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) Act 2011 ("the Act")

Reference number: FTS/HPC/PF/21/0689

Re: Property at Flat 8/1, 503, Stobcross Street, Glasgow, G3 8GL ("the Property")

The Parties:

Mr. Angus Simpson residing at the Property ("the Homeowner") and
Peter Cusack Property Consultancy Ltd., having a place of business at Building 1, Speirsbridge Business Park, Thormliebank, Glasgow, G46 8NG ("the Factor") represented by Ms. Rhona M. Wark of BTO Solicitors LLP 48 St Vincent Street Glasgow G2 5HS ("the Factor's Representative")

Tribunal Members

Karen Moore (Chairperson) and Helen Barclay (Ordinary Member)

Decision

The Tribunal determined as follows:

The Factor failed to comply with the Section 14 of the Act in respect of full compliance with Section 7.2 of the Property Factor Code of Conduct ("the Code");

The Factor did not fail to comply with the Section 14 of the Act in respect of compliance with the Code in respect of Section 1: at the preamble and Sections 1.C.e, 1.F, 1.1b and 1.A; Section 2: at the preamble and Sections 2.1, 2.2 and 2.5; Section 3: at the preamble and Section 3.3; Section 4: at the preamble and Sections 4.1,4.6,4.7,4.8 and 4.9; Section 6.4 and Section 7.5.

The Factor did not fail to comply with the Section 17 of the Act ("the property factors' duties").

The Tribunal did not propose to make a Property Factor Enforcement Order ("PFEO")

Background

1. By application received between 17 March 2021 and 5 May 2021 ("the Application") the Homeowner applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Code:

i) Section 1: at the preamble and Sections 1.C.e, 1.F, 1.1b and 1.A;

ii) Section 2: at the preamble and Sections 2.1,2.2 and 2.5;

iii) Section 3: at the preamble and Section 3.3;

iv) Section 4: at the preamble and Sections 4.1,4.6,4.7,4.8 and 4.9;

v) Section 6.4;

vi) Sections 7.2 and 7.5, and

had failed to comply with the property factors' duties.

2. The Application comprised the following documents:

i. Application Form dated 5 March 2021;
ii. Copy Stage 1 complaint letter from the Homeowner to the Factor dated 13 January 2021 together with the Factor's response dated 26 January 2021;
iii. Copy Stage 2 complaint letter from the Homeowner to the Factor dated 29 January 2021 together with the Factor's response dated 8 February 2021;
iv. Copy Homeowner's letter to the Factor dated 14 December 2018 regarding car parking and CCTV relative to the Property;
v. Copy of the Factor's Complaints procedure;
vi. Copy of the Factor's Written Statement of Services ("WSoS");
vii. Copy of part of a licence agreement;
viii. Copy of a car park key fob terms and conditions;
ix. Copy email from the Factor regarding a notice board relative to the Property dated 14 January 2021 together with the Homeowner's reply dated 15 January 2021;
x. Title sheet GLA198254 for the Property and

xi. Formal letters from the Homeowner to the Factor both dated 13 April 2021 to the Factor intimating the breaches of the Code and the property factors' duties together with the Factor's response dated 30 April 2021.

3. The Application was accepted by the Tribunal on 19 May 2021 and an initial hearing was fixed for 28 July 2021 at 10.00 by telephone conference. At that hearing it became apparent that the Factor's Representative had submitted written representations and productions and that the Homeowner had lodged supplementary written representations with the tribunal chamber, none of which had been forwarded to the Tribunal or copied to the Parties. Therefore, the initial hearing was adjourned to a later date, and, at the Homeowner's request, to a video conference. The Tribunal issued a Direction to ensure the proper distribution of the written representations and productions and the submission of further written representations and productions.

4. The Parties complied with the Direction, the Homeowner explaining that he withdrew part of his supplementary written representations.

5. The Factor's Representative lodged written representations and two sets of inventoried productions. The Homeowner lodged a set inventoried productions, a further written statement and a witness list. The Factor's Representative gave notice of an intention to object to (i) the Homeowner's further written statement on the basis that it contained new matters not previously intimated to the Factor and (ii) the witness on the basis that the witness appeared to be an expert witness but no information in respect of his qualifications, the matter on which he would give evidence and no opportunity to precognose had been given.

Hearing

6. A Hearing took place on 10 September 2021 at 10.00 by video conference. The Homeowner was present and unrepresented. Mr. Peter Cusack of the Factor was present and represented by Ms. Wark of the Factor's Representatives.

7. The Tribunal dealt with the Factor's objections as preliminary matters. The Tribunal upheld the objection in respect of the further written statement. The witness, having intimated to the tribunal chamber that he was not available to attend, was withdrawn by the Homeowner.

8. The Tribunal outlined to the Parties the procedure to be followed at the Hearing as follows:

i) The Application being the Homeowner's and the onus of proof being on the Homeowner, the Homeowner will take the Tribunal through the Application;

ii) Ms. Wark will put the Factor's position to him by questions;

iii) The Homeowner will have an opportunity to clarify any points;

iv) The Tribunal members may also ask questions of the Homeowner to clarify his evidence;

v) Ms. Wark will put forward the Factor's position;

vi) The Homeowner will put his position to the Factor by questions;

vii) Ms. Wark will have an opportunity to clarify any points;

viii) The Tribunal members may also ask questions to clarify the Factor's evidence;

ix) The Parties would then have an opportunity to sum-up their positions.

Homeowner's Evidence

9. The Homeowner's evidence comprised his written representations dated 3 September 2021 and his oral evidence at the Hearing, dealing with each head of complaint in turn. For ease of reading, the Tribunal sets out the Evidence in Chief and Evidence in Cross-examination together under each head of complaint. For the sake of clarification, the oral evidence is not set out verbatim but is set out as noted by the Tribunal.

Code Heading: SECTION 1: WRITTEN STATEMENT OF SERVICES which states: 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; to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage.

10. The Homeowner's Evidence in Chief and in his written representations is that he did not receive the WSoS until January 2021 following three requests to the Factor in December 2020 and January 2021. In Cross-examination. he denied that

the Factor had hand-delivered and posted the WSoS to him in August 2018 as stated by the Factor in its written representations and as supported by copy letter and WSoS lodged on behalf of the Factor. He accepted that he had not raised the issue of not receiving the WSoS until December 2020/January 2021.

Code Heading: 1. C. e Financial and Charging Arrangements which states: the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee.

11. The Homeowner's Evidence in Chief and in his written representations is that his fundamental complaint is that the Factor, without consultation, has increased the management fee several times from both the fee set at the final meeting of the Skyline Residents Association on 5 December 2017, the minutes of which were lodged in evidence, and, also from the fee set out in the WSoS. He maintained that the Factor had no authority to do so and had not consulted with the Homeowner as "*as a Skyline Homeowner."*

12. In Cross-examination, the Homeowner stated that he paid his management fee on receipt of a monthly email and had done so up until January 2021. He agreed that he had not questioned the Factor's fee and common charges before January 2021 and accepted that he had not asked for any detail of the accounts between taking ownership of the Property in July 2018 and January 2021. He explained that his reason for doing so in January 2021 was to set up an owner group to challenge the Factor's common charges but agreed that he had not discussed this with any other owner.

Code Heading: 1. F How to End the Arrangement which states: The written statement should set out: clear information on how to change or terminate the service arrangement including signposting to the applicable legislation. This information should state clearly any "cooling off" period, period of notice or penalty charges for early termination.

13. Having been shown by the Tribunal the part of the WSoS which outlines the way in which the factoring can be terminated, the Homeowner withdrew this aspect of the Application.

Code Heading: 1.1 A. Authority to Act The written statement should set out: a statement of the legal basis of the arrangement between you and the homeowner.

14. The Homeowner's Evidence in Chief was that he did not accept that the Factor had been appointed but, in response to questions from the Tribunal accepted that the Factor carries out management tasks. At the Hearing and in his written representations, the Homeowner maintained that the Factor acts without a mandate as it had not been appointed properly. He explained that as the Skyline Residents' Association for the building of which the Property forms part ("Skyline") was not been properly constituted, it had no power to appoint the Factor. The Homeowner questioned the propriety of the appointment process further as there had been no tendering process and the Factor was appointed in preference to a well-established property factor.

15. In Cross-examination, the Homeowner accepted that the Factor carried out management tasks and could do so under custom and practice. He accepted that there has been no challenge by the Skyline owners to the Factor acting on their behalf and that there has been no action in terms of the title deeds to remove the Factor. The Homeowner maintained that his view is that the Factor cannot act in perpetuity on general principle and that the Factor should not continue to act without consultation with new owners. He did not accept that his expectation of the Factor's authority to act differs to what is required by the Code.

Code Heading: SECTION 2: COMMUNICATION AND CONSULTATION
Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes.

16. The Homeowner's Evidence in Chief was his position as set out, in the main, in his written representations. These detail the way in which the Factor blocked the Skyline residents or owners forming a Facebook group by removing notices which residents had affixed to a notice board and by leaving outdated notices in place "*fostering the spread of misinformation."* The Homeowner's position is that the Factor's unreasonable refusal to share its database of contact information and its refusal to forward notices on behalf of the Skyline residents have stopped their attempts to set up an owners' group. Further, the Factor's handling of the residents' use of the car park and its imposition of rules regarding the car park and the parking spaces exceeds its authority.

17. In Cross-examination, the Homeowner agreed that the notice removed by the Factor was a notice which the Homeowner had taped to the front of the Factor's framed notice board. Although not having seen the Factor remove it, he maintained it

was the Factor and not anyone else who had removed it. He stated the Factor should have offered him a space on the notice board as he had a right to place the notice on the board. He maintained that the Factor had obstructed him from setting up a Facebook group of Skyline residents by removing the notice as the Factor had no right to remove it. Although he accepted he could have set up the owners' group in other ways, he was firm in his view that the Factor deliberately blocked or attempted to block him from doing so. He maintained that the Factor's actions were a breach of the Code as the Factor has a responsibility to the promote the Facebook group to foster a sense of community and neighbourliness and maintained that the Factor's refusal to provide the owners' database demonstrated the breach further. The Homeowner did not agree that the database is the Factor's business database and so is confidential and did not accept that**,** if the Factor provided the database, the Factor would be in breach of the relevant regulations.

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

18. The Homeowner's Evidence in Chief was that the Factor's dealings with the Residents' Association is "false and misleading" as the association does not exist. Therefore, the Factor's statements that the association accused the Homeowner of misuse of the notice board are untrue. The Homeowner maintained that the Factor relies on rules and regulations in respect of parking which do not exist and is applying a solution to parking problems which no longer exist. Further, the reasons for the Factor refusing to share the database are untrue.

19. In Cross-examination and with the reference to the Factor's production of a minute of an owners' meeting, the Homeowner did not accept that the rules and regulations in respect of parking which were put in place by previous owners still applied. Although he eventually accepted that, in terms of the titles, these rules could apply to him, he did not accept that the Factor had any jurisdiction over the Homeowner's own parking space. He asserted that the Factor's actions in respect of car parking were not authorised by the Homeowner.

Code Heading: 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).

20. The Homeowner's Evidence in Chief was that there are two aspects to this complaint: (i) the Factor monitoring the Homeowner's movements at the car park

gate and (ii) the debt letter issued to the Homeowner on behalf of the Factor coupled with the Factor broadcasting to other owners that the Homeowner is a debtor. The Homeowner stated that he is not a debtor as he does not owe anything to the Factor He stated that he refuses to pay accounts which, in his opinion, are false. He stated that the Factor had bullied his son in the car park and that information in a message posted on Facebook and seen by other Skyline residents could only have been provided by the Factor. In his written representations, the Homeowner asserted that the Factor could only have witnessed him use the car park gate by monitoring his movements. Further, he asserted that the Factor has sent several emails to Skyline residents identifying his son as having parked in an 'unauthorised' space, even though others do so as a daily occurrence without being identified. He stated that the Factor has not corresponded with him by email for more than two years, contrary to the way in which the Factor corresponds with others, and has removed the Homeowner from mailing lists, the Factor claiming that the Homeowner's email address is faulty. The Homeowner asserted that all of this behaviour amounts to victimisation.

21. In Cross-examination, the Homeowner maintained that the monitoring of movements was both the occasion of monitoring him at the car park gate and also his son's parking on the carriageway. He agreed that the incident with his son occurred around December 2018, and that the Factor had emailed him immediately after to it to explain the background, a copy of the email being lodged in evidence on behalf of the Factor. With reference to a production lodged on behalf of the Factor being correspondence from an owner named Mr Gallagher, the Homeowner agreed that he had spoken with Mr Gallagher regarding the use of an additional car parking space for his son and that a licence agreement had been drawn up. However, he explained that he did not take up the offer of the licence for an additional space. The Homeowner stated that, as there was not a Residents' Association in place at that time, Mr Gallagher did not have any authority to make the offer. He agreed that the Factor had attempted to accommodate an offer of a second fob for the Homeowner and agreed that he had not raised the issue of the fobs and the licence again until now. The Homeowner accepted that he only knew of one incident of the Factor speaking to his son with regard to parking but maintained that this was harassment as the Factor was not entitled to speak to his son in the way in which he did. With reference to a production lodged on behalf of the Factor, being an email from the Factor to Skyline residents dated 21 January 2021, the Homeowner agreed that the only reference to his son was the inclusion of his son's car registration in that email,

agreed that this email did not identify his son by name and agreed that another car registration was also mentioned. The Homeowner accepted that there is no visitor parking for the Property and that his son parks on the carriageway.

22. In Cross-examination, the Homeowner agreed that contrary to his Evidence in Chief, he had received emails in the last two years in respect of the accounts, payment reminders and about car parking, but clarified that it is emails with documents attached which are blocked by the Factor. He explained that he is aware of others receiving emails from the Factor as they are sent on to him.

23. In Cross-examination, with reference to productions lodged on behalf of the Factor being the Factor's debt recovery procedure and the lawyers' debt warning letter, the Homeowner agreed that this debt letter was sent when he had three or four months' arrears and agreed that no further debt action had been taken. The Tribunal explained that the wording of Code allowed a debt warning letter to be issued. The Homeowner accepted that the issue of the letter had not been in breach of the Code but stated that there ought to have been a conciliation attempt by the Factor to find out why he had not paid before going to this stage. The Homeowner stressed that his issue with the Factor was the inclusion of his name on a list of debtors circulated with the annual report as he is not a debtor. He maintained that he wants to pay the charges properly due by him but the Factor's failure to provide information prevents payment. Although the Homeowner stated that he had tried to pay the charges, he confirmed that he had not tendered payment conditionally nor had he lodged the sums withheld.

Code Heading: 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 (Section 1 refers).

24. The Homeowner's Evidence in Chief was that that the Factor did not provide the WSoS within the requisite four weeks and did not answer correspondence within time scales set out in the WSoS.

25. In Cross-examination, the Homeowner could not identify any particular correspondence and did not agree that a chain of emails lodged as productions on behalf of the Factor were genuine as he maintained that they had been tampered with and were "cut and paste".

Code Heading: SECTION 3: FINANCIAL OBLIGATIONS. 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 overriding objectives of this section are: 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
Code Heading: 3.3 Y ou 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. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

26. The Homeowner's Evidence in Chief was that, as set out in his written representations, the Factor had not provided the necessary financial information in a clear and transparent way. Therefore, he cannot treat the Factor's accounts as genuine. He maintained that the Factor has not produced receipts, invoices or sufficient detail to support the accounts and so the accounts are not accounts but are an annual report. Although the Factor offered the supporting information at the Factor's office or on a memory stick, the conditions imposed by the Factor were such that the Homeowner could not accept them. Further, the Homeowner stated that he could not be certain that the information offered was genuine.

27. In Cross-examination, the Homeowner agreed that he had received the annual reports and accounts lodged as productions on behalf of the Factor. He agreed that the annual reports and accounts are detailed and comprise schedules of works and suppliers but maintained that the accounts must be audited accounts, must be transparent and must show what the money is spent on. In the Homeowner's view the annual report produced by the Factor is not a proper account but is a report, and, as it is not vouched for, he does not believe the content. The Homeowner pointed out that he asked for sight of receipts, invoices and policies in his email of 30 March 2021 but did not receive these. His view is that as there is no verification of the accounts and the charges, the Factor is in breach of the Code. He did not accept that the Code does not require verification to this extent. With reference to his email of 30 March 2021, the Homeowner accepted that he received and signed for a recorded delivery letter from the Factor explaining all of the charges

and referring to other earlier letters. He agreed that he had received the earlier letters, that he was offered a memory stick with the information requested by him and that the Factor had attempted to send the accounts by zip file. The Homeowner agreed that he attended at the Factor's office to collect the memory stick but explained that he did not collect it as the Factor asked him to sign an undertaking relating to data protection. He refused to do so as the data was his and not the Factor's data. He did not accept that the undertaking was to confirm that he would not misuse the data. The Homeowner explained that his difficulty with the Factor's approach is that he wants to see original paperwork and the memory stick/zip file are not originals. With reference to a letter from the Factor offering three dates in March and April 2021 for the Homeowner to view the accounts at the Factor's office, the Homeowner agreed that he did not attend, his reason being that he had not been given an opportunity which suited him, albeit he did not contact the Factor with suitable alternative dates. He stated that he did not want to see e-documents but wanted to see the originals as he wanted to be certain that documents were genuine and not documents which the Factor had made up. He explained that, as a journalist of forty-three years' experience and trained to keep up date with legislation and media related matters for accuracy, he was able to identify fake news and fake documents and so knew instantly that the chain of emails lodged on behalf of the Factor are fake. Accordingly, he could not trust the Factor to let him see the genuine documents.

28. In Cross-examination, the Homeowner did not understand or accept that, in terms of the title deeds, decisions made by prior owners remained binding on him. He maintained that he expected to be consulted on increases to the management fee, regardless. He did not fully accept that the management fee had, in fact, decreased, taking the view that it had "fluctuated". He agreed that he had not queried the costs with any of the other owners.

Code Heading: SECTION 4: DEBT RECOVERY. 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 (if they are jointly liable for the debts of others in the group). For this reason, it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem.

Code Heading: 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.

Code Heading: 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)

Code Heading: 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.

Code Heading: 4.9 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.

29. The Homeowner's Evidence in Chief in respect of his complaints under the various parts of Section 4 of the Code at the Hearing and as set out in his written representations, all stem from his view that he is not a debtor but is withholding payment until the Factor demonstrates to his satisfaction that the Factor's accounts are verified by an audit. His position was that he is dissatisfied with the level and quality of service provided by the Factor and so he refuses to pay the Factor's fee and common charges. He maintained that he cannot be classed as a "debtor" as he has made many offers to pay but the *Factor "has engineered a situation where I am unable to pay these charges"* and that the Factor has breached the General Data Protection Regulations by publicly identifying the Homeowner as a debtor. The Factor should not have treated him as a debtor by writing to his lender or including his name as such in the annual report and should not have issued a debt warning letter via its solicitors without trying to resolve matters with him.

30. In Cross-examination, the Homeowner accepted that no court action had been raised and accepted that the Factor has a debt recovery procedure, although he maintained that he had not been given a copy of the procedure by the Factor. He accepted that owners are obliged to pay their shares of common charges and that, by not paying the burden, falls on the other owners.

Code Heading: 6*.4 Carrying out repairs and maintenance. 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.*

31. The Homeowner's Evidence in Chief was that, as set out in his written representations, the Factor does not carry out regular inspections as these are not reported on, and, in any event, the Factor's Property Management reports are vague, inconclusive and not open to scrutiny by residents.

32. In Cross-examination, although Ms. Wark took the Homeowner through the relevant pages of the annual reports and accounts, the Homeowner did not accept that the annual reports and accounts issued by the Factor set out detail of the periodic inspections and a programme of works.

Code Heading: 7.2 Complaints resolution. When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.

33. The Homeowner's Evidence in Chief and in his written representations, was that Factor did not deal appropriately with his Stage 2 complaint as it should have carried out a review of its Stage 1 letter before issuing a detailed Stage 2 letter and that the Factor should have advised him of his right to apply to the tribunal. The Factor in its written representations accepted that it had not signposted the Homeowner to the tribunal.

Code Heading: 7.5 You must comply with any request from the homeowner housing panel to provide information relating to an application from a homeowner.

34. At the Hearing, the Homeowner accepted that this complaint is not applicable.

Property Factor Duties: The Application sets out the property factor duties as obstruction, victimisation and a failure to deal with window cleaning per the title deeds

35. In addition to the Homeowner's Evidence in Chief and in Cross-examination as set out in the preceding paragraphs, in his written representations and at part 7 of

the application form, the Homeowner's position is that the Factor has a vendetta against him and his family, has singled them out for poor treatment, has intimidated them and has obstructed the Homeowner from contacting other Skyline owners and residents. In his written representations, the Homeowner set out the detail as the Factor treating the Homeowner differently to other residents and subjecting him to harassment, examples being the vilification of the Homeowner and his son for parking infringements when other residents are not treated in this way, the introduction of a new section in the Factor's annual statement to name the Homeowner as a debtor and writing to the Homeowner's mortgage lender about unpaid common charges. Further, the Homeowner stated that the Factor reneged on an undertaking to have the Homeowner's car covered by the updated CCTV system, disseminated false and defamatory information about him and his son and has denied him proper services. The Homeowner cited the Factor's refusal to provide its database as obstructing him from contacting other Skyline owners.

36. With regard to the window-cleaning, the Homeowner's position is that this is a mandatory obligation on the Factor in terms of the title deeds. In Cross-examination, did not accept that the Factor, at a meeting of Skyline owners, had been instructed not to carry out this service for financial reasons as more pressing works were required.

37. At the close of the Homeowner's evidence, Ms. Wark gave notice that she intended to make a motion that the Application be dismissed due to insufficiency of evidence and the points conceded by the Homeowner. The Homeowner asked if he would be able to ask questions of the Factor. The Tribunal explained that the onus of proof was on the Homeowner, that Mr Cusack of the Factor was not obliged to give evidence and if he did not do so, there would be no scope for the Homeowner to question him. The Tribunal advised the Homeowner that he would have the opportunity to clarify his evidence following the close of Cross-examination. Given the time available, the Hearing was continued to a later date.

38. The Hearing continued on 20 October 2021 at 10.00 by video conference. The Homeowner was present and unrepresented. Mr. Peter Cusack of the Factor was present and represented by Ms. Wark of the Factor's Representatives.

39. The Homeowner was invited to to clarify his evidence following the Cross-examination and stated that there was nothing he wished to add.

40. Ms. Wark made a formal motion to dismiss the Application due to insufficiency of evidence and the points conceded by the Homeowner.

41. The Homeowner raised the matter of asking questions of the Factor and stated that there were further points he wished to explore with the Factor. He referred to the letter from the tribunal chamber administration which advised him that he could cross-examine at the Hearing. The Tribunal explained again that the onus of proof was on the Homeowner, that the Factor was not obliged to give evidence and if he did not do so, there would be no scope for cross-examination. The Tribunal explained that it took account of all the information before it being the Application, the written representations and the evidence at the Hearing.

42. Ms. Wark addressed the Tribunal on the motion to dismiss with reference to the alleged breaches and the evidence led.

43. With regard to Section 1 of the Code at the preamble, Ms. Wark asked the Tribunal to accept that this had been hand delivered by the Factor within the time limit.

44. With regard to Section 1. C. e of the Code, Ms. Wark submitted that the WSoS included the charging structure and ways in which this can be changed and reviewed which had been followed

45. With regard to Section 1.1 A of the Code, Ms. Wark submitted that WSoS set out the Factor's authority to act, that the Factor had been properly appointed and that, even if there was no proper appointment, the Factor acted through custom and practise, which had been accepted by the Homeowner.

46. With regard to Section 2 of the Code, Ms Wark submitted that the Factor would have been in breach of the data protection regulation if it had done so and that this did not prevent or obstruct the Homeowner from contacting the Skyline owners and setting up a resident's group in other ways.

47. With regard to Section 2 .1 of the Code, Ms Wark submitted that the information provided by the Factor was correct: the Homeowner had failed to pay the accounts due and that the car park rules and regulations had been properly put in place and so were binding on the Homeowner. The matter of the fobs and additional parking was one which the Factor tried to facilitate to assist the Homeowner but the Homeowner did not take up the offer.

48. With regard to Section 2.2 of the Code, Ms Wark submitted that the Factor's dealings were legitimate. There had been one incident of the Factor noticing the Homeowner's improper use of the car park gate, there had been one incident in 2018 when the Factor challenged the Homeowner's son for infringing the parking regulations and an email from the Factor to all Skyline owners regarding the continued parking infringements by the Homeowner's son. The Homeowner is a "debtor" and so the Factor's instruction to its solicitors and the inclusion of the Homeowner in the annual report and accounts were appropriate.

49. With regard to Section 2.5 of the Code, Ms Wark submitted that there was no evidence that the Factor did not respond promptly and was in breach of this part of the Code.

50. With regard to Section 4 of the Code, Ms Wark submitted that there was no evidence that the Factor was in breach of this part of the Code. The Factor issued a detailed annual reports and accounts. Although not obliged to do so by the Code, the Factor offered the Homeowner the background information in various formats and offered a meeting at the Factor's offices but the Homeowner chose not to take up these offers. The Homeowner was in default of his obligation to pay the accounts and the Factor was entitled to take the appropriate action and was obliged by the Code to notify the other owners. She submitted that there was no breach of data protection regulations as the use of the personal information was a legitimate aim, the other owners being entitled to be made aware of defaulting co-owners.

51. With regard to Section 6.4 of the Code, Ms Wark submitted that there was no evidence that the Factor did not carry out regular inspections and so no evidence that the Factor was in breach of this part of the Code. The evidence was that inspections were not reported on and this is not required by the Code.

52. With regard to Section 7.2 of the Code, Ms Wark stated that the Factor accepted that it had not signposted the Homeowner to the tribunal.

53. With regard to the property factor duties as set out by the Homeowner, Ms Wark submitted that there was little evidence to support the Homeowner's allegations of a vendetta and of intimidation. There was no evidence of the Factor not assisting the Homeowner and no evidence of different treatment of him, nor was there any evidence of defamatory statements made about the Homeowner and his son. With regard to the window-cleaning, the Factor was complying with an instruction from the owners and was not in breach of its duties.

54. The Tribunal adjourned the Hearing for a short time for the Homeowner to consider his response to the submissions.

55. When the Hearing reconvened, the Homeowner advised that the Tribunal that he considered that he had submitted enough evidence.

56. With regard to Section 1 of the Code, the Homeowner maintained that he had not received the WSoS until January 2021. He submitted that the accounts produced by the Factor are not accounts but are reports containing “numbers and words” and are not accepted by him as the accounts which are required by the Code.

57. With regard to Section 2 of the Code, the Homeowner maintained that the Factor had breached the Code by removing his notice from the notice board and by blocking his communications with his co-owners. Although, the Homeowner is aware of the delicacy of data protections issues, he submitted that the Factor could have done more for the benefit the residents and should have provided the database which is the property of the owners.

58. With regard to Sections 2 .1 of the Code, the Homeowner submitted that the Factor is wrong to class him as a debtor and maintained that his right in terms of the Code is to have the invoices which support the accounts and that the Factor refuses to comply with this. He submitted that he has tried to pay accounts but the Factor’s refusal to provide the documents and so comply with the Code, prevent the Homeowner from paying. Contrary to Ms. Wark’s submissions, the Homeowner stated that he had not been given an opportunity to see the documents. The Homeowner submitted that the chain of emails lodged by the Factor were fake.

59. With regard to Section 2.2 of the Code and the issue of an additional car park fob, the Homeowner submitted that he did not request an additional fob and the Factor’s actions in respect of regulating the car park are outwith his authority. The Homeowner submitted that he did not have an issue with regard to the car parking provision when his son moved home to assist with his mother’s care and the Factor had no right to become involved. He submitted that this was also a breach of the Factor’s duties.

60. With regard to Section 2.5 of the Code, the Homeowner maintained that he had not received the WSoS timeously, that the Factor did not respond promptly to emails, the chain submitted by the Factor being false, and that the Factor failed to communicate with him. He further submitted that he had not received the accounts

as those prepared by the Factor were not proper accounts and that he had not received the invoices requested by him.

61. With regard to the property factor duties, the Homeowner submitted that the Factor had defamed the Homeowner and his son by providing private information to a third party group. The Factor had failed in his duties as he did not discuss the reason for not carrying out window cleaning with the Homeowner and had not addressed the Homeowner's issues regarding the car park CCTV.

Tribunal's assessment of the evidence and consideration of the Respondents' Motion

62. The Tribunal adjourned to consider the motion to dismiss the Application and the Homeowner's response. The issue for the Tribunal was one of sufficiency of evidence on the balance of probability to enable the Tribunal to determine if the Homeowner had established the heads of complaint made in the Application.

63. The Tribunal looked at each head of complaint in turn and had regard to the whole evidence before it. The Tribunal accepted that the Homeowner was, in the main truthful, particularly with regard to the concessions he made in cross-examination. However, the Tribunal found that much of the evidence was the Homeowner's opinion and was not fact, that it was of little relevance to the specific heads of complaint and that, as the Homeowner changed his evidence at times, he was not wholly reliable.

64. Code Heading: Section 1: Written Statement of Services which states: *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; to any new homeowner within four weeks of you being made aware of a change of ownership of a property which you already manage.*

The Tribunal's view is that this is a matter of fact and that there is sufficient evidence for the Tribunal to reach a view on the balance of probabilities.

65. Code Heading: 1. C. e Financial and Charging Arrangements which states that the WSoS should set out : *the management fee charged, including any fee structure and also processes for reviewing and increasing or decreasing this fee.*

The Tribunal's view is that this is a matter of fact which is evidenced by the content of the WSoS itself. There was no challenge by the Homeowner to the provenance of

the WSoS or evidence to show that the WsoS was lacking in this respect. The Homeowner's complaint was based on his perception that the Factor ought to consult personally with him on the management fee, which perception is both unfounded and not required by the Code. Therefore, the Tribunal found that that there was no evidence to establish this head of complaint.

66. Code Heading: 1.1 A. Authority to Act which states that the WSoS should set out: *a statement of the legal basis of the arrangement between you and the homeowner.*

The Tribunal's view is that this, too, is a matter of fact which is evidenced by the content of the WSoS itself and the actions of the Parties. Again, there was no challenge by the Homeowner to the provenance of the WSoS or evidence to show that the WSoS was lacking in this respect. The Homeowner's complaint was based on his opinion that the Factor had been appointed by an improperly constituted body of owners and without a property tendering process, neither of which were evidenced in fact or are of relevance to the wording of the Code. The Homeowner's own evidence was that the Factor carries out property managements tasks for which he has been paid by the Homeowner and the other Skyline owners and so any defect in the Factor's formal appointment has been cured by the subsequent actions of the Parties. Therefore, the Tribunal found that that there was no evidence to establish this head of complaint.

67. Section 2 of the Code which states at the preamble: *Communication and Consultation. Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes.*

The Homeowner's position is that the Factor failed in this regard by removing a notice affixed to a notice board and by leaving outdated notices in place and so failed to foster good owner relationships. No direct evidence was led to show that that the Factor acted in this way or to show that actions of this type fell foul of this part of the Code. Therefore, the Tribunal found that that there was no evidence to establish this head of complaint.

68. Section 2.1 of the Code which states: *You must not provide information which is misleading or false.*

The Homeowner's position is that a range of the Factor's actions, omissions and statements are *"false and misleading" or "untrue"*. However, the Homeowner's

evidence is opinion and lacks factual detail of specific matters which might fall under this part of the Code. It is clear that the Homeowner is aggrieved at the way in which the Factor took instruction from the Residents' Association and at the way in which the Factor manages the car park, particularly in respect of persons who park outwith designated bays, but these grievances are not evidence of a breach of this part of the Code. Therefore, the Tribunal found that that there was no evidence to establish this head of complaint.

69. Section 2.2 of the Code which states: *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).*

The Homeowner's evidence was that the Factor monitored his movements at the car park gate, that the Factor instructed its solicitor's to issue him with a debt letter and that the Factor notified other owners of his indebtedness. His evidence in respect of the monitoring at the car park gate was restricted to one incident which occurred sometime ago and a further car parking incident with son, also of some age. The Tribunal could not reconcile these incidents with a breach of this part of the Code. The instruction of the debt letter and the notification of the Homeowner's status in respect of unpaid accounts are permissible in terms of the Code. The Homeowner is of the view that he is not a debtor, but the realities are that the Homeowner is in debt to the Factor and that the Factor is entitled to pursue that debt. Accordingly, the Tribunal found that that there was no evidence to establish this head of complaint.

70. Section 2.5 of the Code which states: *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 (Section 1 refers).*

The Homeowner's evidence was that the Factor did not provide the WSoS within the requisite four weeks and a general complaint of delays in responding. The copy correspondence lodged in evidence by both Parties showed the Factor to respond promptly to correspondence, often within a day. Accordingly, the Tribunal found that that there was no evidence to establish this head of complaint.

71. Section 3 of the Code: Financial Obligations which states at the preamble: *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 overriding objectives of this section are: 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

Section 3.3 of the Code which states*: 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. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.*

The Homeowner's evidence in this regard is the way in which the Factor sets out its annual reports and accounts, his opinion that the Factor refuse to provide him with supporting documentation and invoices and his belief that the Factor falsifies documents. With regard to the issue of the accounts, the whole evidence before the Tribunal shows that the Factor issues very detailed annual reports and accounts to the Skyline owners, including the Homeowner, who, although he accepted that he had received these items, refused to accept that they are "accounts" as they are not audited. The Code does not require audited accounts or vouched for accounts. The annual report and accounts issued by the Factor contain detailed financial breakdowns of charges made and a description of the activities and works carried out which are charged for and so are wholly compliant with the Code. With regard to the request for supporting documentation and invoices, the Factor's obligation in terms of the Code is to comply with a "reasonable request" for the supply of these items. The Homeowner accepts that the Factor has offered these in several formats and agrees that he has not taken up any of these offers. His evidence is that he insists on seeing originals as he considers that the Factor will fake the copies offered. There is no evidence from or on behalf of the Homeowner to substantiate why he believes that the Factor will do so or to substantiate that the Factor would not have provided originals for inspection at its offices. The Tribunal takes the view that the Homeowner's requests for the documentation are not reasonable and so the Factor was not obliged to comply with them. Accordingly, the Tribunal found that that there was no evidence to establish this head of complaint.

72. Section 4 of the Code Debt Recovery which at the preamble states: *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 (if they are jointly liable for the debts of others in the group). For this reason, it is important that homeowners are aware of the implications of late payment and property factors have clear procedures to deal with this situation and take action as early as possible to prevent non-payment from developing into a problem.

Section 4.6 of the Code which states: *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)*
Section 4.9 of the Code which states: *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.*

The Homeowner's complaints in respect of these parts of the Code stem again from his opinion that he is not a "debtor". In his evidence, the Homeowner draws a distinction between someone who has not paid an account and someone who withholds payment of an account. The Homeowner's evidence is that as he falls into the latter category, the Factor is in breach of these parts of the Code by pursuing his unpaid accounts and by notifying the other Skyline owners of his indebtedness. However, there is no evidence that the Homeowner is withholding payment or has intimated to the Factor that he is doing so. Moreover, there is no factual evidence of any basis to justify withholding payment. Accordingly, the Tribunal found that that there was no evidence to establish this head of complaint.

73. Section 4.1 of the Code which states: *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.*

Section 4.8 of the Code which states: *You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving notice of your intention.*

In his evidence the Homeowner accepts that the Factor has a debt recovery procedure and that the legal action has not been taken and so there was no evidence to establish these heads of complaint.

74. Section 6.4 of the Code which states: *Carrying out repairs and maintenance. 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.*

There was no factual evidence by or on behalf of the Homeowner's that the Factor does not carry out regular inspections. The Homeowner's evidence is that the Factor does not report on the inspections and, if he does report, it is not in a way which is open to scrutiny. Reporting is not a requirement of the Code and so failure to report is not a breach of the Code. Accordingly, the Tribunal found that that there was no evidence to establish this head of complaint.

75. Section 7.2 of the Code which states: Complaints *resolution. When your in-house complaints procedure has been exhausted without resolving the complaint, the final decision should be confirmed with senior management before the homeowner is notified in writing. This letter should also provide details of how the homeowner may apply to the homeowner housing panel.*

The Factor in its written representations accepted that it had not signposted the Homeowner to the tribunal.

76. Property Factor Duties: *The Application sets out the property factor duties as obstruction, victimisation and a failure to deal with window cleaning per the title deeds*

The Homeowner's position is that the Factor has a vendetta against him and his family, has been intimidating towards them and has obstructed the Homeowner from contacting other Skyline owners and residents. In respect of the vendetta, the incidents which the Homeowner cites are those relating to the Homeowner being monitored in the car park, his son being approached by the Factor for a car parking infringement and his son's car registration being mentioned in an email again relating to car parking infringements, which incidents are discussed earlier in this Decision. The Homeowner's evidence is that other owners are not treated in this way. However, the email from the Factor which mentioned his son's car registration and which was accepted in evidence also mentioned another vehicle and did not mention

either car owner by name or other personal identifier. The Homeowner's evidence was that the Factor introduced of a new section in its annual report and accounts to name the Homeowner as a debtor. However, previous annual reports and accounts which were lodged as productions and referred to in evidence include reference to debtors by name and address. There was no evidence to show that the Factor treated the Homeowner and his family differently to other owners. The Homeowner stated that the Factor reneged on an undertaking to have the Homeowner's car covered by the updated CCTV system, disseminated false and defamatory information but no specific or factual evidence was led by the Homeowner in support of these claims. The Tribunal took the view that there was no evidence to establish that the Factor acted in an untoward way towards the Homeowner or any of his family and so found that that there was no evidence to establish this head of complaint. With regard to the window-cleaning, the relevant clause in the title sheet for the Property is Clause 7.2 which states that although the windows are not common parts, the Factor will deal with the cleaning. No evidence was led by or on behalf of the Homeowner to establish that there is an absolute obligation on the Factor to carry out window cleaning services against the instructions of the other owners or, indeed, that the Factor had failed to carry out these services. Accordingly, the Tribunal found that that there was no evidence to establish this head of complaint.

77. Therefore, the Tribunal upheld the motion to dismiss the Application with the exception of Section 1 of the Code and Section 7.5 of the Code.

Decision of the Tribunal and reasons for the Decision

78. Following the Tribunal's decision to uphold the motion to dismiss the Application in part, the only remaining head of complaint on which the Tribunal required to make a determination was Section 1 of the Code.

79. The Tribunal took into account the Homeowner's evidence and written submissions and the productions lodged on behalf of the Factor being a copy of a letter dated 7 June 2018 from the solicitor for previous owner of the Property to the Factor requesting information on the factoring position, a copy of the Factor's reply dated 25 July 2018 and a copy of the Factor's letter to the Homeowner dated 3 August 2018 enclosing the WSoS. The Tribunal had regard to the various other items of correspondence lodged in evidence and noted that the Factor replies promptly and fully and appears to have good record keeping system. Accordingly, the Tribunal's

assessment of the evidence on the balance of probabilities is that the Factor did deliver the WSoS to the Homeowner on 3 August 2018 and so makes a finding of fact in this regard. Accordingly, the Tribunal found that that this head of complaint was not established.

80. For the sake of completeness, the Homeowner having withdrawn his complaints under Sections 1.F and 7.5 of the Code, the Tribunal dismisses the Application in that regard.

81. The Factor having accepted that it had failed to comply in full with Section 7.2 of the Code, the Tribunal finds a failure to comply with that part of the Code.

Property Factor Enforcement Order ("PFEO")

82. The Tribunal, having determined that the Factor had failed to comply with Section 7.2 of the Code, then considered whether to make a PFEO in terms of Section 19 of the Act. The Tribunal took the view that the extent of the Factor's failing was not significant as the WSoS signposted the Homeowner to the tribunal and there had been no financial or other consequences for the Homeowner and so determined that a PFEO is not necessary.

Unanimity of Decisions

83. These decisions are unanimous. **Appeal**

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.

Karen Moore

Chairperson 27 October 2021