tenements (Scotland) Act 2004 would apply as the Deed of Conditions was ambiguous in its terms. Rule 4.4(b) of the Tenement Management Scheme provides that where common insurance is arranged by virtue of a tenement burden, then each proprietor shall be liable in equal proportions, (as opposed to any proportionate liability based on floor space calculations). The Tribunal confirmed that the Tenement Management Scheme

required that each proprietor at the Development is liable for an equal share of the insurance payments.

36. The Factor had applied the insurance apportionment by equal shares and had accordingly applied these charges correctly between the various owners at the development. There has accordingly not been any failure by the Factor to comply with section 5 of the Code in relation to this matter.

37. The Homeowner had also complained that he was dissatisfied with the fact that the insurance policy approved by the Factor stated that it covered only 12 properties (rather than the 14 which are actually located within the development). The Factor stated in evidence that they accepted that the stated number of properties on the policy was incorrect. The Factor confirmed in their evidence that they had clarified with the insurer that this administrative error did not affect the validity of the insurance. The Tribunal did not consider that had been any failure by the Factor to comply with section 5 of the Code in relation to this matter.

The Factor's Account Processes

38. The Homeowner submitted that the Factor had contravened Section 3 of the Code of Conduct, in particular Sections 3.3 and 3.4 in reference to the Factor's accounting and the transparency of such:

Within the preamble of Section 3 of the Code of Conduct, it states that:

A. *"Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved."*

Thereafter, at Sections 3.3 and 3.4 of the Code of Conduct, it states that:

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

C. 3.4: You must have procedures for dealing with payments made in advance by homeowners, in cases where the homeowner requires a refund or needs to transfer his, her or their share of the funds (for example, on sale of the property)."

39. The Homeowner's submissions identified a list of purported errors within the invoices which demonstrated that the Factor had incorrectly applied charges to the Homeowner's factoring account. The Homeowner averred that certain costs which are not deemed to be common under the Title Deeds should not be shared between all the proprietors within the Block. The Factor submitted that whilst some charges, not deemed to be common, may appear on the Homeowner's account, they are not billed to the Homeowner and not included in charges made to the Homeowner.

40. In addition it was highlighted by the Homeowner that one of the invoices related to work carried out to a property in a completely different city within Scotland, and another was for call out charges specific to one property. The Factor explained that the wrong address on the invoice was an administrative error arising from an issue with their contractor, which has since been rectified.

41. The Tribunal stated in terms of the Code of Conduct, the invoices should be clear to allow a Homeowner to know what they are paying for and how any costs are calculated, and that invoices should not include non-common charges.

42. The Homeowner also submitted that he questioned the liability of repairs to the guttering works. The Deed of Conditions provides that the gutters and rhones are common, and the maintenance of such parts shall be shared as a 'common charge', payable by all proprietors. However, the Deed of Conditions also provides that should any rhones or downpipes serve two or more flats then they shall be owned in common by such proprietors, along with the costs of the maintenance of such parts. The Tribunal noted that they were unaware of a situation where any gutter pipes, rhones and downpipes would only exclusively serve certain properties; but they stated that an expert opinion may be required for this matter. The Tribunal stated that the Factor should take this matter into consideration when determining liability, considering their better knowledge of the development, and the intricacies of such.

43. It was not clear to the Tribunal what (if any) charges had been incorrectly levied against the Homeowner. The Tribunal directed the Factor to provide a full accounting for the 5 years from the date that the Homeowner applied to the Tribunal, starting from 20th November 2011. Such accounting would allow the Tribunal to determine whether the Homeowner's account would be in credit or debit compared to the current balance on their account. Both the Factor and the Homeowner agreed that this would allow them to address and assess the position.

44. The Factor lodged the full accounting as directed. At the hearing the Tribunal heard evidence from the Homeowner in relation to a number of concerns relative to the full accounting which had been lodged by the Factor. The Homeowner complained that he had been charged in relation to repairs to a satellite dish which he did not use, that there were discrepancies in relation to insurance costs, that in relation to communal cleaning costs there were discrepancies and hand written amendments to invoices which had been submitted in support of the Factors account and that certain services which had been charged had not been received.

45. Having regard to all of the evidence the Tribunal have determined that the Factor has not been able to demonstrate that they have complied fully section 3 of the Code of Conduct. The preamble to section 3 of the Code of Conduct highlights that Homeowners should know what it is they are paying for, how the charges were calculated and that no improper requests were involved. The Factor is required to provide a detailed financial breakdown of charges made and the description of the activities and works carried out. In this matter the Tribunal had to direct the Factor to provide a full accounting as the Tribunal were unable to determine from the papers originally lodged by the Factor whether charges had been properly calculated. Although the Factor has appeared to have acted fairly and reasonably it is only after having produced the fully reconciled account that the Tribunal can reach any decision. The fact that the Factors had to produce this account suggested evidence that the previous accounts produced by the Factor were not sufficient to ensure that the Homeowner knew what he was paying for and how charges were calculated. The Tribunal accordingly determined that the Factor had breached section 3 of the Code in this respect.

46. The Tribunal determined that there had been a breach of the relevant sections of the Code in respect of their accounting practices – namely, there had been costs that were erroneously

charged to the owner – either costs that should never have been charged, or costs more than what had been agreed or invoiced by the contractor. However, albeit breaching the code, the Tribunal noted that the Factor had throughout their operations, acted fairly and reasonably in trying to accommodate the Homeowners and to be detailed in their accounts. The Tribunal emphasised that their role was not to rectify any title issues that were causing confusion to the Homeowner, rather to determine whether the Factor had acted reasonably in determining whether costs were common or not.

Debt Spreading Between Owners

47. The Homeowner submitted that the Factor had contravened Section 4 of the Code of Conduct, particularly sections 4.1 and 4.8, in regard to the Factor's debt recovery procedure, including whether they had debt spread:
    A. "4.1: You must have a clear written procedure for debt recovery which outlines a series of steps which you will follow unless there is a reason not to. This procedure must be clearly, consistently and reasonably applied. It is essential that this procedure sets out how you will deal with disputed debts.
    B. 4.8: You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention."
48. The Homeowner also queried the entries labelled "Legals" within invoices and why this was charged without any communication as to what it was for. He submitted that owners should be notified of any bad debts which are not being paid by other owners, prior to any debt being spread amongst the other owners in the Development (a practice referred to as Debt Spreading).

49. The Factor indicated that the annual agreed budget provides for a contingency of legal costs and if such sums are not used, they will be returned to the proprietors at the end of the year.

50. The Tribunal requested details of any debt that may have been due by an owner and which had been "spread" amongst other owners during the Factor's appointment. The Factor knew of one owner who had been sequestrated in the past but did not believe there was any debt spreading for this proprietor.

51. The Deed of Conditions provides that the proprietors shall have the option to decide at a meeting if and to what extent action should be pursued for the recovery of any debt, and should it not be recovered, then the debt shall be spread/ shared equally amongst the remaining proprietors.

52. The Homeowner pointed out that the actual accounts rendered showed at least £180.00 spent in legals, so there must have been some debt enforcement action taken by the Factor, but this may not have resulted in debt spreading.

53. The Tribunal at the hearing on 12 October 2018 enquired more as to whether the Homeowner had been kept notified regarding any debt recovery problems that the Factor were encountering. The Homeowner maintained that he never received any updates about the debt recovery problems encountered by the Factor; yet there are charges within the reconciled accounts in respect of debt recovery. The Factor submitted that there was a breakdown of the debt recovery procedure on their website. However, the Tribunal noted that the issue at hand was not that the debt recovery procedure was not available, rather the issue was whether the Factor had been communicating with the homeowners in any instance of debt recovery issues.

54. The Factor submitted that in any case where it might be necessary to pursue court action against a homeowner, they would notify the other homeowners. At the hearing, the Factor referred to the notification issued in respect of a homeowner within the Development, who had been sequestrated. The Tribunal asked whether evidence of such notification could be produced. Although the Factor averred that they had presented this matter to other owners at an AGM, and issued letters to the homeowners on this matter, they could not produce any evidence to this effect to the Tribunal.

55. On the issue of Debt Spreading, the Tribunal determined that the Factor had breached the terms of the relevant sections of the Code of Conduct. The Tribunal noted that the Factor had failed to keep the Homeowner updated with the debt recovery problems that were being encountered, and failed to seek the Homeowner's views on how they wished the Factor to proceed.

Issue with Factoring Deposit or Float Held by the Factor

56. The Homeowner submitted that the Factor had contravened section 1.1a (C) (h) of the Code of Conduct in respect of their Factoring Deposit: "The written statement should set out...(h) any arrangements relating to payment towards a floating fund, confirming the amount, payment and repayment".

57. The Homeowner was dissatisfied with the lack of communication and attempts of the Factor to obtain the balance of factoring deposits held by the former Factor at the time of appointment. The Factor's submissions included a letter to the former factor instructing the deposits to be returned directly to the Homeowners.

58. The Tribunal considered whether there was any commitment by the Factor to get the deposits back, and whilst the Factor did assist in this matter, the Tribunal considered it prudent that the Factor exhibit proof that the Factor communicated its efforts (and lack of results) to the proprietors at the development. At the final hearing, the Tribunal enquired whether the Factor had any further update. The Factor confirmed that the company had been liquidated. The Tribunal confirmed that it was therefore extremely unlikely that such deposit would be returned to the Homeowner.

59. The Tribunal determined that there could be no breach of the Code of Conduct by the Factor in this instance because the issue did not pertain to their activities, or operations. Rather, the matter related to a previous factor, a matter that the Factor had tried to assist the homeowners within the Development in getting this money back.

The Factor's Approach to Routine Work

60. The Homeowner submitted that the Factor had contravened sections 1.1aB(c) & (d), and section 6 of Code of Conduct in respect of their obligations to carry out repairs and maintenance:

    A. Section 1.1aB(c): The written statement should set out...the core services that you will provide. This will include the target times for taking action in response to

requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);

B. Section 1.1aB(d): The written statement should set out...the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a "menu" of services) and how these fees and charges are calculated and notified.

C. Section 6.1: You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

D. Section 6.2: If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.

E. Section 6.3: 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.

F. Section 6.4: 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.

G. Section 6.5: You must ensure that all contractors appointed by you have public liability insurance.

H. Section 6.6: If applicable, documentation relating to any tendering process (excluding any commercially sensitive information) should be available for inspection by homeowners on request, free of charge. If paper or electronic copies are requested, you may make a reasonable charge for providing these, subject to notifying the homeowner of this charge in advance.

I. Section 6.7: You must disclose to homeowners, in writing, any commission, fee or other payment or benefit that you receive from a contractor appointed by you.

J. Section 6.8: You must disclose to homeowners, in writing, any financial or other interests that you have with any contractors appointed.

K. Section 6.9 You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor.

61. The Homeowner submitted that the Factor, during their appointment, failed to carry out general maintenance to the property which should have been identified during the monthly inspections which the Factor carries out. The Homeowner stated that the bin stores, trees, bay windows and other common parts were in a poor state and that it would be obvious to anyone looking at such common parts that repairs would be needed. The Homeowner stated that such matters had been reported to the Factor.

62. The statement of service issued by the Factor states that the Factor will provide an estates manager, contract tendering, monthly site inspections and quarterly site inspection reports.

63. The Factor stated that they provide a maintenance service and are not qualified surveyors. The monthly inspections are to check previous works that have been carried out, not to identify required repairs. When questioned about the bin store needing repaired, the Factor stated that they may have picked this up during the visit but it is subjective as to whether it needs repaired. Should a homeowner report a repair being required though, the estates manager within the Factor's business will investigate and instruct a surveyor to inspect.

64. The Homeowner believes that as the Written Statement of Service states that there will be monthly inspections, it seems to imply a higher level of service and that these inspections are to identify works which may be required. This is especially so as ongoing maintenance is carried out every 3 months, and thus the Homeowner cannot see the point of monthly inspections to check work which is carried out less often.

65. The Homeowner's complaint is that the Factor has not taken a proactive approach. The Homeowner did not dispute that the Factor had however carried out monthly site inspections. His complaint was that the Factor should have taken forward repairs which they identified in those monthly inspections. There is no requirement for the Factor to take forward a proactive repairs service in terms of their statement of service. The Factors statement of service simply requires them to carry out monthly site inspections and to react to repairs which are reported to them. The Tribunal are of the view that the actions of the Factor are in compliance with section 6 of the Code and with their statement of service. The Tribunal accordingly determined that the Factor had complied with the Code of Conduct in relation to this matter.

The Factor's Approach to Certain "Emergency" Works, and the Costs in Relation thereto

66. The Homeowner submitted that the Factor had contravened sections 2.4 and 6 of the Code. In particular the Homeowner complained that, in relation to certain works carried out at a chimney in the development, the Factor had proceeded with the works without consultation with Homeowners (as required by section 2.4 of the Code) and without following the procedures required in terms of section 6 of the Code in relation to the use of external contractors.

67. The Tribunal understood the background to this issue was that in the course of an inspection, it was identified that a chimney head at the Development was not in a secure condition. This matter was brought to the Factors attention, who in turn notified the local authority. The Factor deemed the matter to be an emergency and accordingly instructed some initial safeguard measures (scaffolding/safety fencing) and thereafter instructed contractors to carry out necessary repairs to the chimney head.

68. The Homeowner was concerned that the state of the chimney was, or should have been, known to the Factor from the results of an earlier survey which had been carried out at the subjects. Had the Factor acted on receipt of that earlier survey and had they taken earlier steps to obtain authority to repair the chimney head, then the "emergency situation" may not have arisen. In any case the Homeowner was not satisfied that the Factor dealt with the ultimate repair through emergency procedures.

69. It was the Homeowners position that the Factor, having set up some immediate (temporary) measures then took a considerable period of time before the necessary works were actually completed. It is the Homeowners position that during that extended period of time the Factor had the opportunity to tender the works for the best possible price.

70. There is not a specific clause in the Deed of Conditions covering the development in relation to what might be deemed as emergency works. The Tenement Management Scheme provides that "Emergency Works" is work which, before a scheme decision can be obtained, requires to be carried out to scheme property to (a) prevent damage to any part of the tenement, or (b) in the interests of health and safety.

71. The submissions by both parties appear to show that the Factor tried to get approval from the proprietors to carry out remedial work to the chimney to make it safe in the long term but unfortunately no agreement was reached between the owners, so the Factor had no authority to act. Some years later the seriousness of the state of repair of the chimney became an issue again and after an inspection, the Factor determined that the chimney was dangerous and required to be repaired. The Factor contacted the local authority who could only block off the area and scaffold the building (at a cost).

72. The Factor gave evidence that they continued to chase the council on a daily basis to try and get works carried out and ultimately, a local businessman (who has carried other works out within the area) was contacted to carry out the works. Unfortunately there was a delay in the commencement of the contractor's repair work, but the Factor decided to wait for the contractor to complete the works to avoid having to pay an additional contractor. The Factor submitted that they began to have concerns regarding how long the chosen contractor had taken to get on site, so began to look for alternative quotes. However, they informed the Tribunal that due to the time of year, (the week before Christmas), most contractors were closed.

73. The Homeowner submitted that the works to the chimney should have been carried out in the initial stage where future action had been identified, and that the Factor should have notified the

Homeowner of the process – noting specifically that no procurement process had been undertaken in respect of the carrying out of works to the chimney.

74. The Tribunal determined that the Factor acted reasonably in determining that the works which were required to the chimney could be categorised as emergency works. In terms of "the Code" an emergency repair would be where urgent work is required to prevent damage, or in the interests of health and safety, and where there is not time to use the normal channels of consultation and decision making. The Tribunal accepted the evidence of the Factor, that they had evidence of a dangerous chimney head which posed a danger to health and safety. As such it was reasonable for the Factor to deem necessary works as emergency works.

75. The Tribunal determined, however, that the Factor failed to properly consult and communicate with the Homeowner during the process of the emergency works. Having instructed emergency works, such works were then delayed for a number of reasons and there is no evidence that the Factor clearly communicated with the Homeowners to explain what was happening and to keep the Homeowners updated of any likely costs.

76. The Tribunal have determined on this issue that the Factor has not breached the Code of Conduct for the manner in which they approached the necessary works to the chimney.

77. The Tribunal was not satisfied that there was clear evidence that the Factor had ever acted in an intimidating of threatening manner towards the Homeowner.

General Issues in Relation to Communication Between the Parties

78. The Homeowner submitted that the Factor had contravened sections 2.1, 2.2 and 2.5 of the Code of Conduct in respect to the communication to Homeowners within the Development:

    A. 2.1: You must not provide information which is misleading or false.

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

C. 2.5: You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

79. The Homeowner, within his submissions, produced various documents and copies of correspondence between both parties in support of this matter. The Homeowner also submitted that the Factor had contravened section 7.1 of the Code of Conduct in respect to the non-compliance with the response times of complaints that he had made to the Factor:

7.1: You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors.

80. The Homeowner stated that on various instances in corresponding with the Factor, the Factor was intimidating or threatening towards him. The Factor denies any instance of this occurring.

81. The Homeowner submitted that his complaints had not been complied with within the period set out by the Factor in their Written Statement for Service. The Factor accepted that on occasion they had not responded within the timescales set forward in their own dispute resolution/complaints procedure policy. The Factor had already apologised to the Homeowner in this respect.

82. The Tribunal determined that there was a failing on the part of the Factor in terms of their communications. This had already been recognised by the Factor who had written to the Homeowner to apologise for their failing. The Tribunal found no evidence that the Factor provided information which was false or misleading or communicated in a manner which was abusive or intimidating.

Decision

83. Having considered the evidence the Tribunal determined that the Factor has breached the Code of Conduct in respect of the following matters:-

    A. The Factor has breached section 1 of the Code of Conduct as they have exceeded the financial threshold that was set out in the deed of conditions and carried out above that financial threshold without the prior authorisation of the owners at the development.

    B. The Factor has breached the terms of section 3 of the Code of Conduct in that they were not able to demonstrate that the Homeowners would know what they were paying for and how the charges were calculated.

    C. The Factor had breached section 4 of the Code of Conduct in that they had not followed the clear written procedure in relation to debt recovery and in particular had failed to communicate with the Homeowner and keep him updated in relation to debts which require to be spread amongst all owners at the development.

    D. The Factor had not complied with section 2.5 of the Code of Conduct in that they had not complied with the timescales within their own dispute resolution/complaints procedure

84. Having determined that there were breaches of the Code, the Tribunal required to determine whether they should make a Property Factor Enforcement Order in terms of the 2011 Act. The Tribunal took the view that such an order should be made. The terms of the proposed draft order are attached. The proposed Property Factor Enforcement Order will require a payment to be made to the Homeowner by the Property Factor in the sum of £250.00. This sum is designed to act as compensation in respect of the Property Factor's failure to comply with the code.

85. The Tribunal had regard to the efforts made by the Property Factor to act in a reasonable manner throughout the period of their tender as Property Factor. Although they had exceeded authority to instruct work on certain occasions they had acted in good faith (albeit this was still a breach of the Code). Despite failing to properly correspond with the owners at the development, the Factor had attempted to deal with emergency situations in a reasonable manner. They had apologised to the

Homeowner where they had failed to meet their own timescales in dealing with complaints. The sum awarded by way of compensation therefore reflects not only the breach of the Code but also takes into account these mitigating factors on behalf of the Factor.

86. Accordingly, the Tribunal decided that a Property Factor Enforcement Order should be made and a draft of that proposed order is attached to this decision. The parties are invited to make representations to the Tribunal in respect of the proposed order in terms of section 19(2) of the Property Factors (Scotland) Act 2011 and the Tribunal require that such representations are remitted within fourteen days of the date of the intimation of this decision.

87. 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. Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

15 March 2019

....

Andrew Cowan, Chairperson Date

.... Witness

.... Full name

.... Designation