

# Housing and Property Chamber

## First-tier Tribunal for Scotland

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**Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').**

**Chamber Ref:FTS/HPC/PF/22/0190**

**168 Inverewe Place, Dunfermline, Fife, KY11 8FW ('the Property')**

**The Parties:**

**Mrs Diane Jackson residing at Suite 117 GAB Elgin Avenue, Grand Cayman ('the Homeowner and Applicant')**

**James Gibb Property Management Limited, t/a James Gibb, Bellahouston Business Centre, 423 Paisley Road West, Glasgow, G51 1PZ ('the Factor and Respondent')**

**Committee members:**

**Jacqui Taylor (Chairperson) and Mike Scott (Ordinary Member).**

### **Decision of the Tribunal**

The Tribunal determines that the Factor has failed to comply with sections 3.3, 4.3, 4.5, 4.8 and 7.2 of the Code of Conduct.

The decision is unanimous.

### **Background**

1.The Homeowner purchased her property 168, Inverewe Place, Dunfermline, KY11 8FW on 25<sup>th</sup> July 2014 ('the Property'). The Property is a first floor flat within a four storey block, containing twelve flats in total. The development was erected by Barratt Homes Limited.

2.James Gibb are factors of the Property and were registered as a property factor on 23rd November 2012. They have been factors of the development since the property was built in 2000.

3. By application dated 21st January 2022 the Homeowner applied to the Tribunal for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code'):

- Section 1: Written Statement of Services.  
Sections 1
- Section 2: Communications and Consultation.  
Section 2.5
- Section 3: Financial Obligations.  
Section 3.3
- Section 4: Debt Recovery.  
Sections 4.1, 4.3, 4.5 and 4.8
- Section 5: Insurance.  
Section 5.2
- Section 7: Complaints Resolution.  
Section 7.2

4. The application had been notified to the Factor.

5. By Notice of Acceptance by Jacqui Taylor, Convener of the Tribunal, dated 22 March 2022, she intimated that he had decided to refer the application (which application paperwork comprises documents received between 21 January 2022 and 11 March 2022) to a Tribunal.

6. A virtual Case Management Discussion ('CMD') took place in respect of the application on 1<sup>st</sup> June 2022.

The Homeowner was represented by her husband Graeme Jackson.

The Factor was represented by Jacqueline Borthwick, Director of Client Assets with James Gibb and Rhona Wark, solicitor.

6.1 In connection with the application, the parties advised as follows:

**Section1: Written Statement of Services.**

Mr Jackson agreed to provide the Tribunal with a copy of the Home Report and Property Sale Questionnaire from the time his wife purchased the Property; a copy of the missives ( the offer and subsequent formal letters) and correspondence ( letters and emails) his wife received from their solicitors regarding the purchase of the Property.

Ms Wark agreed to ascertain if a letter was sent by the Factor to the solicitors acting for the Homeowner detailing the factoring arrangements regarding the Homeowners purchase as distinct from a letter setting out the factoring arrangements regarding the sale. If such a letter was available she agreed to provide the Tribunal with a copy.

## **Section 2: Communications and Consultation (Section 2.5).**

Mr Jackson agreed to amend the application to specify the particular emails, letters and telephone calls that were not responded to.

## **Section 3: Financial Obligations (Section 3.3).**

Mr Jackson explained that his wife received no correspondence from the Factor before 2019.

## **Section 4: Debt Recovery (Sections 4.1, 4.3, 4.5 and 4.8).**

**4.1:** Mr Jackson explained that Mr Rosenhall had a conversation with his wife in 2019 and following that conversation he sent her an email which purported to attach the debt recovery procedure but there was no attachment. The first time his wife received a copy of the debt recovery procedure was when it was lodged by the Factor as a production in relation to the application.

Ms Borthwick advised the Tribunal that she will provide the Tribunal with a copy of the email sent by Mr Rosenhall to Mrs Jackson which shows that the debt recovery procedure was attached.

**4.3:** Mr Jackson advised that the late payment charges that have been applied by the Factor are set out in the invoice which is item C2 of the Factor's productions.

**4.5:** As before, Mr Jackson explained that his wife received no correspondence from the Factor before 2019.

**4.8:** As before, Mr Jackson explained that his wife received no correspondence from the Factor before 2019. His wife bought the Property as a buy to let property and it was let to a company who used it as accommodation for dockyard workers.

## **Section 5: Insurance (Section 5.2).**

As before, Mr Jackson explained that his wife received no correspondence from the Factor before 2019.

## **Section 7: Complaints Resolution (Section 7.2).**

The parties had nothing further to add in relation to this complaint at this stage.

## 6.2 Witnesses

Mr Jackson agreed that his wife would attend the hearing and provide a witness statement.

Ms Wark confirmed that Jacqueline Borthwick and perhaps one other representative of the Factor would attend the hearing. She also advised that Mr Rosenhall is still employed by the Factor and he would attend the hearing.

7. A virtual Hearing took place in respect of the application on 5<sup>th</sup> September 2022.

The Homeowner was represented by her husband Graeme Jackson.

The Factor was represented by Jacqueline Borthwick, Director of Client Assets with James Gibb and Rhona Wark, solicitor.

### 7.1 Background of Property Purchase

#### 7.1.1 Summary of opening statement by Mr Jackson

At the beginning of the hearing Mr Jackson explained that Maloco solicitors acted for Mrs Jackson in connection with her purchase of the Property in 2014. Mrs Jackson did not require a loan for the purchase of the Property. At the time of the purchase Mrs Jackson was living in the Falkland Islands and she communicated with her solicitor regarding the purchase by telephone and fax. He acknowledged that he has not provided the Tribunal with a copy of the Home Report as he does not believe that one was obtained. Maloco solicitors recommended the Property to Mrs Jackson and gave her a copy of a mortgage valuation report. He has provided the Tribunal with a copy of that report. Mrs Jackson was told that the Property was factored. However, she was not given the details of the Factors or the factoring arrangements. He does not recall that Mrs Jackson was told that a factoring deposit would have to be paid. He also explained that Mrs Jackson is an experienced landlord as she owns other properties which are leased. Mrs Jackson did not find out the details of the Factor until 2019.

#### 7.1.2 Summary of opening statement by Ms Wark

Ms Wark explained that the Factor sent the usual presale letter to the sellers solicitors with the Factors details. It is usual for the Sellers' solicitor to pass the factoring letter to the Purchaser's solicitor prior to settlement. In her experience the transaction would not settle if this letter was not provided. The Factor also sent the usual welcome letter to Mrs Jackson at the Property address. The Factor did not know that the Property was leased. Maloco solicitor received the factoring letter and consequently knew the Property was factored. The Factor cannot be held responsible if Mrs Jackson's solicitor did not provide Mrs Jackson with the Factor's details.

## **7.2 The Tribunal makes the following findings in fact:**

1. Maloco solicitors sent the Factor a letter dated 8<sup>th</sup> July 2014 advising that they act for the seller. The letter also advises the Factor of the Purchaser's details and states that her address is in Wakefield. The letter clarifies that the date of entry is 25<sup>th</sup> July 2014.
2. The Factor sent Maloco solicitors a letter dated 22<sup>nd</sup> July 2014 regarding the factoring arrangements for the Property.
3. The Factor sent an introductory letter addressed to the Homeowner at the Property address dated 23<sup>rd</sup> July 2014.
4. The Tribunal accepted the evidence of Jacqueline Borthwick and find that the introductory letter dated 23<sup>rd</sup> July 2014 included the welcome pack and written statement of services.
5. The letter dated 23<sup>rd</sup> July 2014 was not returned to the Factors.
6. The Homeowner did not reside at 168 Inverewe Place, Dunfermline on 23<sup>rd</sup> July 2014.
7. The Homeowner did not receive the letter from the Factor dated 23<sup>rd</sup> July 2014.
8. The email from Geoff Rosenthal, an employee of the Factor, to Mr Jackson dated 15<sup>th</sup> August 2019 details the date 23<sup>rd</sup> September 2015 as being the first date a letter was returned to the Factor marked 'gone away'.
9. The Factor registered Notices of Potential Liability with the Registers of Scotland under title number FFE69029 on 21<sup>st</sup> March 2016 and 5<sup>th</sup> March 2019.
10. The Factor served the Simple Procedure application on Mrs Jackson at the Property address on 16<sup>th</sup> October 2018.
11. The Factor send emails to Mr Jackson dated 29<sup>th</sup> August 2019 with copies of the outstanding invoices attached.
12. The email from the Factor to Mr Jackson dated 19<sup>th</sup> September 2019 requests that Mrs Jackson provides a signed letter of authority authorizing Mr Jackson to act on her behalf in relation to the factoring account.
13. The email from the Factor to Mrs Jackson's solicitor dated 28<sup>th</sup> November 2019 states that the letter of authority by Mrs Jackson has still to be received.
14. Mr Jackson sent an email to the Factor dated 4<sup>th</sup> December 2019 which, amongst other matters, states that the written statement of services has still to be provided to his wife.
15. The email from the Aaron Kane, the Factor's solicitor, to Mr Jackson dated 10<sup>th</sup> May 2021 attached a copy of the Factor's Written Statement of Services.
16. The titles of the Property are Land Certificate FFE69029. Section D of the Land Certificate FFE69029 refers to factoring arrangements.

17. In 2014 Mrs Jackson were aware that the Property was factored as her solicitor had advised her that this was the position, as confirmed by Mr Jackson.
18. The Written Statement of Services was issued to the Homeowner on 27<sup>th</sup> January 2020.

7.3 The parties' oral and written representations in relation to the application are as follows:

#### **Section1: Written Statement of Services.**

**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. If a homeowner applies to the homeowner housing panel for a determination in terms of section 17 of the Act, the Panel will expect you to be able to show how your actions compare with the written statement as part of your compliance with the requirements of this Code. 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; to existing homeowners within one year of initial registration as a property factor. However, you must supply the full written statement before that time if you are requested to do so by a homeowner (within four weeks of the request) or by the homeowner housing panel (within the timescale the homeowner housing panel specifies); to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement.**

#### **The Homeowner's written complaint:**

The Factor must provide the written statement within 4 weeks of being aware of a change of ownership of a property. The Factor was aware that Mrs Jackson did not reside in the property address as their records confirm the mail was returned to them by Royal Mail. The Factor attempted to send mail to the address provided by Mrs Jackson's solicitor in 2014 but this was not until 2016 and again the Factor was aware that this was not received by Mrs Jackson. The Factor made no attempt to check the Landlord Register which clearly sets out that the property is managed by an agent. This was a reasonable step for the Factor to take given the type of property and that this property had been a rental property prior to Mrs Jackson's ownership. The Factor states that they checked the Land Register but this cannot be correct as this contained the correct residential address for Mrs Jackson in the Falkland Islands. After the Factor established contact with Mrs Jackson in 2019 they were asked several times for the written statement and again failed to provide this

within 4 weeks. The correct statement was only provided as a link by the Factor's solicitor on 10 May 2021.

**The Homeowner's oral representations:**

Mr Jackson advised that he had provided the Tribunal with copies of letters from his wife's solicitor regarding the purchase of the property, including a copy of the Mortgage Valuation Report for the Property. His wife had never received a copy of a Home Report or a Property Sale Questionnaire. His wife first received a copy of the title deeds/ Land Certificate for the Property in 2020. As he and his wife were living in the Falkland Islands in 2014, when his wife bought the Property, they largely communicated with their solicitor by telephone or fax. His wife's solicitor had explained the documents in connection with the transaction over the phone. He was not sure if the Property had been advertised for sale. Maloco and co, his wife's solicitors, were aware that they were looking to buy an investment property and recommended this property to them. His wife's solicitor told his wife that the Property was factored.

**The Factor's written response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The Factor took such steps as were reasonable in the circumstances to locate Mrs Jackson. They are not required to take extra ordinary steps or incur substantial expenses doing so. The required documents were sent to the Property and they were not returned. If, as Mrs Jackson maintains, the Property was under the auspices of her agent Maloco, then before a tenant took entry any mail would have been collected and it is reasonably surmised forwarded to the addressee, namely the Homeowner.

On non payment of the common charges reminders were issued to the Property address which were subsequently returned marked 'gone away'. Consequently, in April 2016 they obtained a copy of the Land Certificate which showed that Mrs Jackson's address was an address in Wakefield. This address had also been provided by the solicitor acting in the purchase of the property in July 2014. As a matter of course the Factor does not send letters to a previous address. However, on this occasion, all correspondence was sent to the address in Wakefield. The letter was also returned marked 'gone away'. There is no obligation within the Code of Conduct that they take any other measures than those the Factor had taken. The Factor had no reason to believe that Mrs Jackson was not going to live in the Property. In February 2017 the tenant contacted the Factor and advised that the Property was tenanted.

Since 2014 the agents acting for Mrs Jackson have been aware that Life Property and James Gibb are the Factor of the Property.

The Factor accepted that the written statement of services was not further issued to Mrs Jackson until 27 January 2020.

### **Oral representations on behalf of the Factor:**

Ms Wark explained that the requirement to send the written statement to the Homeowner within four weeks of a Factor agreeing to provide services to them, as required by section 1 of the Code of Conduct had been complied with by sending the introductory letter dated 23<sup>rd</sup> July 2014 to the Property. The letter included the welcome pack and written statement of services. That letter was not returned to the Factor. Consequently, the Factor is entitled to treat the letter as having been delivered.

Ms Wark also explained that in July 2014 the Factor did not know the Property was leased. She acknowledged that the Factor did not check the Register of Landlords to determine if the Property was leased. She advised that at that time it was not standard practice of the Factor to check the Register of Landlords. There is no requirement on the Factor to go to extra ordinary lengths to locate the owner of the Property.

The Factor had sent the usual factoring letter to Maloco solicitors before Mrs Jackson bought the Property dated 22<sup>nd</sup> July 2014 explaining the factoring arrangements in connection with the sale of the Property. Maloco solicitors acted for both the seller and Mrs Jackson as purchaser. Ms Wark thought it was strange that Mrs Jackson had not received the factors details from her solicitor.

Jacqueline Borthwick confirmed that the letter dated 23<sup>rd</sup> July 2014 included the welcome pack and all welcome packs include the written statement of services.

### **The Tribunal's Decision**

The Factor sent the written statement of services to Mrs Jackson with their letter dated 23<sup>rd</sup> July 2014. The Tribunal accept the position put by Ms Wark that as the letter was not returned to the Factor the Factor is entitled to treat the letter as delivered for the purposes of section 1 of the Code of Conduct. The Tribunal also accept that it would be unusual for a Factor to write to a purchaser's previous address. The Tribunal acknowledge that a Factor would only write to a purchaser's previous address whether they had been advised that the purchaser was not going to reside in the property. Maloco did not advise the Factor that Mrs Jackson was not going to reside in the Property.

The Tribunal accept that Mr Jackson asked the Factors to provide the written statement of services in 2019 but as Mrs Jackson did not provide the Factor with a letter of authority authorising Mr Jackson to act on her behalf in connection with the factoring account the Factor was not obliged to act on the request made by Mr Jackson to provide the written statement of services.



The Tribunal determine that the Factor has **not failed to comply with section 1 of the Code of Conduct.**

Separately, the Tribunal is surprised that Mrs Jackson's solicitors did not provide Mrs Jackson with details of the Factors and that Mrs Jackson did not ask her solicitors for details of the Factors given that she was aware that factoring arrangements existed.

## **Section 2: Communications and Consultation.**

**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.**

Mr Jackson confirmed that he was withdrawing his complaint that the Factor had failed to comply with section 2.5 of the Code of Conduct.

## **Section 3: Financial Obligations.**

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

### **The Homeowner's written complaint:**

You are required to provide the Homeowner with a written financial breakdown of charges made and a description of the activities and works carried out. Mrs Jackson received no such information from the Factor until 2019. Mrs Jackson was therefore unaware of any debt that was arising or works that were being carried out on her behalf.

### **The Homeowner's oral complaint:**

Mr Jackson explained that no billing information was provided to Mrs Jackson before 2019. Mrs Jackson had a postal redirection in place from their property in Wakefield to their address in the Falklands for a period of two years after they bought the Property 168 Inverewe Place, Dunfermline. Mr Jackson also explained that his wife placed the Property on the sale in March 2019. A Sheriff Officer contacted Maloco in July 2019 as they had noticed the for sale sign at the Property.

The Property was not sold at this time and Mrs Jackson still owns the Property.

### **The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

Mrs Jackson has now been sent all documentation she requested after having provided the Factor with her contact details. It is of note that the liability for Factoring charges is not disputed and yet Mrs Jackson has not yet paid the Factoring charges less the items which she does dispute or ongoing charges since she has been personally aware of the identity of the Factor and charges due. The only sums paid are those for which an interim decree has been granted. Thus rendering it necessary for the Factor to proceed in pursuit of Mrs Jackson for unpaid charges.

The question of the title deeds not containing Life Property Management as the property Factor is irrelevant. Life Property Management was appointed by the original Developers and has acted as Factor since the development was completed.

### **Oral Representations on behalf of the Factor.**

Ms Wark explained that once the Factor knew the contact details of Mrs Jackson in late 2019 she was provided with copies of the outstanding accounts. She confirmed that the Factor sent letters to Mrs Jackson at the Property but these letters were returned to the Factor in late 2015/ early 2016. This prompted a search of the Registers of Scotland. The Factor checked the Registers of Scotland records and confirmed that Mrs Jackson still owned the Property. The Factor did not check the Register of Landlords as it is not part of their standard procedure and there is no requirement for the Factor to do this in their debt recovery procedure. The Factor registered Notices of Potential Liability over the Property.

### **The Tribunal's Decision**

The Code of Conduct requires the Factor to provide homeowners with a detailed financial breakdown of charges made and a description of the activities at least once a year. The Tribunal accepts that the Factor sent regular invoices to Mrs Jackson as follows:

11<sup>th</sup> December 2015 addressed to Mrs Diane Jackson at 168, Inverewe Place, Dunfermline.

6<sup>th</sup> June 2016 and 30<sup>th</sup> November 2016 addressed to Mrs Diane Jackson at her address in Wakefield.

6<sup>th</sup> June 2017, 14<sup>th</sup> December 2017, 4<sup>th</sup> June 2018, 18<sup>th</sup> January 2019 addressed to Mrs Diane Jackson at 168, Inverewe Place, Dunfermline.

6<sup>th</sup> June 2019, 6<sup>th</sup> December 2019, 2<sup>nd</sup> June 2020, 8<sup>th</sup> December 2020, 8<sup>th</sup> June 2021 addressed to Mrs Jackson, Maloco Associates, Dunfermline.

However, Mrs Jackson only received the copies of the invoices when they were forwarded to her by Maloco Associates in 2019.

The Tribunal considered that the delay of five years for the Factor to make contact with Mrs Jackson to be unreasonable. The fact that mail was first returned to the Factor in 2015 should have made the Factor realise that Mrs Jackson did not reside in the Property. It would not have been unreasonable for the Factor to make further enquiries of Malocco Associates and the Register of Landlords before 2019. Had the Factor written to Mrs Jackson at the address in Wakefield ( the address provided by Maloco solicitors) within two years of the date she purchased the Property 168 Inverewe Place, Dunfermline the mail redirection would have forwarded the letter to her in the Falklands. Due to this unreasonable delay the Tribunal determine that the Factor **has breached section 3.3 of the Code of Conduct.**

#### **4. Debt Recovery**

**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.**

##### **The Homeowner's written complaint:**

While a debt recovery procedure was mentioned in early correspondence from Life Property Management, Mrs Jackson is yet to receive a copy of the written procedure for debt recovery.

##### **Oral representations on behalf of the Homeowner:**

Mr Jackson explained that Mrs Jackson did not receive a copy of the Factor's debt recovery procedure until court proceedings were raised against Mrs Jackson.

##### **The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The letter dated 5<sup>th</sup> January 2022 advised as follows:

On 23<sup>rd</sup> July 2014 an introductory pack was sent to the Homeowner addressed to 168 Inverewe Place, Dunfermline. The letter was not returned.

Non payment of common charges reminder letters were sent to the Homeowner at 168, Inverewe Place, Dunfermline which were returned marked 'gone away'.

The Factors obtained a copy of the Land Certificate of 168 Inverewe Place, Dunfermline from the Registers of Scotland in April 2016 which detailed the Homeowner's address as 17 Millcroft, Lofthouse, Wakefield. That address was also

provided by the sellers' solicitor in a letter dated 8<sup>th</sup> July 2014. A letter was sent to Mrs Jackson at her address in Wakefield in 2016 which was also returned marked 'gone away'.

The letter 5<sup>th</sup> January 2022 also explained that usually in conveyancing transactions the sellers solicitors will advise the purchasing solicitors of the identity of the factor and if there are any charges to pay. The purchasing agent will ask that the selling agent confirm that all common charges are up to date and that there are no large maintenance expenditures contemplated or outstanding.

The Written Statement of Services was issued to the Homeowner by email dated 27<sup>th</sup> January 2020. The Factor acknowledged that it had not been sent to her within four weeks of the Homeowner requesting a copy. They apologized but stated that the Homeowner had not suffered any loss as a result of the delay.

The letter dated 7<sup>th</sup> March 2022 referred to the provisions of the 2021 Code of Conduct and explained that no request for the debt recovery procedure has been made.

#### **Oral Representations on behalf of the Factor:**

Ms Wark confirmed that the Factor sent their debt recovery procedure to Mrs Jackson on 15<sup>th</sup> August 2019.

#### **The Tribunal's Decision:**

The Written Statement of Services included with the Homeowner's original application incorporates Income Recovery Procedures at paragraph 5.11. The Factor has not breached section 4.1 of the Code of Conduct as the Factor has a clear written procedure for debt recovery. The Tribunal notes that the 2012 Code of Conduct does not require the Factor to provide the Homeowner with a copy of their debt recovery procedure, unlike the 2021 Code of Conduct.

The Tribunal determine that the Factor **has not breached section 4.1 of the Code of Conduct.**

**4.3: Any charges that you impose relating to late payment must not be unreasonable or excessive.**

#### **The Homeowner's written complaint:**

Mrs Jackson was unaware that any late fees would be applied to her account because she had not been advised of any such late fees in advance. She had not received the written statement or any prior warning. In any event, Mrs Jackson was not late with her payment as she had never received any invoice requesting payment. Without an invoice she was unaware of what to pay, who to pay or how to pay. The late fees and penalties are at the crux of the dispute and amount to around

£300. Mrs Jackson is entitled to retain payment until the matter is resolved and a correct invoice is received.

**Oral representations on behalf of the Homeowner:**

Mr Jackson explained that Mrs Jackson has been charged three late payment charges totaling £99. The late payment charges were applied on 11<sup>th</sup> August 2015, 23<sup>rd</sup> January 2018 and 17<sup>th</sup> July 2018. The legal fees that had been charged to Mrs Jackson's account have been reversed.

**The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The letter of 7<sup>th</sup> March 2022 states in relation to the breach of section 4.3 of the Code of Conduct:

In respect of the late payment charges, all invoices were forwarded in 2019. These set out the charges at that point. During discussions that took place, it was proposed late payment charges to 2019 be waived. That proposal was not accepted. Mrs Jackson has made no direct payment of the charges due. No late payment fees have been applied since 2019 despite payment for invoices raised after 2019 not being forthcoming. It is our position that there is no breach under section 4.3

**Oral Representations on behalf of the Factor:**

Ms Wark explained that she considered that three late payment charges which total £99 over a period of five years not to be unreasonable.

**The Tribunal's Decision:**

The Tribunal determined that the late payment charge of £33 applied on 11<sup>th</sup> August 2015 was not an unreasonable charge as it was applied before the Factor knew that Mrs Jackson did not reside in the Property. The first letter returned to the Factor marked 'gone away' was on 23<sup>rd</sup> September 2015.

The late payment charges applied on 23<sup>rd</sup> January 2018 and 17<sup>th</sup> July 2018 were unreasonable as the Factor was aware that Mrs Jackson was not resident in the Property when these charges were imposed and, as previously explained in relation to the complaint under section 3.3 of the Code of Conduct, the Tribunal considered that the delay of five years for the Factor to make contact with Mrs Jackson to be unreasonable.

Consequently, the Tribunal determine that the Factor **has breached section 4.3 of the Code of Conduct.**

**4.5: You must have systems in place to ensure the regular monitoring of payments due from homeowners. You must issue timely written reminders to inform individual homeowners of any amounts outstanding.**

**The Homeowner's written complaint:**

Prior to 2019 Mrs Jackson did not receive any written reminders to inform her of any due fees or amount outstanding. The company did not have effective systems as it took until 2019 to write to the Wakefield address supplied by her conveyancing solicitor. It then took until 2019 to make contact with her property manager and this only occurred as a result of sheriff officers providing the property manager's details when they quickly and easily established this was a rental property. Despite this information, it took a further 2 months for the Factor to make contact. A simple check of the Landlord Register, the Land Register or an enquiry with the conveyancing solicitor would have pointed the Factor in the direction of Mrs Jackson and these should not be alien steps for a large property factor with dedicated debt recovery resources. In the witness statement the Factor provided to the sheriff Court it is stated under oath that a check of the Land Register was undertaken. If this is true, it would have given Mrs Jackson's correct residential address in the Falkland islands but there is no evidence of the Factor ever sending correspondence to that address.

**Oral representations on behalf of the Homeowner:**

Mr Jackson explained that Mrs Jackson was flabbergasted that it took the Factor five years to carry out checks to enable them to locate Mrs Jackson. Mrs Jackson was not hiding. Her contact details were readily available on the Register of Landlords. The delay in the Factor making contact with Mrs Jackson was due to a failure of the Factor's systems.

**The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The letter of 7<sup>th</sup> March 2022 states in relation to the breach of section 4.5 of the Code of Conduct:

Clause 4.5 states that you must have systems in place to ensure the regular monitoring of payments due from homeowners. Since 2019, when the Factor had an up to date contact details for Mrs Jackson this has happened. Mrs Jackson has made no payments, other than those payments ordered by the court. It is the Factor's position that there is no breach of the code under section 4.5.

**Oral Representations on behalf of the Factor:**

Ms Wark emphasized that the Factor does have systems in place to ensure the regular monitoring of payments due from homeowners. Mrs Jackson knew that there

was a property factor for her Property but did not chase this up to find out the identity and contact details of the Factor. There has to be some responsibility on the part of Mrs Jackson to ensure that her financial obligations are met.

### **The Tribunal's Decision:**

The Tribunal considered that the delay of five years for the Factor to make contact with Mrs Jackson to be evidence of the fact that the Factor's does not have an effective system in place in relation to monitoring payments due by homeowners. The Tribunal determined that the Factor **had breached section 4.5 of the Code of Conduct.**

**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.**

### **The Homeowner's written complaint:**

You must not take legal action against a homeowner without taking reasonable steps to resolve the matter and without giving legal notice. Legal action was taken against Mrs Jackson before any contact had been made with her and therefore no attempts to resolve the matter as a result of the Factor's failed administrative processes. Mrs Jackson nor her legally appointed agent and property manager received any invoice requesting payment nor was any correspondence received advising of late payment or that legal action would be taken. The Factor took Mrs Jackson to court and obtained a decree in absence. However, the Sheriff Appeal Court ruled on 24<sup>th</sup> February 2021 that the charge for payment not having been properly served was not executed as a matter of law.

### **Oral representations on behalf of the Homeowner:**

Mr Jackson explained that he had nothing further to add in relation to this complaint.

### **The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The letter of 7<sup>th</sup> March 2022 states in relation to the breach of section 4.8 of the Code of Conduct:

Legal action was taken against Mrs Jackson and a Decree was obtained. This followed years of no response, Sheriff Officers reports indicated Mrs Jackson was at the Property. It is only at the point in 2019 when decree was served that Mrs Jackson was traced. The Factor had written to Mrs Jackson on a number of occasions. These letters were not returned from 168 Inverawe Place. Upon breakdown of the discussions a charge was served. Following service of the charge

Mrs Jackson appealed to the Sheriff Appeal Court and the decree was recalled and the matter was sent back to the Sheriff for determination.

At that stage the charge as a result of the recall was also dissolved. As the original action was for payments due to November 2018. The charges continued to accrue and the Factor instructed their solicitors to amend the sums sought to those due in total at 8.6.2021 the sum now sued for is £4871.21, to that date. The Sheriff also granted an interim decree in the sum of £2701.93. This was paid from sums previously arrested and subsequently held to the order of the court. Proof is set out in terms of the balance of £2160.27. Charges continue to accrue, beyond that date. Mrs Jackson has not made any payments.

As factors they engaged in discussions to settle matters through their solicitors. They had made several offers to settle matters which were the subject of the court action. Mrs Jackson has rejected each and insisted any agreed sum be to the date of settlement rather than initially 2018 and latterly June 2021. The sheriff court action recalled has been continued multiple times to try and facilitate settlement. Mrs Jackson has made no payments at all not even payment less the late payment charges to 2019 or insurance to that date. All offers and proposals of the settlement have been rejected and Mrs Jackson has suggested the balance of her account be waived. There have been numerous attempts throughout the course of the court action to reach a resolution. Mrs Jackson has not, despite knowing of the Factor's identity and of the charges being incurred since 2019, made any payment at all in respect of these charges, nor has she indicated to make partial payment withholding what she believes to be the late fees of around £300. The Factor has offered to waive insurance costs to 2019, which was rejected.

The Factor has acted reasonably, in all the circumstances and had no option but to progress with court action. It is the Factor's position that there is no breach of the code under section 4.8.

#### **Oral Representations on behalf of the Factor:**

Ms Wark explained that her clients raised debt recovery proceedings at the Sheriff Court in respect of the outstanding accounts due by Mrs Jackson. They had served the action on Mrs Jackson using the Property address. On appeal Sheriff Drummond decided that the charge had not been served correctly and the decree for payment was recalled.

Ms Wark advised that it is reasonable to raise court proceedings using a property address for service. If it is determined that there has been a breach of section 4.8 of the Code of Conduct she explained that she does not consider Mrs Jackson to have been prejudiced as the decree had been recalled.



## **The Tribunal's Decision**

The Tribunal considered that the delay of five years for the Factor to make contact with Mrs Jackson to be unreasonable as already determined. The Factor had raised court proceedings against Mrs Jackson on 16<sup>th</sup> October 2018 before they had ascertained contact details for Mrs Jackson. The Tribunal determined that the Factor **had breached section 4.8 of the Code of Conduct** as court proceedings were raised without giving Mrs Jackson notice of their intention to start court proceedings.

**5.2 If your agreement with homeowners includes arranging any type of insurance, the following standards will apply: 5.2 You must provide each homeowner with clear information showing the basis upon which their share of the insurance premium is calculated, the sum insured, the premium paid, any excesses which apply, the name of the company providing insurance cover and the terms of the policy. The terms of the policy may be supplied in the form of a summary of cover, but full details must be available for inspection on request at no charge, unless a paper or electronic copy is requested, in which case you may impose a reasonable charge for providing this.**

### **The Homeowner's written complaint:**

Prior to 2019 Mrs Jackson did not receive any information from the Factor setting out the insurance provision or the terms of the policy. Mrs Jackson arranged her own insurance over multiple years and this has now created a double insurance issue, which, because of the time lapsed is not resolvable with the insurance providers.

### **Oral representations on behalf of the Homeowner:**

The Factor did not provide any insurance details to Mrs Jackson as required by section 5.2 of the Code of Conduct.

### **The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The letter of 7<sup>th</sup> March 2022 states in relation to the breach of section 5.2 of the Code of Conduct:

The terms of the title deeds are clear. In addition, the common insurance policy details were requested by and provided to Maloco who represented both the seller and Mrs Jackson, the purchaser. In terms of insurance, the Factor, with a view to resolving matters, had offered to forego the insurance charges as part of the overall settlement. This was rejected by Mrs Jackson. Mrs Jackson has been aware of the

insurance since 2019. It is the Factor's position that there is no breach of the code under section 5.2.

### **Oral Representations on behalf of the Factor:**

Ms Wark explained that the insurance details were provided to Maloco Solicitors in the letter dated 22<sup>nd</sup> July 2014. She referred the Tribunal to clause 6 of the Standard Missives which had been incorporated into the contract for Mrs Jackson's purchase of the Property. Standard Clause 6 (C) states that it is a condition that evidence of any block insurance policy will be exhibited prior to the Date of Entry. She also explained that had Mrs Jackson's solicitor not been satisfied with the insurance position they would not have settled Mrs Jackson's purchase.

### **The Tribunal's Decision:**

The Tribunal accepted that the letter from the Factor to Maloco Solicitors dated 22<sup>nd</sup> July 2014 would have been passed to the Solicitors acting for Mrs Jackson in connection with her purchase of the Property and if they had not been satisfied with the insurance position they would not have settled the transaction.

They noted that the letter dated 22<sup>nd</sup> July 2014 includes the following details:

- The insurance company
- The sum insured
- The Policy Number
- The policy renewal date
- The fact that the policy is based on the rebuild value of the development.

The letter does not include the basis on which the share of the premium is calculated, the premium paid or the excesses that apply.

However, the Tribunal noted that the Written Statement of Services at paragraph 8.3 refers to the fact that the full policy is available on the Factor's website and clause 8.11 states that the premium payment schedule is detailed in section 13 of the development schedule. As previously determined in relation to the Section 1 Code of Conduct complaint, the Factor sent the written statement of services to Mrs Jackson with their letter dated 23<sup>rd</sup> July 2014. The Tribunal have already accepted that as the letter was not returned to the Factor the Factor is entitled to treat the letter as delivered. The Tribunal determined that the Factor **had not breached section 5.2 of the Code of Conduct.**

## **7 COMPLAINTS RESOLUTION Section 7.2**

**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 (now the Housing and Property Chamber).**

### **The Homeowner's written complaint:**

No advice was provided by Life Property Management on how to take a complaint to the homeowner housing panel.

In asking for the matter to be escalated to a senior manager and receiving a response, Mrs Jackson was not advised of any escalation procedure or that the response was their final decision. This resulted in their focus being on the defence of the legal action in the sheriff court and was potentially unnecessary if an escalation process had been known about and the powers of the Tribunal had been communicated at an early stage as required by the Code.

### **Oral representations on behalf of the Homeowner:**

Mr Jackson explained that the complaint is that the Factor did not direct Mrs Jackson to the Housing and Property Chamber.

### **The Factor's response:**

The Factor referred the Tribunal to their letters dated 5<sup>th</sup> January and 7<sup>th</sup> March 2022.

The letter of 7<sup>th</sup> March 2022 states in relation to the breach of section 7.2 of the Code of Conduct:

The court action was due to progress to proof on 31<sup>st</sup> January 2022 in respect of the balance to June 2021 on Mrs Jackson's account. As Mrs Jackson claims within her defence the breaches set out amount to a counterclaim, the sheriff sisted that action to allow Mrs Jackson to raise these matters with the First tier Tribunal who have jurisdiction in respect of the Factor's Code. Mrs Jackson wrote to James Gibb on 12<sup>th</sup> December raising the complaint. In the Factor's response of 5<sup>th</sup> January 2022, they answered setting out their position that the matter could now be referred to the Housing Panel of the First tier Tribunal. The address of the Panel was not included in this response, for which they apologise. However, Mrs Jackson had the Written Statement of Services by her own admission since January 2020, which does clearly set out the process and the Sheriff Court action was sisted after 5<sup>th</sup> January to allow Mrs Jackson to make such an application.

All complaints appear to relate to the fact that Mrs Jackson's whereabouts were unknown until 2019. In responding, the Factor's position is that they have acted in accordance with the Code and have taken such steps as were reasonable at the time.

The Factor acknowledged that Mr Jackson was not sent the Written Statement of Services within 4 weeks of the request in 2019 and their letter of 5<sup>th</sup> January 2022 did not contain the contact details of the First-tier Tribunal neither of which they believe is significant in the circumstances and for which they apologize. It is the Factor's position that there is no breach of the code under section 7.

### **Oral Representations on behalf of the Factor:**

Miss Borthwick acknowledged that her letter to Mrs Jackson dated 5<sup>th</sup> January 2022 did not include contact details of the First-tier Tribunal. However, she does not believe that that Mrs Jackson was prejudiced by this omission.

### **The Tribunal's Decision:**

As the letter from the Factor to Mrs Jackson dated 5<sup>th</sup> January 2022 did not include the contact details of the First-tier Tribunal the Tribunal determined that the Factor **has breached section 7.2 of the Code of Conduct.**

The Tribunal also noted that clause 7.11 of the Written Statement of Services states that If attempts to resolve the complaint have failed, James Gibb will provide contact details of the First-tier Tribunal for Scotland (Housing and Property Chamber) to whom the complaint can be passed. Mr Jackson received a copy of the Written Statement of Services as an attachment to the email from Aaron Kane dated 10<sup>th</sup> May 2021.

### **8. Property Factor Enforcement Order.**

In all of the circumstances narrated above, the Tribunal finds that the Factor has failed in its duty under section 17(1)(b) of the 2011 Act, to comply with Sections 3.3, 4.3, 4.5, 4.8 and 7.2 of the Code of Conduct.

The Tribunal were mindful of the fact that the Factor's failure to comply with sections 3.3, 4.3, 4.5 and 4.8 of the Code of Conduct was due to the unreasonable delay of five years for the Factor to make contact with Mrs Jackson. However, Mrs Jackson knew that the Property was factored in 2014 but did not receive details of the factoring arrangements from her solicitors at that time and did not press her solicitors to provide her with these details. Consequently, the Tribunal find that Mrs Jackson is partly responsible for the delay in contact being made with the Factors and any award of compensation should be reduced to reflect this fact.

The Tribunal therefore determined to issue a Property Factor Enforcement Order.

Section 19 of the 2011 Act requires the Tribunal to give notice of any proposed Property Factor Enforcement Order to the Property Factor and allow parties an opportunity to make representations to the Tribunal.

The Tribunal proposes to make the following Order:

*‘The Factor must pay the homeowner £266 for the inconvenience she had suffered from their own funds and at no cost to the owners. The said sums to be paid within 28 days of the communication to the Factor of the Property Factor Enforcement Order. If the homeowner’s account is in arrears the said sum may be credited to her account.’*

## **9. Appeals**

**In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

Signed .....Date 30<sup>th</sup> September 2022

Chairperson