First-tier tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: Property Factors (Scotland) Act 2011, section 19(1)(a)

Case Reference Numbers: FTS/HPC/PF/17/0108 and FTS/HPC/PF/18/2228

The Property:

Drumsmittal Road, North Kessock, Inverness

The Parties:-

Emrys Jones, 30 Drumsmittal Road, North Kessock, Inverness, IV1, 3JU
("the Homeowner")

and

Allied Souter & Jaffrey, Lyle House, Fairways Business Park, Castle Heather, Inverness, IV2 6AA
("the Factors")

Tribunal Members:

Adrian Stalker (Chairman) and Andrew Taylor (Ordinary Member)

Decision:

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Factors had complied with the Code of Conduct for Property Factors ("the Code"), the Tribunal determined as follows:

(a) That, in respect of the Homeowner's application FTS/HPC/PF/17/0108, the Factors had not failed to comply with section 3 of the Code;
(b) That the action required by the Property Factor Enforcement Order ("PFEO") made by the First-tier Tribunal on 28 September 2017, that the Factors: "Draft and provide to each homeowner and the Association a clear statement of how service delivery and charges will be affected if one or more homeowners does not fulfil their obligations, in terms of section 4.4 of the Code", is no longer necessary, and under section 21(1)(b) of the Property Factors (Scotland) Act 2011 ("the Act"), that part of the PFEO is revoked;
(c) That in respect of the Homeowner's application FTS/HPC/PF/18/2228, the Factors had not failed to comply with section 3.2 and 4.7 of the Code;

(d) That in respect of the Homeowner's application FTS/HPC/PF/18/2228, the Factors had failed to comply with 3.3 of the Code, but that no PFEO will be made in respect of this failure.

Background

1. This decision concerns two separate applications, FTS/HPC/PF/17/0108 and FTS/HPC/PF/18/2228, made under the Property Factors (Scotland) Act 2011 ("the Act") and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 ("The Procedure Rules").

2. On 30 May 2017, a First-tier Tribunal made a decision in relation to application FTS/HPC/PF/17/0108. It decided that the Factors had failed to comply with sections 1 and 4.4 of the Code. However, it did not uphold the Homeowner's complaint under sections 3, 4.6 and 4.7 of the Code.

3. On 28 September 2017, that Tribunal made a PFEO under section 20 of the 2011 Act, requiring the Factors to:

    i. Pay to the Homeowner the sum of £100.
    ii. Draft and provide to each homeowner and the Drumsmittal Road Owners Association a written statement of services taking cognisance of the requirements of the Code.
    iii. Draft and provide to each homeowner and the Association a clear statement of how service delivery and charges will be affected if one or more homeowners does not fulfil their obligations, in terms of section 4.4 of the Code.

4. The Homeowner appealed against the decision of the First-Tier Tribunal, in respect of its refusal to uphold his complaint under section 3 of the Code. By a decision dated 11 June 2018, the Upper Tribunal Judge quashed the decision of that Tribunal, as regards the complaint under section 3. The UT Judge remitted application FTS/HPC/PF/17/0108 to another Tribunal, composed of members not involved in the decision of 30 May 2017, "...to reconsider the question of whether there has been a breach of section 3 of the Code…"

5. Meanwhile, by a letter to the Housing and Property Chamber dated 6 December 2017, the Homeowner had also complained that the Factors had failed to comply with the earlier Tribunal's PFEO, in particular point iii (in paragraph 3 above), which concerns section 4.4 of the Code.

6. Subsequently, in August 2018, the Homeowner made another application, FTS/HPC/PF/18/2228, in which he complained that the Factors had failed to comply with sections 3.2, 3.3, 4.4, 4.6 and 4.7 of the Code. However, by his letter

to the Chamber dated 18 September 2018, the Homeowner stated that he only wished to pursue his complaints under sections 3.2, 3.3 and 4.7.

Hearing

7. By letters dated 16 October 2018, the Chamber notified the parties that a hearing would take place in relation to both applications on 27 November 2018. They were further advised that any written representations on the application must be returned to the Chamber by 6 November 2018. The Factors' solicitors sought further time to lodge representations, which was allowed.

8. The hearing took place on 27 November 2018, at The Spectrum Centre, 1 Margaret Street, Inverness. The Homeowner, Mr Jones, was present. Mr Duncan Swarbrick, a solicitor advocate, represented the Factors. He was accompanied by Richard Smith, one of the Factors' Directors. Mr Smith assisted in the clarification of Factors' position, where necessary.

9. The Tribunal explained to the parties that the hearing was intended to consider three matters:

   (a) the question remitted to this Tribunal by the UT Judge, as to whether there has been a breach of section 3 of the Code by the Factors;
   (b) whether the Factors have failed to comply with point (iii) in the earlier Tribunal's PFEO of 28 September 2017;
   (c) the complaints made by the Homeowner in application FTS/HPC/PF/18/2228, to the effect that the Factors had failed to comply with sections 3.2, 3.3 and 4.7 of the Code.

10. Both parties had lodged productions for the hearing. The Homeowner had numbered certain of his productions with the letter "R"; reference to "R8" or "R9" etc. is a reference to one of those documents. The Factors' productions were lodged in an appendix, and are designated "A1", "A2" etc. In this decision, reference to the "Association" is to the Drumsmittal Road Owners Association.

Preliminary issue (1): Change of Factor

11. It was apparent from the Homeowner's second application, in particular, that the management of the development at Drumsmittal Road has been transferred by the Factors to Newton Property Management ("Newton").

12. R10 is a letter from Newton to the Homeowner dated 20 November 2017. This indicates that the "factoring book of Allied, Souter & Jaffrey" has been purchased by Newton.

13. Mr Smith confirmed that, with effect from 1 November 2017, the factoring division of the Factors had been purchased by Newton. That division had previously managed a total of 67 estates, the management of which had all now passed to Newton. Two of the Factors' employees had moved to Newton: Derek Rudkin, the Manager of the Factoring Department; and June Thompson, Senior Admin Assistant for that department. Since 1 November 2017, the Factors have no longer been involved in the factoring or managing of properties.

14. Mr Smith remains with Allied, Souter & Jaffrey. He is not employed by Newton. Mr Swarbrick confirmed that he represented Allied, Souter & Jaffrey alone. He did not appear for Newton.

15. In Newton's aforementioned letter of 20 November 2017 (R10), it states: "We are aware of the recent finding of the First-tier Tribunal and the obligation to comply with the PFEO issued remains with Allied, Souter & Jaffrey".

16. Mr Swarbrick suggested the effect of the change made on 1 November 2017 was that the rights and obligations incidental to the role of factor, or property manager, of the 67 estates (including the development at Drumsmittal Road) were assigned from the Factors to Newton. He was asked whether the residents of the estates had been consulted before this change took place. He replied that residents had been notified of the change, before it took place, but they were not consulted.

17. Mr Smith advised the Tribunal that Allied, Souter & Jaffrey had sought to ensure that all of its obligations in relation to the estates would be taken over by Newton, once the transfer was effected.

18. The Tribunal was also taken to the Factors' productions A6 and A7. Page 3 of A6 was a "Drumsmittal Road Owners Certificate of Income & Expenditure" prepared by the Factors, for the period 1 November 2016 to 31 October 2017 (i.e. until the day before the transfer). This indicated available funds of £4,305.44. A7 was a statement prepared for the Drumsmittal Road Owners Association by Newton, which stated that the "Bank balance transferred from Allied Souter & Jaffrey Ltd - £4,305.44".

19. The Homeowner disputed that an assignation has ever taken place. No formal document of assignation had ever been produced to homeowners. He maintained that Newton's contract with the homeowners is different, as are its accounting procedures. However, he also accepted that that Newton are now undertaking the factoring of the development at Drumsmittal Road. He did not suggest that he wished the role of Factor to be resumed by Allied, Souter & Jaffrey. He also conceded that, as far as he was aware, neither the Association, nor any of the individual homeowners of any of the 67 estates had sought to challenge the transfer. The Tribunal notes that, in application FTS/HPC/PF/18/2228, the

Homeowner's complaint under section 3.2 (described at paragraphs 68 and 69 below) is premised on there having been a change of property factor. Therefore, his denial of such a change seems self-contradictory.

20. Accordingly, the Tribunal finds in fact and law that the obligations of the Factors, in relation to the development at Drumsmittal Road have, with effect from 1 November 2017, been transferred to Newton.

Preliminary issue (2): Mr Swarbrick's written submission

21. Having heard from the parties as to the change of factor, the Tribunal indicated that it intended to consider the three matters set out at paragraph 9 above. Mr Swarbrick invited the Tribunal to consider his written submission, which, he said, had been sent to the Housing and Property Chamber at or around the same time as the Factors' productions. The written submission had not been provided to the members of the Tribunal in advance of the hearing (though the members had been given copies of the productions). The Tribunal asked the Homeower if he had seen the written submission. He insisted that he had not seen it.

22. The Tribunal adjourned for 20 minutes, to enable the members to read the submission. A copy was made for the Homeowner, in order that he could consider what motion, if any, he wished to make to the Tribunal in respect of the written submission. During the adjournment, the Tribunal's clerk ascertained that the submission had been received by the Housing and Property Chamber on 16 November, but for reasons that were not clear, a copy was not intimated to the members of the Tribunal. When the Tribunal resumed, it apologised to both parties for this administrative error. The Homeowner indicated that he wished to seek an adjournment of the hearing, in order to have time to fully consider Mr Swarbrick's written submission, and if necessary, to prepare his own submission in writing.

23. At this point, however, Mr Swarbrick was able to show the Tribunal an email from the Homeowner, dated 16 November, in terms of which the Homeowner acknowledged intimation of the written submission. This email made specific reference to the number of paragraphs in the submission (35), which would only have been known to the Homeowner if he had received that document, and looked at it. This was put to the Homeowner, at which point he was constrained to accept that he had received the written submission on 16 November.

24. In these circumstances, the Tribunal decided to proceed with the hearing, and refused the Homeowner's application for an adjournment. The Tribunal considered that the Homeowner had not shown good cause for an adjournment under rule 28(3) of the Procedure Rules. Having received Mr Swarbrick's submission eleven days before the hearing, the Homeowner had sufficient time to

prepare a submission in writing, if he wished to do so, or to seek a postponement of the hearing, in order to prepare a response.

25. For the sake of completeness, it is necessary to record that the Homeowner raised this matter again at the end of the hearing, when he asked if he would be allowed to lodge written submissions with the Tribunal, in response to Mr Swarbrick's submission. That request was refused. The Tribunal explained that it could not receive submissions from parties after the hearing had been completed.

The issue remitted to this Tribunal by the Upper Tribunal

26. Given the terms of the Upper Tribunal Judge's decision (see in particular paragraph [23]) the Tribunal began by seeking to identify the information provided to homeowners for the purposes of section 3 of the Code.

27. As it turned out, this was not in dispute at the hearing. Both parties' productions contained examples of the "Certificate of Income and Expenditure" issued by the Factors in respect of a financial year from 1 November to 31 October. The Homeowner produced the Certificates for the years ended 31 October 2014 and 31 October 2015 (respectively R7 and R6). The Factors also produced the Certificate for year ended 31 October 2015 and the Certificate for year ended 31 October 2016 (A6, pages 1 and 2).

28. The Factors maintained that these certificates were sent out to all of the homeowners in the development, with the letter notifying them of the AGM of the Association. The proposed budget for the following year was also provided with that letter. This had been done since 2012. That was not disputed by the Homeowner.

29. Accordingly, the Tribunal finds in fact that a "Certificate of Income and Expenditure" in respect of the financial year from 1 November to 31 October was issued annually to the homeowners in the development, by the Factors, from 2012 to 2016. It is these "Certificate[s] of Income and Expenditure" to which section 3 of the Code must be applied, in particular the test of "clarity and transparency", and the requirement in section 3.3. The Tribunal understood the Homeowner to seek, in particular, the application of section 3 of the Code to the Certificate for the year to 31 October 2016, being the last Certificate before he made his application to the First-tier Tribunal.

30. The Factors and the Homeowner also produced (A6, page 3 and R26), a further "Certificate of Income and Expenditure" for the period to 31 October 2017, to which reference has already been made (at paragraph 18 above). At the hearing, there was some discussion as to status of this document, given that it has not been signed off by Helen Matheson, the Factors' Director of Finance, and was

not produced on the Factors' letter headed paper. Be that as it may, the Tribunal notes that the Homeowner's application was made in March 2017. Accordingly, it would take his complaint, under chapter 3 of the Code, to relate to the certificates that were produced by the Factors before that date. The Certificate for the year to 31 October 2017 is considered in relation to his later application, FTS/HPC/PF/18/2228.

31. The Factors also produced (A6, pages 4-10) an "Expenditure Analysis" which was attached to the certificate for the period to 31 October 2017. The Tribunal was advised that a similar document was prepared by the Factors for the previous financial years. There was disagreement between the parties as to the extent to which the "Expenditure Analysis" was circulated. Mr Smith said that it was made available to the Association and was open to discussion at the AGM. It was also made available to anyone who asked for further information on factoring charges. The Homeowner insisted that he was not aware of any "Expenditure Analysis" produced by the Factor, and had not seen one until it was produced by the Factors in this process. He had attended AGMs, and could not recall any reference being made to such a document.

32. The Tribunal did not find it necessary to make any finding in relation to this issue, for the purposes of applying section 3 of the Code. It was accepted by the Factors that the "Expenditure Analysis" was not provided to the homeowners generally. Therefore, it could not be regarded as fulfilling section 3.3 of the Code, in particular.

33. As to the application of section 3 of the Code "Certificate[s] of Income and Expenditure", Mr Swarbrick relied on his written submission (paragraphs 8-17). In order to avoid repeating that submission in this decision, it is attached as an appendix.

34. The Tribunal noted that the Factors imposed an annual service charge, which was invoiced quarterly. It asked Mr Swarbrick and Mr Smith to explain how that was fixed. Mr Smith explained that the Factors prepared a budget, which set out anticipated expenditure for the following year on various items, such as "Landscape Maintenance". That would produce a total anticipated expenditure, which was then divided by 78, to arrive at the service charge. For year 1 November 2015 to 31 October 2016, the total anticipated expenditure was £7,980, and so the service charge was £102.31. A copy of the budget for the coming year was provided to homeowners with the letter notifying them of the Association's AGM.

35. The Certificate of Income and Expenditure produced to the homeowners at the end of the year would then record the service charges collected (under "income") and list the various items in the Factors' expenditure, on matters such as

"Landscape Maintenance". This was a procedure, it was submitted, that was clear and transparent. It also provided a "detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for", for the purposes of section 3.3 of the Code.

36. The Homeowner was asked to explain why, in his submission, the Certificates did not meet the requirements of section 3 of the Code. He made various points, in respect of the Certificate for the year to 31 October 2016 (A6, page 2). In understanding the Homeowner's position, the Tribunal also had reference to paragraphs [12] and [13] of the judgment of the Upper Tribunal, in which the submissions of the Homeowner as to the deficiencies of this Certificate of Income and Expenditure are recorded.

37. The Homeowner's position was as follows:

(a) The Certificate is "just a cash flow statement". It was not the form of a balance sheet and did not detail the position with debtors and creditors at the year-end date.
(b) It did not explain why there was a shortfall between the service charges collected and the number of homeowners. The annual service charge was £102.32. Therefore, the amount that ought to have been collected was £7,980.96. On the certificate, the amount shown as collected was £7,609.86. Therefore, there was a shortfall of £371.10, which ought to have been explained.
(c) The Certificate did not detail how many owners were not paying their service charge, how long their debts had been outstanding, or the total amount outstanding.
(d) The "Expenditure" section of the Certificate contained an entry for "Debt Recovery" at £369.79, but did not explain what those charges were for.

38. The Tribunal did not consider these complaints to be well founded.

39. The Tribunal notes that section 3 of the Code begins with the fundamental propositions:

> While transparency is important in the full range of your services, it is especially important for building trust in financial matters. Homeowners should know what it is they are paying for, how the charges were calculated and that no improper payment requests are involved.

The Code goes on to set out certain "overriding objectives" in section 3, being:

- Protection of homeowners' funds

- Clarity and transparency in all accounting procedures
- Ability to make a clear distinction between homeowners' funds and a property factor's funds

40. The Certificates were, in the view of the Tribunal, clear and transparent. The Factors estimated, at the beginning of the financial year, the cost of managing the development. They fixed the Homeowner's annual charge by dividing the estimated cost by 78. They then reported to the Homeowners how they had spent the money they had collected. Accordingly, the Certificate and the Budget provided the Homeowners with clear and transparent information on what they were paying for, and how the charges were calculated. They also provided the homeowners with "a detailed financial breakdown of charges made" (being the annual service charge) and "a description of the activities and works carried out which are charged for" (being the list of items of expenditure in the Budget and the Certificate) for the purposes of section 3.3.

41. As regards the Homeowner's criticism (a): it is not necessary, to fulfil the requirements of section 3 of the Code, that information is provided to Homeowners in the form of a balance sheet. Even if the Certificate is "just a cash flow statement", the Certificates and the Budgets clearly and transparently informed the Homeowners what they were paying for, and how the charges were calculated.

42. As regards point (b) and (c) the Tribunal considers that, although these points are distinct, they arise from the same fundamental concern: the non-payment of the service charge by certain homeowners, and how that affects the Homeowner and other owners in the development. The Homeowner explained that non-payment by other owners affects the amount of money held by the Factors (i.e. the balance on the bank account, which is shown as the first figure on the Certificate). That, he insisted, affected the charge imposed on other owners.

43. That being so, it is necessary to note that detailed provision is made, in section 4 of the Code, in relation to "Debt Recovery". At the beginning of that section the Code states that: "Non-payment by some homeowners can sometimes affect provision of services to the others, or can result in the other homeowners being liable to meet the non-paying homeowner's debts…it is important that homeowners are aware of the implications of late payment…" Thus, the Homeowner's fundamental concern is addressed in section 4 of the Code, and in particular section 4.6, which states:

> 4.6 You must keep homeowners informed of any debt recovery problems of other homeowners which could have implications for them (subject to the limitations of data protection legislation).

44. The Tribunal also notes that the Homeowner's application FTS/HPC/PF/17/0108 complained of a breach of sections 4.4, 4.6 and 4.7. The previous Tribunal upheld his complaint under section 4.4, but rejected the complaint under 4.6 and 4.7. The Homeowner did not pursue an appeal in relation to the rejection of his complaint under sections 4.6 and 4.7.

45. As regards the Homeowner's point (b), the Tribunal considers that it is clear and transparent, from the Certificate of Income and Expenditure for the year ending 31 October 2016, that the Factors have collected £7,609.86, rather than £7,980.96. It follows that certain owners have not paid their full service charge. The Tribunal does not accept the contention that the reason for the shortfall has to be spelled out: non-payment by certain homeowners is clearly the reason for the shortfall. As to the implications of non-payment, on the charges made to other homeowners, that is a matter for section 4.6 of the Code, unless it has some impact on the way that charges are calculated, or results in what section 3 terms "improper payment requests".

46. As regards point (c), the Tribunal considers that this is a complaint which falls squarely within section 4.6 of the Code, rather than section 3. It is not necessary for the Factors to provide a statement, under section 3, as to how many owners were not paying their service charge, how long their debts have been outstanding, or the total amount outstanding, unless that has an impact on: "what it is [the homeowners] are paying for, [and] how the charges were calculated".

47. That would be sufficient to dispose of the Homeowner's criticisms (b) and (c). However, for the sake of completeness the Tribunal notes that at paragraph 10 of its decision, the earlier Tribunal recorded the position of the Factors' Mr Smith, in relation to section 4.6 of the Code, as follows:

> Mr Smith said the problems with debt were minimal…The debts were reducing; there had been no impact on other homeowners; and the debts were not written off. If there were, indeed, no implications for homeowners, he did not feel the Factor had to provide any more information than had been provided.

48. Production A7 is statement recently produced by Newton, for the Association. This states that, of the 78 owners in the development, 19 are in debit, by a total sum of £1,597.11. However, of those 19 owners, only 2 have arrears of more than £20. Debtor 1 owes £446.64. He/she has been sequestrated. The statement indicates that Newton had received notice on 17 April 2018 that the debt "will be paid following sequestration". Debtor 2 owes £885.42. An inhibition has been in place over that debtor's property since May 2016. The Homeowner accepted that this statement provided him with the information that he had been seeking.

49. Notably, the statement from Newton ends: “There are no immediate plans to distribute this debt among homeowners.” The Tribunal pointed out to the Homeowner, that in the worst case scenario, the total debt from Debtor 1 and Debtor 2, of £1,332.06 would be distributed amongst the remaining 76 owners. In that case, each would have to pay £17.53. In the Tribunal’s view, the information given by Newton effectively vindicates the position adopted by Mr Smith before the previous Tribunal. The problems with debt are reasonably characterised as “minimal”, and there has been no impact on other homeowners. Even if there was to be an impact on other homeowners, it would not be financially significant.

50. Finally, as regards the Homeowner’s point (d), the Tribunal considers that it is sufficient that the Factors have informed the homeowners, in the Certificate, that they have expended the sum of £369.79 on “debt recovery”. That serves as a description of an activity or work which has been carried out, for the purposes of section 3.3. It clearly informs the homeowner of that expenditure, and enables him/her, to make a reasonable request under that section for “supporting documentation and invoices or other appropriate documentation for inspection or copying”. The Factors advised the Tribunal that no such request was ever made by the Homeowner, as regards the Factors’ expenditure on “debt recovery”. That was not disputed by the Homeowner.

51. For the foregoing reasons, the Tribunal does not uphold the Homeowner’s complaint under section 3 of the Code.

Have the Factors complied with the PFEO issued by the previous FTT?

52. The original Tribunal upheld the Homeowner’s complaint under section 4.4, and made an order which included the requirement that the Factors:

> Draft and provide to each homeowner and the Association a clear statement of how service delivery and charges will be affected if one or more homeowners does not fulfil their obligations, in terms of section 4.4 of the Code.

53. This issue is covered in paragraphs 18-20 of Mr Swarbrick’s written submission. Paragraph 20 states that:

> As reported to the FTS by letter of 20 July 2017, the Factor inserted the following statement in its written statement of services: “Failure of owners to pay accounts on time may impact on the services provided to the development and may prevent [the Factor] from instructing repairs or providing factoring services.”

54. It was a matter of agreement that this was the only means by which the Factors had sought to address the relevant part of the previous Tribunal's PFEO.

55. In the view of this Tribunal that was insufficient. The statement subsequently made in written statement of services describes the impact on services delivery. However, it says nothing about the impact on charges. That was required by the Tribunal's PFEO. If it was the view of the Factors that non-payment would have no impact on charges, that should have been stated, in order to comply with the PFEO.

56. However, that is not an end to the matter. At paragraph 22 of his submission, Mr Swarbrick points out that the Factors no longer manage the Drumsmittal development. They ceased to have that role, about six weeks after the previous Tribunal made its PFEO on 28 September 2017. Therefore, one may reasonably question whether there is any point in continuing to require the Factors to comply with this part of the PFEO. Mr Swarbrick therefore moved the Tribunal to exercise its power, under section 21(1)(b) of the 2011 Act: "Where the First-tier Tribunal has made a property factor enforcement order it may, at any time—(b) where it considers that the action required by the order is no longer necessary, revoke it."

57. On this point, the Homeowner insisted that it was important to record the Factors' breach of section 4.4, and the PFEO, so that other factors would be aware that the Tribunal would not allow them to get away with flouting the requirements of the Code.

58. The Tribunal prefers Mr Swarbrick's submission. The relevant part of the original Tribunal's Order was not simply ignored. The Factors had acted in an attempt to address the Order. That provided some of the information required, but not all of it. However, the point is now academic, given that the Factors no longer manage the development. As at 1 November 2017, it was no longer for the Factors to say what will happen, if homeowners do not pay their service charges. That must now be done by Newton.

59. Thus, the Tribunal is satisfied, under section 21(1)(b) that the action required by this part of the PFEO "is no longer necessary", and that it is appropriate to exercise its power to revoke the relevant part of the PFEO, under that provision.

The complaint under application FTS/HPC/PF/18/2228

60. This was a complaint under sections 3.2, 3.3 and 4.7 of the Code. The Tribunal finds it convenient to deal with these sections in reverse order.

61. In light of the information available to the Tribunal, described above, it is possible to deal with the section 4.7 complaint in short order. That section requires the

factor to demonstrate that it has taken reasonable steps to recover unpaid charges from any homeowner who has not paid their share of the costs prior to charging the remaining homeowners, if they are jointly liable for such costs. There is no evidence that the Factors, or Newton, have ever sought payment from the remaining homeowners in respect of the unpaid charges of homeowners in arrears. Therefore, section 4.7 does not apply.

62. The complaint under section 3.3 relates to the "Certificate of Income and Expenditure" produced by the Factors for the period to 31 October 2017 to which reference has already been made (at paragraphs 18 and 30 above). It is page 3 of A6 and was also produced by the Homeowner (R26). Unlike previous certificates, this document was not signed off by Helen Matheson, the Factors' Director of Finance, and was not produced on the Factors' letter headed paper. The Homeowner maintained that this document was not distributed to the homeowners in advance of the AGM. He obtained a copy at the AGM. None of these points were disputed by Mr Swarbrick or Mr Smith.

63. Mr Swarbrick argued (at paragraph 29 of his written submission) that the Certificate to 31 October 2017 was not able to be produced by the Factors until after 1 November 2017, when they were no longer factors of the development. Thereafter, the duty under section 3.3 lay with Newton.

64. The Tribunal does not accept that argument. If Allied Souter & Jaffrey had imposed charges, then in the view of the Tribunal, they were obliged to provide a breakdown of those charges under section 3.3, even if they had ceased to be the Factors.

65. However, the relevant Certificate provided the same information as the previous Certificates which, as the Tribunal has already found, was sufficient to meet the requirements of section 3 of the Code.

66. In the Tribunal's view, there was a failure, under section 3.3, in that the Certificate was not sent to all of the homeowners in the development. However, that did not prejudice the Homeowner, as he obtained a copy of the Certificate at the AGM. Although it was not signed and headed in the usual way, it would have been apparent to him that it had been prepared by Allied Souter & Jaffrey. It was in the same style as the previous Certificates, and had been prepared and signed by Elaine Harkus, on behalf of the Factors, as had the previous Certificates.

67. The Tribunal concludes, under section 19(1)(a) of the Act, that there has been a failure to comply with section 3.3. of the Code. However, the making of a PFEO lies at the discretion of the Tribunal under section 19(1)(b). In the foregoing circumstances, the Tribunal does not consider it necessary or appropriate to make such an order, and it does not do so.

68. The complaint under section 3.2 arises from the transfer of the factoring role for the development from the Factors to Newton, on 1 November 2017. Section 3.2 states:

> Unless the title deeds specify otherwise, you must return any funds due to homeowners (less any outstanding debts) automatically at the point of settlement of final bill following change of ownership or property factor.

69. The Homeowner maintained that as there had been a "change of …property factor", the Factors were obliged to return any funds due to homeowners automatically. They had not done so, and therefore there had been a breach of section 3.2.

70. Mr Swarbrick's submission on this point is to be found at paragraphs 24 to 26 of his written submission.

71. Essentially, the issue here is whether 3.2 applies in a case where the obligations of the factor are assigned to another factor, which takes up where the other factor left off. There was no "final bill" issued by Allied Souter & Jaffrey, and therefore no "point of settlement" for that bill. The funds held in credit by Allied Souter & Jaffrey were not retained by them; they were transferred to Newton.

72. Mr Swarbrick argued that if section 3.2 were applied in the manner contended by the Homeowner, it would have been necessary for Allied Souter & Jaffrey to return all of those funds to the homeowners. In that case, Newton would then have had no funds to continue provision of the service. They would have to have immediately required payment from the homeowners of funds to enable them to do so, i.e. the funds which had just been returned to the homeowners by the previous factors. This, it was suggested, would have been a pointless exercise.

73. Section 3.2 has its clearest application in cases in which the factors' contract with the homeowners is terminated, with no other factor for the time being appointed. Then there will presumably be settlement of a "final bill". In that case, the factors would have to account to the homeowners for moneys it held on their behalf. That is consistent with one of the overriding objectives of section 3: "Protection of homeowners' funds".

74. However, where there is an assignation by one factor to another, with the consequent transfer of funds held on behalf of the homeowners (as in this case), then in the view of the Tribunal there is no "final bill", and therefore no requirement to account to homeowners in the manner envisaged by section 3.2. It agrees with Mr Swarbrick that such an accounting would have the effect of requiring further time and trouble on the part of the outgoing and incoming

factors, and the homeowners, which would be pointless. It would also not be necessary to meet the overriding objective of protecting the homeowners' funds.

75. Accordingly, the Tribunal accepts the Factors' argument on this point. It finds that there has been no breach of section 3.2 of the Code.

Disposal under section 19, appeal, etc

76. The Tribunal makes the determination set out at pages 1 and 2 of this decision. It does not make any PFEO.

77. The Tribunal's decision was unanimous.

78. **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.**

79. 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.

Signed Adrian Stalker

Date 18 December 2018

Chairman